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Complaint for Permanent Injunction and Declaratory Judgment

(Filed June 19, 1969)

In the

UNITED STATES DISTRICT COURT

For the District of Colorado

Civil Action No. C-1499

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor; Christine A. Colley, individually and on behalf of Kris M. Colley and Mark A. Williams, minors; Irma J. Jennings, individually and on behalf of Rhonda O. Jennings, a minor; Roberta R. Wade, individually and on behalf of Gregory L. Wade, a minor; Edward J. Starks, Jr., individually and on behalf of Denise Michelle Starks, a minor; Josephine Perez, individually and on behalf of Carlos A. Perez, Sheila R. Perez and Terry J. Perez, minors; Maxine N. Becker, individually and on behalf of Dinah L. Becker, a minor; Eugene R. Weiner, individually and on behalf of Sarah S. Weiner, a minor,

Plaintiffs,

vs.

School District Number One, Denver, Colorado; The Board of Education, School District Number One, Denver, Colorado; William C. Berge, individually and as President, Board of Education, School District Number One, Denver, Colorado; Stephen J. Knight, Jr., individually and as Vice President, Board of Education, School District Number One, Denver, Colorado; James C. Perrill, Frank K. Southworth, John H.

Complaint for Permanent Injunction and Declaratory Judgment

AMESSE, JAMES D. VOORHEES, JR., and RACHEL B. NOEL, individually and as members, Board of Education, School District Number One, Denver, Colorado; ROBERT D. GILBERTS, individually and as Superintendent of Schools, School District Number One, Denver, Colorado,

Defendants.

I. JURISDICTION

A. Plaintiffs seek to enjoin the defendants from maintaining, requiring, continuing, encouraging, and facilitating separation of children and faculty, on the basis of race, and further, from unequal allocation of resources, services, facilities, equipment, and plant on the basis of race. Plaintiffs also request specific injunctive relief pertaining to certain resolutions passed and enacted by defendant Board of Education, especially Resolutions No. 1520, 1524, and 1531. Copies of said Resolutions are attached to this complaint.

B. Plaintiffs also seek a declaratory judgment under Title 28, Section 2201 for the purpose of determining questions of actual controversy between the parties, to wit:

1. The question of whether the rules, regulations, resolutions, policies, directives, customs, practices, and usages of the defendants and each of them in denying, on account of race, color, or ethnicity, to the minor Negro and Hispano plaintiffs and other Negro and Hispano children residing in the school district, educational opportunities, advantages, and facilities afforded and available to Anglo children of public school age similarly situated in the school district, are unconstitutional and void, as depriving said

plaintiffs of equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The question of whether the rules, regulations, resolutions, policies, directives, customs, practices, and usages of the defendants and each of them in denying to the plaintiffs who attend schools substantially segregated on the basis of race or ethnicity and other children residing in the school district the advantages, educational benefits, intellectual stimulation and practical preparation for a multiracial world afforded by providing an integrated education to other children of public school age similarly situated in the school district are unconstitutional and void as depriving said plaintiffs of equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

C. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sections 1343(3) and (4). This is a civil action authorized by law and arising under Title 42, Section 1983 and the Fourteenth Amendment of the Constitution of the United States.

D. All individual defendants reside within the District of Colorado; defendant School District is a body corporate organized and existing under the laws of the State of Colorado, CRS § 123-30-1 (1964). Venue is therefore proper in this District under Title 28 U.S.C. Section 1391(b) and (c).

II. PARTIES

A. *Plaintiffs:*

1. Plaintiffs Wilfred Keyes, Christine A. Colley, Irma J. Jennings, Roberta R. Wade, Edward J. Starks, Jr., Josephine Perez, Maxine N. Becker, and Eugene R. Weiner, are adults, citizens of the United States and the State of Colorado, and residents within School District Number One, Denver, Colorado.

2. Plaintiff children who sue by their parents and next friends, are minor children, citizens of the United States and the State of Colorado, and residents within School District Number One, Denver, Colorado.

a. Plaintiff Christi Keyes, a minor, sues by her parent and next friend, Wilfred Keyes; she will attend Hallett Elementary School (10.1% Anglo, 84.4% Negro, 3.7% Hispano) beginning in September, 1969. They are Negro.

b. Plaintiff Kris M. Colley, a minor, sues by his parent and next friend, Christine A. Colley, and is a resident of an attendance area detached from the attendance area of East High School by provision of Resolution No. 1520 described hereinafter. If action is taken to implement the recision of said resolution, he will attend East High School (53.7% Anglo, 39.6% Negro, 5.8% Hispano) in September, 1969. They are Negro.

c. Plaintiff Mark A. Williams, a minor, sues by his guardian and next friend, Christine A. Colley, and is a resident of an attendance area detached from the attendance area of Smiley Junior High School by Resolutions

No. 1520 and 1524 described hereinafter. If action is taken to implement the recision of said resolutions, he will attend Smiley Junior High School (23.6% Anglo, 71.6% Negro, 3.7% Hispano) in September, 1969. They are Negro.

d. Plaintiff Rhonda O. Jennings, a minor, sues by her parent and next friend, Irma J. Jennings, and is a resident of an attendance area detached from the attendance area of Cole Junior High School by Resolution No. 1524. If the recision of said resolution is implemented, she will attend Cole Junior High School (3.8% Anglo, 72.5% Negro, 22.2% Hispano) beginning in September, 1969. They are Negro.

e. Plaintiff Gregory L. Wade, a minor, sues by his parent and next friend, Roberta R. Wade, and is a resident of an attendance area detached from Barrett Elementary School by Resolution No. 1531 described hereinafter. If action is taken to implement the recision of said resolution, he will attend Barrett Elementary School (0.3% Anglo, 96.9% Negro, 1.9% Hispano) in September, 1969. They are Negro.

f. Plaintiff Denise Michelle Starks, a minor, sues by her parent and next friend, Edward J. Starks, Jr., and is a resident of an attendance area detached from Philips Elementary School by Resolution No. 1531. If action is taken to implement the recision of said resolution she will attend Philips Elementary School (55.3% Anglo, 36.6% Negro, 5.2% Hispano) in September, 1969. They are Negro.

g. Plaintiff Carlos A. Perez, a minor, sues by his parent and next friend, Josephine Perez, and will attend West High School (54.7% Anglo, 4.6% Negro, 39.8% Hispano) beginning in September, 1969. They are Hispano.

h. Plaintiff Sheila R. Perez, a minor, sues by her parent and next friend, Josephine Perez, and will attend Baker Junior High School (15.4% Anglo, 10.0% Negro, 73.1% Hispano) beginning in September, 1969. They are Hispano.

i. Plaintiff Terry J. Perez, a minor, sues by his parent and next friend, Josephine Perez, and is a student at Greenlee Elementary School (19.1% Anglo, 25.0% Negro, 54.5% Hispano). They are Hispano.

j. Plaintiff Dinah L. Becker, a minor, sues by her parent and next friend, Maxine N. Becker, and is a student at Merrill Junior High School (98.2% Anglo, 0.3% Negro, 0.8% Hispano). They are Anglo,

k. Plaintiff Sarah S. Weiner, a minor, sues by her parent and next friend, Eugene R. Weiner. From January through June, 1969, she was a participant in a voluntary enrollment plan and was a student at Hallett Elementary School (10.1% Anglo, 84.4% Negro, 3.7% Hispano). She has been informed by defendants that there may or may not be space available at said school in September, 1969, and therefore does not know what school she can attend. They are Anglo.

3. Plaintiffs bring this action in their own behalf and in behalf of others pursuant to Rule 23(b)(1)(B), 23(b)(2) and 23(b)(3), Federal Rules of Civil Procedure:

Complaint for Permanent Injunction and Declaratory Judgment

(a) The class which the plaintiffs represent is so numerous that joinder of all members thereof is impractical; said class consists of:

(i) All those school children, who by virtue of the actions of the Board complained of in the First Cause of Action will be attending segregated or substantially segregated schools and who will be forced to receive an unequal educational opportunity beginning in September, 1969;

(ii) All those school children, who by virtue of the actions or omissions of the Board complained of in the Second Cause of Action will be and have been attending segregated schools or substantially segregated schools, and who will be and have been receiving an unequal educational opportunity.

(b) There are questions of fact and law common to all members of the class represented by plaintiffs, namely:

(i) Whether in fact the members of said class, by virtue of the actions of the Board complained of in the First Cause of Action will be attending segregated or substantially segregated schools, and will be forced to receive an unequal educational opportunity, and, further, whether in law such actions of the Board are unconstitutional and void;

(ii) Whether in fact the members of said class, by virtue of the actions or omissions of the

Board complained of in the Second Cause of Action will be and have been attending segregated or substantially segregated schools and will be and have been receiving an unequal educational opportunity, and further, whether in law, such actions and omissions of the Board are unconstitutional and void.

(c) The claims of the individual minor plaintiffs are representative and typical of the class, in that each such plaintiff reflects and illustrates either or both of the types of deprivation complained of in the First and Second Cause of Action.

(d) Said individual minor plaintiffs will fairly and adequately represent and protect the interests of the class, in that said plaintiffs and the class share common objectives and purposes in presenting the issues framed herein, and in seeking a declaration of their constitutional rights.

(e) The prosecution of separate actions by individual members of the class would as a practical matter be dispositive of the interests of other members not parties to the adjudications, and would substantially impair their ability to protect their interests.

(f) The parties opposing the class, *i.e.*, the defendants herein have acted and have also refused to act on grounds generally applicable to the class, as more fully appears herein in the First and Second Cause of Action, and the final injunctive relief and declaratory relief sought herein will apply to the class as a whole.

(g) The questions of law or fact common to the members of the class predominate over any questions affecting or relating only to individual members of the class, and proceeding by way of this class action is superior to any other alternate means available, if any, for the fair and efficient adjudication of the controversy and the granting of adequate relief; thus the only alternative would be the prosecution of separate suits relating to each school within the District, but no adequate relief could be formulated for the constitutional defects of the school system as a whole under such a piecemeal approach, nor would the differences between schools be significant enough to justify such a multitude of suits.

B. *Defendants:*

All defendants are sued individually and in their official capacities:

1. Defendant School District Number One, Denver, Colorado, (hereinafter "School District") is organized and exists under the laws of the State of Colorado. (Colorado Revised Statutes, §§ 123-30-1 *et seq.*) (1964).

2. Defendant Board of Education of School District Number One, Denver, Colorado (hereinafter referred to as "Board" or "Board of Education") is organized and exists under the laws of the State of Colorado, CRS § 123-30-3 (1964); the Board is composed of seven school district directors, elected to such office by electors residing within the boundaries of the School District; said Board is vested

with all powers delegated to a board of education or to a school district by law, and is required to perform all duties required by law; CRS § 123-30-3 (1964).

3. Defendant William C. Berge is President of the said Board of Education; defendant Stephen J. Knight, Jr., is Vice President of said Board of Education; defendants James C. Perrill, Frank K. Southworth, John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel are school directors and members of said Board of Education.

4. Defendant Robert D. Gilberts is Superintendent of Schools of School District Number One, Denver, Colorado (hereinafter "Superintendent"). He is the executive officer of the Board of Education and is charged with the responsibility of maintaining, managing, and governing the public schools in the School District, in accordance with the rules, regulations, resolutions, policies, directives, customs, practices, and usages established by defendant Board of Education.

III. FIRST CAUSE OF ACTION

General Factual Allegations

A. Defendant Board of Education on or about January 30, 1969, upon recommendation of the Superintendent, passed and enacted Resolution No. 1520, making certain changes in the attendance areas of certain secondary schools in the School District. Said Board of Education stated in said Resolution that such changes were designed to improve educational opportunity in the public schools by revising and thereafter stabilizing the racial and ethnic composition of pupil memberships in such schools. Schools

affected by said Resolution and racial composition of such Schools in September, 1968, were: East High School (53.7% Anglo, 39.6% Negro, 5.8% Hispano); South High School (87.3% Anglo, 0.2% Negro, 12.2% Hispano); George Washington High School (96.0% Anglo, 2.9% Negro, 0.8% Hispano); Hill Junior High School (96.1% Anglo, 1.5% Negro, 1.3% Hispano); Smiley Junior High School (23.6% Anglo, 71.6% Negro, 3.7% Hispano).

B. Plaintiff Kris M. Colley, the son of plaintiff Christine A. Colley, is a resident of an attendance area which was detached from the attendance area of East High School (53.7% Anglo, 39.6% Negro, 5.8% Hispano) and assigned to George Washington High School (96.0% Anglo, 2.9% Negro, 0.8% Hispano) under Resolution No. 1520; if action is taken to implement the recision of said Resolution, he will attend East High School in September, 1969, and the racial composition of both schools will remain substantially as quoted. If Resolution 1520 is implemented the racial composition of these schools will be: East High School 68.0% Anglo, 25.0% Negro, 7.0% Hispano, George Washington High School 87.0% Anglo, 12.0% Negro, 1.0% Hispano.

C. Defendant Board of Education on or about March 20, 1969, upon recommendation of the Superintendent, passed and enacted Resolution No. 1524, making additional changes in the attendance areas of certain secondary schools in the School District in order to further implement the aforesaid Resolution No. 1520. Schools affected by said Resolution and racial composition of such schools in September, 1968, were: Smiley Junior High School (23.6% Anglo, 71.6% Negro, 3.7% Hispano); Merrill Junior High

School (98.2% Anglo, 0.3% Negro, 0.8% Hispano); Grant Junior High School (85.4% Anglo, 4.5% Negro, 9.3% Hispano); Kunsmiller Junior High School (90.3% Anglo, 0.3% Negro, 8.8% Hispano); Hill Junior High School (96.1% Anglo, 1.5% Negro, 1.3% Hispano); Thomas Jefferson Junior-Senior High School (99.2% Anglo, 0.3% Negro, 0.2% Hispano); Hamilton Junior High School (no figures available at this time); Cole Junior High School (3.8% Anglo, 72.5% Negro, 22.2% Hispano); Byers Junior High School (92.5% Anglo, 0.6% Negro, 5.7% Hispano); Bishel Junior High School (75.0% Anglo, 0.3% Negro, 24.4% Hispano); Kepner Junior High School (70.7% Anglo, 1.7% Negro, 27.5% Hispano).

D. Plaintiff Mark A. Williams, the ward of plaintiff Christine A. Colley, is a resident of an attendance area which was detached from the attendance area of Smiley Junior High School (23.6% Anglo, 71.6% Negro, 3.7% Hispano) and assigned to Hill Junior High School (96.1% Anglo, 1.5% Negro, 1.3% Hispano) under Resolution No. 1524; if action is taken to implement the recision of said Resolution, he will attend Smiley Junior High School in September, 1969, and the racial composition of both schools will remain substantially as quoted. If Resolutions No. 1520 and 1524 are implemented the racial composition of these schools will be: Smiley Junior High School 72.0% Anglo, 20.0% Negro, 8.0%Hispano; Hill Junior High School 81.0% Anglo, 17.0% Negro, 2.0% Hispano.

E. Plaintiff Rhonda O. Jennings, the daughter of plaintiff Irma J. Jennings, is a resident of an attendance area which was detached from the attendance area of Cole Junior High School (3.8% Anglo, 72.5% Negro, 22.2% Hispano)

and assigned to Kepner Junior High School (70.7% Anglo, 1.7% Negro, 27.5% Hispano) under Resolution No. 1524; if action is taken to implement the recision of said Resolution, she will attend Cole Junior High School beginning in September, 1969, and the racial composition of both schools will remain substantially as quoted. If Resolution No. 1524 is implemented the racial composition of these schools will be: Kepner Junior High School 69.0% Anglo, 4.0% Negro, 27.0% Hispano, and Cole Junior High School 6.0% Anglo, 64.0% Negro, 30.0% Hispano.

F. Plaintiff Dinah L. Becker, the daughter of plaintiff Maxine N. Becker, is a resident of an attendance area assigned to Merrill Junior High School, (98.2% Anglo, 0.3% Negro, 0.8% Hispano) and will attend said school in September, 1969.

G. Defendant Board of Education on or about April 25, 1969, upon recommendation of the Superintendent, passed and enacted Resolution No. 1531 making changes in the attendance areas of certain elementary schools in the School District. Said Board of Education stated in said Resolution that such changes were designed to stabilize the racial and ethnic composition of pupil memberships in these schools and further the integration of the Denver Public Schools and improve educational opportunity in such schools. Said Resolution No. 1531 also contained provisions for removal of mobile classroom units from Stedman Elementary School, and provided transportation for pupils previously therein to Denison, Force and Schenck Elementary Schools. The schools for which attendance areas were changed and their racial composition as of September, 1968, were: Montclair Elementary School (92.7% Anglo,

25% Negro, 3.2% Hispano); Philips Elementary School (55.3% Anglo, 36.6% Negro, 5.2% Hispano); Ashley Elementary School (85.8% Anglo, 6.4% Negro, 5.8% Hispano); Palmer Elementary School (91.7% Anglo, 4.9% Negro, 1.7% Hispano); Park Hill Elementary School (71.0% Anglo, 23.2% Negro, 3.9% Hispano); Steck Elementary School (86.1% Anglo, 10.7% Negro, 1.0% Hispano); Steele Elementary School (85.0% Anglo, 6.6% Negro, 7.6% Hispano); Whiteman Elementary School (88.1% Anglo, 8.9% Negro, 2.6% Hispano); Moore Elementary School (79.3% Anglo, 8.3% Negro, 8.9% Hispano); Montclair Annex Elementary School (98.1% Anglo, 1.9% Negro, 0.0% Hispano); Barrett Elementary School (0.3% Anglo, 96.9% Negro, 1.9% Hispano); Carson Elementary School (90.3% Anglo, 6.7% Negro, 0.8% Hispano); Asbury Elementary School (88.9% Anglo, 5.7% Negro, 3.9% Hispano).

H. Plaintiffs Christi Keyes and Mark Keyes, the children of plaintiff Wilfred Keyes, are residents of an unchanged attendance area assigned to the Hallett Elementary School (10.1% Anglo, 84.4% Negro, 3.7% Hispano) and will attend said school in September, 1969.

I. Plaintiff Gregory L. Wade, the son of Roberta R. Wade, is a resident of an attendance area detached from Barrett Elementary School (0.3% Anglo, 96.9% Negro, 1.9% Hispano) and assigned to Carson Elementary School (90.3% Anglo, 6.7% Negro, 0.8% Hispano) under Resolution No. 1531; if action is taken to implement the recision of said Resolution, he will attend Barrett Elementary School in September, 1969, and the racial composition of both schools will remain substantially as quoted. If Resolution No. 1531 is implemented the racial composition of these

schools will be: Barrett Elementary School, 73.0% Anglo, 24.0% Negro, 3.0% Hispano, Carson Elementary School, 78.0% Anglo, 20.0% Negro, 2.0% Hispano.

J. Plaintiff Denise Michelle Starks, the daughter of Edward J. Starks, Jr., is a resident of an attendance area of Philips Elementary School (55.3% Anglo, 36.6% Negro, 5.2% Hispano) which was altered to become a part of the attendance area for Palmer Elementary School (91.7% Anglo, 4.9% Negro, 1.7% Hispano) under Resolution No. 1531; if action is taken to implement the recision of said Resolution, she will attend Philips Elementary School in September, 1969, and the racial composition of both schools will remain substantially as quoted. If Resolution No. 1531 is implemented the racial composition of these schools will be: Philips Elementary School, 70.0% Anglo, 22.0% Negro, 8.0% Hispano, Palmer Elementary School 81.0% Anglo, 15.0% Negro, 4.0% Hispano.

K. To implement the aforesaid Resolutions No. 1520, 1524, and 1531 defendant Board of Education has required defendant Superintendent to initiate a purchase of twenty-seven (27) school buses. In addition the defendant Superintendent substantially completed steps designed to implement such Resolutions in September, 1969, including initiation of in-service training for over eight hundred (800) faculty and staff, preparation of class schedules, schedules of course availability, pupil assignments, space assignments, transportation utilization and other actions.

L. On May 20, 1969, pursuant to regular statutory requirements two new members were elected to seats on the defendant Board of Education, these being defendants

James C. Perrill and Frank K. Southworth. Defeated in the same election were two incumbent members of the Board of Education who had voted for passage of the aforesaid Resolutions No. 1520, 1524 and 1531. The victorious candidates, defendants Perrill and Southworth, had campaigned on slogans such as "Against Forced Busing!" "For Neighborhood Schools!" and promised, if elected, to vote for recision of the aforesaid Resolutions No. 1520, 1524 and 1531. Said slogans and promises intensified racial polarization within the School District.

M. Having seated its two newly elected members, defendant Board of Education on June 9, 1969, passed by a vote of 4-3, three motions rescinding each of the three Resolutions No. 1520, 1524 and 1531.

N. If defendants are permitted to implement the motions to rescind Resolutions No. 1520, 1524 and 1531, as by implementing substitute resolutions now or hereafter passed by the Board, such implementation will or may entail modification or cancellation of said presently-existing purchase order for twenty-seven school buses; modification or recision and destruction of all work already accomplished with regard to prior implementation of the now-rescinded Resolutions No. 1520, 1524 and 1531; *e.g.*, class assignments, pupil assignments, space assignments, schedules for utilization of transportation facilities, which if destroyed will irreparably injure the minor plaintiffs and others similarly situated, as follows: In the event that this Court should ultimately decide to grant to plaintiffs the permanent relief prayed for herein, such relief will not be possible for the school year beginning September, 1969, unless during the pendency of this action the *status*

quo is maintained; *i.e.*, unless the contracts, schedules and assignments already prepared to implement the now-rescinded Resolutions are retained. If the *status quo* is not maintained, the minor plaintiffs and their classes will be segregated and forced to receive an unequal educational opportunity during the school year beginning September, 1969, as is more fully detailed herein in paragraphs A through M.

O. If Resolutions No. 1520, 1524 and 1531 are not reinstated and implemented, and if the motions for recision and any substitute resolutions or motions are not declared unconstitutional and void as depriving said minor plaintiffs and those similarly situated of equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States, said plaintiffs and those similarly situated will be irreparably harmed and injured because they will be segregated on the basis of race and ethnicity, and forced to attend schools which will be segregated, and which would not be segregated if Resolutions No. 1520, 1524 and 1531 were reinstated and implemented, resulting in their being forced to receive an unequal educational opportunity during the school year beginning September, 1969, and for subsequent years thereafter, as is more fully stated in paragraphs A through P herein.

P. Plaintiffs have no plain, speedy, adequate or complete remedy to redress the wrongs and illegal acts complained of herein, other than this suit for injunctive relief. Any other remedy to which plaintiffs and those similarly situated could be entitled would be atttended by such uncertainties and delays as to deny substantial relief,

would involve a multiplicity of suits, cause further irreparable injury, and occasion damage, vexation and inconvenience, not only to plaintiffs, and those similarly situated, but to defendants as well.

FIRST COUNT

A. Plaintiffs hereby incorporate by reference each and every allegation contained in the General Factual Allegations of this First Cause of Action.

B. The recision of Resolutions No. 1520, 1524 and 1531 will have the effect of encouraging private acts of racial discrimination and is therefore a derogation of the minor plaintiffs' rights to equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States.

SECOND COUNT

A. Plaintiffs hereby incorporate by reference each and every allegation contained in the General Factual Allegations of this First Cause of Action.

B. In rescinding Resolutions No. 1520, 1524 and 1531 defendant Board members were motivated by racial and ethnic considerations.

C. Negro and Hispano plaintiffs, and the classes which they represent, view the actions of said defendants in rescinding these Resolutions as a significant defeat of their attempt to obtain equal educational opportunity and the equal protection of the laws for all Negro and Hispano students in the School District.

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THIRD COUNT

A. Plaintiffs hereby incorporate by reference each and every allegation contained in the General Factual Allegations of this First Cause of Action.

B. Prior to the passage of Resolutions No. 1520, 1524 and 1531, the pupil population of the schools affected thereby were substantially segregated on the basis of race or ethnicity.

C. If Resolutions No. 1520, 1524 and 1531 had been implemented the effect would have been to substantially relieve the actual segregation of the pupil populations of the schools affected thereby.

D. In rescinding these resolutions the defendant Board members voting in favor of recision, and, therefore, the defendant Board itself, were motivated by a desire to maintain, require, and facilitate the racial and ethnic separation which existed in the schools affected prior to the passage of Resolutions No. 1520, 1524 and 1531, and which would have been significantly alleviated by the Resolutions rescinded.

FOURTH COUNT

A. Plaintiffs hereby incorporate by reference each and every allegation contained in the General Factual Allegations of this First Cause of Action.

B. By the recision of Resolutions No. 1520, 1524 and 1531 defendants Board and Board members knowingly

reassigned children whom it had previously designated to receive an integrated education to schools which will as a result of the Board's action be substantially segregated, and thus resegregated such children on the basis of race and ethnic origin.

FIFTH COUNT

A. Plaintiffs hereby incorporate by reference each and every allegation contained in the General Factual Allegations of this First Cause of Action.

B. Prior to the passage of Resolutions No. 1520, 1524 and 1531, the pupil populations of the schools affected were substantially segregated on the basis of race and ethnicity, and those schools with predominantly Negro or Hispano populations were providing unequal educational opportunity due to the fact that such schools were (on the average for all Denver schools) assigned less-experienced faculty, had higher drop-out rates, were assigned and allocated a disproportionately large number of Negro or Hispano faculty, had a disproportionately large number of mobile units, and had pupil memberships derived from generally lower economic status.

C. Implementation of the aforesaid Resolutions No. 1520, 1524 and 1531 would have resulted in substantial alleviation of the racial and ethnic segregation in such schools.

D. The benefits which would have accrued from integration under Resolutions No. 1520, 1524 and 1531 would have

significantly eliminated the existing inequalities in educational opportunity as set forth in paragraph B above, and the recision of those resolutions therefore operates to deny minor plaintiffs an educational opportunity equal to that accorded students in schools the pupil population of which are not predominantly Negro or Hispano.

SIXTH COUNT

A. Plaintiffs hereby incorporate by reference each and every allegation contained in the General Factual Allegations of this First Cause of Action.

B. Prior to the passage of Resolutions No. 1520, 1524 and 1531 the pupil populations of the schools affected thereby were substantially segregated on the basis of race or ethnicity.

C. If Resolutions No. 1520, 1524 and 1531 had been implemented the effect would have been to substantially relieve the actual segregation of the pupil populations of the schools thereby affected.

D. By reinstating the racial and ethnic separation existing in the affected schools prior to the passage of Resolutions 1520, 1524 and 1531, and by assigning plaintiffs and the class they represent to those segregated schools to which they would have gone had Resolutions No. 1520, 1524 and 1531 never been passed, defendants have acted to deny plaintiffs an equal educational opportunity by implementing and effectuating a policy the effect of which is to confine plaintiffs to schools which because of the

recision will be actually segregated on the basis of race or ethnicity.

PRAYER FOR FIRST CAUSE OF ACTION

A. Wherefore, plaintiffs, in behalf of themselves and those similarly situated, pray as follows:

1. That defendants, and each and every of defendant School District's officers, agents, servants, employees and each of them, and all other persons in active concert or participation with them be, preliminarily during the pendency of this action and permanently thereafter, restrained and enjoined

   (a) from in any way interfering with, modifying, cancelling or rescinding the purchase order for said twenty-seven school buses;

   (b) from destroying, changing or otherwise modifying, in any manner whatsoever, or relocating all those documents, contracts, schedules, or other writings and memoranda relating or pertaining to the implementation of Resolutions No. 1520, 1524 and 1531.

   (c) from taking any action or making any communication to faculty, staff, parents or students during the pendency of this action or before permanent orders are issued by this Court which would make it impossible or substantially more difficult, to proceed with the implementation of Resolutions No. 1520, 1524

and 1531 at the start of the school year in September, 1969, with the exception that defendants shall not otherwise during such time be prevented from simultaneously preparing for the implementation of alternate or additional plans concerning the matters described herein as they so desire.

2. That those motions passed by defendant Board rescinding Resolutions No. 1520, 1524 and 1531, and resolutions, policies, directives, plans and actions passed, enacted or implemented by defendants or any of them attempting to further the purposes of said rescinding motions or to prevent the full and complete implementation of Resolutions No. 1520, 1524 and 1531 be declared null and void and of no force and effect whatsoever as a denial of equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

3. That defendants be required to implement fully and completely the provisions, plans and actions outlined in Resolutions No. 1520, 1524 and 1531 beginning in September, 1969, and further that defendants be forever enjoined from acting to nullify, modify, delay, or deny to plaintiffs or others similarly situated the equal educational opportunity guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

4. That the Court, pursuant to 28 U.S.C. § 2201, adjudge and decree that:

(a) The actions of defendant Board in rescinding Resolutions No. 1520, 1524 and 1531, have denied to the minor plaintiffs who are Negro or Hispano and other persons similarly situated, educational opportunities, advantages and facilities equal to those afforded and available to Anglo children in schools unaffected by such recision, and that said actions are unconstitutional and void, as depriving said plaintiffs of equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States;

(b) The actions of defendant Board in rescinding Resolutions No. 1520, 1524 and 1531, have denied to the minor plaintiffs who are Anglo, and other persons similarly situated, the advantages, educational benefits, intellectual stimulation and practical preparation for a multiracial world afforded and available to those Anglo children attending racially balanced and integrated schools within the school District, and that such actions are unconstitutional and void, as depriving said plaintiffs of equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

B. That plaintiffs recover their costs, and for such other and further relief as may to the Court appear proper.

IV. SECOND CAUSE OF ACTION

First Count

A. Plaintiffs incorporate herein by reference each and every allegation of the First Cause of Action herein.

B. By the following described acts, among others, defendants and/or their predecessors have over the years and are at present deliberately and purposefully attempting to create, foster and maintain racial and ethnic segregation within the School District:

(1) With full knowledge of the existence of racially and ethnically segregated residential patterns, and with full knowledge that the superimposition thereupon of a so-called "neighborhood school" policy would result in significant racial and ethnic segregation in the School District reflective of said segregated residential patterns, said defendants adopted and continue to maintain such a neighborhood school policy with the intent, purpose and effect of creating, fostering and maintaining racially and ethnically segregated schools.

(2) Over a period of years and on repeated occasions said defendants have created, altered and enforced certain school attendance area boundaries with the purpose, intent and effect of creating, fostering and maintaining racial and ethnic segregation within the School District.

(3) With the purpose, intent and effect of creating, fostering and maintaining racial and ethnic segre-

gation of the Denver public schools, said defendants during certain years have allowed certain Anglo children optional transfer outside of established school attendance areas, in contravention of said defendants' existing published policies and resolutions, with no apparent purpose other than that of encouraging, promoting and continuing the segregation of the Anglo students from Negro and/or Hispano students.

(4) With the purpose, intent and effect of creating, fostering and maintaining racial and ethnic segregation in the School District, said defendants have assigned Negro and Hispano faculty and staff to those schools having predominantly Negro and Hispano pupil populations, thereby furthering, confirming and solidifying the racially and ethnically segregated character of those schools.

(5) As certain schools within the School District have undergone transition to gradually increasing proportions of Negro and/or Hispano pupil populations, said defendants have created optional attendance areas which were consciously and intentionally designed to promote and allow transfer of Anglo pupils to predominantly Anglo schools and thereby to retain and confine Negro and/or Hispano pupils to schools of predominantly Negro and/or Hispano pupil populations.

C. These various actions of said defendants have effected in the School District a significant segregation of pupils by race and ethnicity, as evidenced by the following facts:

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(1) In September, 1968, of the 63,385 Anglo students in the public schools in the School District, 37,539, or 59%, were in 43 schools the pupil population of which were over 85% Anglo.

(2) In September, 1968, of the 13,639 Negro students in the public schools in the School District, 8,451, or 62%, were in 15 schools the pupil populations of which were over 85% Negro and/or Hispano.

(3) In September, 1968, of the 18,611 Hispano students in the public schools in the School District, 9,360 Hispanos, or 50.2%, were in 35 schools the pupil populations of which were over 50% Negro and/or Hispano.

SECOND COUNT

A. Plaintiffs hereby incorporate by reference each and every allegation contained in their First Cause of Action and subparagraphs C(1), C(2), and C(3) of the First Count of this Second Cause of Action in so far as those subparagraphs allege the existence in the School District of actual segregation on the basis of race and ethnicity.

B. By the following described acts, among others, defendants or their predecessors have allocated to those schools in the School District whose populations are predominantly Negro and/or Hispano resources substantially inferior to those allocated to schools with predominantly Anglo pupil populations:

(1) Defendants and/or their predecessors have provided predominantly Negro and Hispano schools

with physical plants, equipment, materials, supplies and curricula inferior to that provided to schools with predominantly Anglo student pupil populations.

(2) Defendants and/or their predecessors have allocated and assigned a disproportionately large number of less-experienced faculty to those schools in the School District with predominantly Negro or Hispano pupil populations, while at the same time allocating and assigning a disproportionately large number of more-experienced faculty to schools with predominantly Anglo pupil populations.

C. By providing those schools having predominantly Negro and Hispano student populations with resources inferior to those allocated to predominantly Anglo schools, defendants and/or their predecessors have in the past and are at present denying students attending those schools, including plaintiff Sarah S. Weiner and those similarly situated the equal protection of the laws by providing them with an educational opportunity unequal to that provided by other schools in the School District.

THIRD COUNT

A. Plaintiffs hereby incorporate by reference each and every allegation contained in their First Cause of Action, except in so far as they may be construed to allege an *intent* on the part of defendants and/or their predecessors to segregate the School District's pupil population on the basis of race and ethnicity.

B. Plaintiffs hereby incorporate by reference each and every allegation contained in subparagraphs C(1), C(2) and C(3) of the First Count of this Second Cause of Action, in so far as those subparagraphs allege the existence in the School District of actual segregation on the basis of race and ethnicity.

C. Defendants and/or their predecessors have adopted and continue to maintain a "neighborhood school" policy which effects the assignment of students to schools according to a geographic limitation, and results in the racial and ethnic segregation of students as is shown by the facts incorporated in paragraph B above.

D. By the creation and maintenance of a school system segregated on the basis of race and ethnicity, defendants and/or their predecessors have and will continue to deny an equal educational opportunity to those students assigned to schools which are predominantly Negro and/or Hispano, and to deny equal protection of the laws to such students and to plaintiffs and other members of the classes which they represent.

FOURTH COUNT

A. Plaintiffs incorporate herein by reference each and every allegation of their First Cause of Action.

B. Defendants and/or their predecessors originated and defendants continue to administer throughout the School District various systems of pupil ability grouping referred to hereinafter as the "track systems".

C. Under these systems students are purportedly classified according to ability to learn and then assigned either to a regular or accelerated educational program and curriculum.

D. The effect of the application and administration of these track systems has been the segregation and separation of students on the basis of race and ethnicity and the denial to the minor Negro and Hispano plaintiffs, and those similarly situated, an educational opportunity equal to that offered Anglo students of comparable ability and qualifications.

PRAYER FOR SECOND CAUSE OF ACTION

A. Wherefore, plaintiffs, in behalf of themselves and in behalf of those persons similarly situated, pray as follows:

1. Under the First Count of this Second Cause of Action,

(a) That defendants, and each of them, be permanently enjoined and restrained from directly or indirectly continuing, maintainig, requiring, promoting or encouraging, through their rules, regulations, resolutions, policies, directives, customs, practices and usages, the segregation and separation by race and ethnicity of the pupils of the schools within the School District.

(b) That defendants be required to submit to this Court, within a time which is both reasonable and certain, and which would allow sufficient

time for implementation of such program for the beginning of the school year commencing on or about September 1, 1970, a comprehensive plan for the School District as a whole, and for each school therein where such condition exists, which will effectively:

(i) Remove the segregation and separation of school children by race and ethnicity within and among such schools;

(ii) Afford and ensure to every school child, regardless of race or ethnicity, and regardless of the school which such child attends, an equal educational opportunity;

(c) That defendants, and each of them, be permanently enjoined and restrained:

(i) From any further creation, alteration or enforcement of any boundaries for any school attendance area that is intended to or does in fact discriminate on the basis of race or ethnicity as between school children within the District.

(ii) From any further creation or enforcement of optional areas or zones or permissive policies which are intended to or do in fact discriminate on the basis of race or ethnicity as between school children within the District as to the right of optional transfer outside of established school attendance areas;

(iii) From any further utilization or adoption of policies regarding the assignment of faculty

or staff which are intended to or do in fact assign faculty and staff to schools on the basis of race or ethnicity, thereby furthering and solidifying the racial and ethnic character of such schools.

(d) That the Court, pursuant to 28 U.S.C. § 2201, adjudge and decree that the actions of defendants in purposefully and knowingly creating and maintaining the segregation and separation by race and ethnicity of the school children within the District are unconstitutional and void, as depriving plaintiffs, and those similarly situated, of equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. Under the Second Count of this Second Cause of Action,

(a) That defendants and each of them be permanently enjoined and restrained from directly or indirectly continuing, maintaining, requiring, promoting or encouraging through their rules, regulations, resolutions, policies, directives, customs, practices and usages the unequal allocation of resources which is intended to or does in fact discriminate on the basis of race and ethnicity as between school children within the District.

(b) That defendants be required to submit to this Court, within a time which is both reasonable and certain, and which would allow sufficient time

for implementation of such plan by the beginning of the school year commencing in September, 1970, a comprehensive plan for the School District as a whole, and for each school therein where such conditions exist, which will effectively:

(i) Remove any existing disparity in the resources allocated to such schools; and

(ii) Afford and ensure to every school child, regardless of race or ethnicity, and regardless of the school which such child attends, an equal opportunity to attend schools which from the standpoint of facilities, faculty and staff, are in fact equal or as nearly so as is practical and feasible under the circumstances.

(c) That defendants and each of them be permanently enjoined and restrained:

(i) From adopting or continuing any policy which is intended to or in fact does result in an unequal allocation of such resources as physical plant equipment, materials, supplies and curricula among and between schools on the basis of race or ethnicity, or which discriminates on the basis of race or ethnicity as between school children within the District.

(ii) From any further policy regarding the assignment of faculty or staff which is intended to or does in fact assign less-experienced or

less-qualified faculty or staff to schools which are predominately Negro and/or Hispano in their racial and ethnic composition.

(d) That the Court, pursuant to 28 U.S.C. § 2201, adjudge and decree that the actions of the defendants in allocating resources among and between schools within the District with the effect of allocating inferior resources to those schools which are predominately Negro and/or Hispano in their racial or ethnic composition, are unconstitutional and void as depriving plaintiffs and those persons similarly situated of equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States.

3. Under the Third Count of this Second Cause of Action,

(a) That defendants, and each of them, be permanently enjoined and restrained from directly or indirectly continuing, maintaining, requiring, promoting or encouraging, through their rules, regulations, resolutions, policies, directives, customs, practices and usages, the segregation and separation by race and ethnicity of the pupils of the schools within the School District.

(b) That defendants be required to submit to this Court, within a time which is both reasonable and certain, and which would allow sufficient time for implementation of such program for the begin-

ning of the school year commencing on or about September 1, 1970, a comprehensive plan for the School District as a whole, and for each school therein where such condition exists, which will effectively:

(i) Remove the segregation and separation of school children by race and ethnicity within and among such schools;

(ii) Afford and ensure to every school child, regardless of race or ethnicity, and regardless of the school which such child attends, an equal educational opportunity;

(c) That defendants, and each of them, be permanently enjoined and restrained from any further creation, alteration or enforcement of any boundaries for any school attendance area that is intended to or does in fact discriminate on the basis of race or ethnicity as between school children within the District.

(d) That the Court, pursuant to 28 U.S.C. § 2201, adjudge and decree that the actions of defendants which resulted in the actual segregation and separation by race and ethnicity of the school children within the District are unconstitutional and void, as depriving said plaintiffs, and those similarly situated, of equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. In the alternative, under the Third Count of this Second Cause of Action, that defendants be required to

submit to this Court, within a time which is both reasonable and certain, and which would allow sufficient time for implementation by the beginning of the school year commencing in September, 1970, a comprehensive plan for the School District as a whole, and for each school therein where such condition exists, which will effectively:

(a) Mitigate, to the greatest extent possible and feasible under the circumstances, the segregation and separation of school children by race and ethnicity within and among said schools;

(b) Minimize, to the greatest extent possible and feasible under the circumstances, the adverse effects upon equal educational opportunity caused by the segregation which remains.

5. Under the Fourth Count of this Second Cause of Action,

(a) That defendants, and each of them, be permanently enjoined and restrained from directly or indirectly continuing, maintaining or applying the existing track system or any other ability grouping, test or device which is either intended to or does in fact discriminate between pupils on the basis of race or ethnicity or which is either intended to or does in fact accord Negro and Hispano students an educational opportunity unequal to that accorded Anglo students of comparable abilities and qualifications.

(b) That the Court, pursuant to 28 U.S.C. § 2201 adjudge and decree that the actions of defendants in creating, applying and administering the exist-

ing "track systems" which both in fact discriminates against Negro and Hispano students and denies said students an educational opportunity equal to that accorded Anglo students of comparable abilities and qualifications are unconstitutional and void, as depriving plaintiffs, and those similarly situated, of equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

B. That plaintiffs recover their costs and for such other and further relief as may to the Court appear proper.

BARNES & JENSEN

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Complaint for Permanent Injunction and Declaratory Judgment

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Complaint for Permanent Injunction and Declaratory Judgment

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STATE OF COLORADO,
CITY AND COUNTY OF DENVER, *ss.*

EUGENE R. WEINER, being duly sworn, deposes and says that he is one of the plaintiffs in the within action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those, he believes them to be true.

/s/ EUGENE R. WEINER

Subscribed and sworn to before me this 19th day of June, 1969.

Witness my hand and official seal.

/s/ MARGARET P. APPERSON
Notary Public
My commission expires:
May 22, 1972

(SEAL)

Plaintiffs' Exhibit 3

Exhibit Annexed to Complaint

(Resolution 1520)

Approved by the Board of Education on January 30, 1969

WHEREAS, pursuant to the Resolution of this Board of Education passed on May 16, 1968, and numbered 1490, in response to the subsequent specific direction of this Board of Education, and in accordance with Article VIII, Section 2 of the By Laws of this Board, the Superintendent of this School District has proposed certain changes in the boundaries of the attendance areas of certain secondary schools of this School District, which changes are one of the steps designed to improve educational opportunity in the public schools of this District by revising and thereafter stabilizing the racial and ethnic composition of pupil memberships in such schools;

WHEREAS, this Board of Education did receive said proposals of the Superintendent for study and action and did order that the citizens of this School District be given an opportunity to express their views on said proposals at a public hearing; and

WHEREAS, this Board of Education, having heard the views of the citizens of this School District on the proposed changes in attendance areas and boundaries; having considered traffic patterns, distances, housing patterns, school building capacities, optimum pupil memberships for the schools concerned, pupil achievement data, the need for providing transportation to pupils and the cost thereof,

and current policies of the Board of Education regarding the provision of transportation for pupils; and having otherwise informed itself on the questions presented by the said proposals, FINDS that, because of the housing patterns in the City and County of Denver, East High School and Smiley Junior High School contain growing numbers of pupils of racial and ethnic minorities; that a reduction of such numbers is desirable as one of the steps to improve educational opportunity in such schools; and that the changes in the attendance areas as proposed by the superintendent are consistent with the foregoing and as hereinafter set forth herein, will reasonably accomplish such reduction and thereafter stabilize the racial and ethnic composition of pupil memberships in these schools; and that such changes are in the public interest.

NOW THEREFORE, IT IS RESOLVED by the Board of Education of School District No. 1 in the City and County of Denver and State of Colorado that, effective as of the opening of school in September of 1969, the boundaries of the attendance areas of the following secondary schools in this School District be, and they are hereby, changed as follows:

1. The following described area shall be detached from the EAST HIGH SCHOOL attendance area and shall become a part of the SOUTH HIGH SCHOOL attendance area.

   Beginning at the intersection of the Union Pacific Railroad tracks and Clayton Street, thence: Easterly along the railroad tracks to Colorado Boulevard, South on Colorado Boulevard to East 32nd Avenue,

West on East 32nd Avenue to Fillmore Street, North of Fillmore Street to East 40th Avenue, West on East 40th Avenue to Clayton Street, and North on Clayton Street to the point of beginning.

2. The following described area shall be detached from the South High School attendance area and shall become a part of the East High School attendance area.

   Beginning at the intersection of Logan Street and the centerline of Cherry Creek, thence: Southeasterly along the centerline of Cherry Creek to Alameda Avenue, West along Alameda Avenue to South Logan Street, and North on Logan Street to the point of beginning.

3. The following described area shall be detached from the George Washington High School attendance area and shall become a part of the South High School attendance area.

   Beginning at the intersection of South Colorado Boulevard and East Arizona Avenue, thence: East on Arizona Avenue to South Dahlia Street, South on South Dahlia Street to the City Limits, Northwest along the City Limits to the Colorado and Southern Railroad tracks, Westerly along the Colorado and Southern Railroad tracks to South Colorado Boulevard, and North on South Colorado Boulevard to the point of beginning.

4. The following described area shall be detached from the East High School attendance area and shall

become a part of the George Washington High School attendance area.

Beginning at the intersection of Ivanhoe Street extended and Interstate Highway 70, thence: Easterly on Interstate Highway 70 to Syracuse Street extended, South on Syracuse Street extended and Syracuse Street to East 32nd Avenue, West on East 32nd Avenue to Monaco Boulevard, South on Monaco Boulevard to Montview Boulevard, West on Montview Boulevard to Jasmine Street, South on Jasmine Street to East Colfax Avenue, West on East Colfax Avenue to Ivanhoe Street, and North on Ivanhoe Street to the point of beginning.

5. The following described area shall be detached from the George Washington High School attendance area and shall become a part of the East High School attendance area.

Beginning at the intersection of East Colfax Avenue and Ivanhoe Street, thence: East on East Colfax Avenue to Jasmine Street, South on Jasmine Street to East 6th Avenue, West on East 6th Avenue to Colorado Boulevard, South on Colorado Boulevard to East Alameda Avenue, West on East Alameda Avenue to the centerline of Cherry Creek, Northwesterly along the centerline of Cherry Creek to Steele Street, North on Steele Street to East 7th Avenue, East on East 7th Avenue to Colorado Boulevard, North on Colorado Boulevard to East 8th Avenue, East on East 8th Avenue to Grape Street, North on Grape Street to East 14th Avenue, East on East 14th Avenue to Holly Street, North

on Holly Street to East Colfax Avenue, and East on East Colfax Avenue to the point of beginning.

6. The following described area shall be detached from the HILL JUNIOR HIGH SCHOOL attendance area and shall become a part of the SMILEY JUNIOR HIGH SCHOOL attendance area.

Beginning at the intersection of East Colfax Avenue and Kearney Street, thence: East on East Colfax Avenue to Yosemite Street, South on Yosemite Street and Yosemite Street extended to East 1st Avenue extended, West on East 1st Avenue extended and East 1st Avenue to the west boundary the United States Air Force Reservation, North on the west boundary of the United States Air Force Reservation to the north boundary of the United States Air Force Reservation, East on the north boundary of the United States Air Force Reservation to Quebec Street, North on Quebec Street to East 6th Avenue, West on East 6th Avenue to Kearney Street, and North on Kearney Street to the point of beginning.

7. The area known as Montbello which was annexed to the City and County of Denver by Ordinance No. 262, Series of 1965, of the Ordinances of the City and County of Denver and State of Colorado, shall remain in the EAST HIGH SCHOOL subdistrict and in the SMILEY JUNIOR HIGH SCHOOL subdistrict.

Unless otherwise specified, references to city streets and avenues as boundaries shall be taken as referring to the centerlines of such streets and avenues.

Exhibit Annexed to Complaint

IT IS FURTHER RESOLVED that, consistent with the foregoing, the Superintendent is hereby directed to make the following recommendations by March 10, 1969, for consideration and action by this Board at its regular March meeting:

1. To recommend further changes in the boundaries of the Smiley Junior High School attendance area which will detach therefrom attendance areas sufficient in size to include approximately 850 pupils who would otherwise attend Smiley Junior High School and designate such detached areas as attendance areas for other junior high schools within this School District, all effective with the beginning of school in September, 1969.

2. To recommend whether or not each area so detached from the Smiley Junior High School attendance area shall continue as part of its present senior high school attendance area or be designated as part of the attendance area for another senior high school within this School District.

3. To make such other recommendations as he shall deem necessary or desirable in order to carry out the intent of this resolution.

IT IS FURTHER RESOLVED that the present policies of this School District regarding provision of transportation for secondary school pupils to and from school remain in full force and effect, except, that from and after September, 1969, those senior high school pupils residing in the area bounded by Clayton Street, the Union Pacific Railroad tracks, Colorado Boulevard and East 32nd Avenue and herein assigned to South High School effective September,

1969, shall be provided with transportation to and from South High School without charge to them.

IT IS FURTHER RESOLVED that those pupils entering their senior year of high school in September of 1969, and who reside in the senior high school attendance areas changed by this resolution shall have the option of attending the senior high school of the attendance area in which they continue to reside or the senior high school which they attended at the close of the 1968-1969 school year, which option shall be exercised in accordance with procedures prescribed by the Superintendent of this School District.

Plaintiffs' Exhibit 4

Exhibit Annexed to Complaint

(Resolution No. 1524)

Approved by the Board of
Education March 20, 1969

WHEREAS, this Board of Education by its Resolution Numbered 1520 and passed on January 30, 1969, directed the Superintendent of this School District to make certain recommendations for consideration and action by this Board;

WHEREAS, in accordance with said Resolution 1520 and Article VIII, Section 2, of the By Laws of this Board, the Superintendent has recommended changes in the boundaries of the attendance areas of Certain of the secondary schools of this School District; and

WHEREAS, this Board of Education has considered the recommendations of the Superintendent, finds them in accord with the purposes and intent of said Resolution No. 1520, and finds that such changes are in the public interest;

NOW THEREFORE, IT IS RESOLVED by the Board of Education of School District No. 1 in the City and County of Denver and State of Colorado that the boundaries of the attendance areas of the following junior high schools in this School District be, and they are hereby, changed as hereinafter specifically provided; that on and after the opening of school in September of 1969 all 7th, 8th and 9th grade pupils from time to time residing in such changed attendance areas are hereby assigned to the junior high school of such changed attendance areas as follows:

1. The following described area shall be detached from SMILEY JUNIOR HIGH SCHOOL attendance area and as hereinabove provided shall become a part of MERRILL JUNIOR HIGH SCHOOL attendance area.

Exhibit Annexed to Complaint

Beginning at the intersection of the Union Pacific Railroad tracks and Clayton Street, thence: Easterly along the Railroad tracks to Dahlia Street, South on Dahlia Street to East 35th Avenue, West on East 35th Avenue to Cherry Street; South on Cherry Street to East 30th Avenue, West on East 30th Avenue to Colorado Boulevard, North on Colorado Boulevard to East 32nd Avenue, West on East 32nd Avenue to Fillmore Street, North on Fillmore Street to East 40th Avenue, West on East 40th Avenue to Clayton Street, and North on Clayton Street to the point of beginning.

2. The following described area shall be detached from SMILEY JUNIOR HIGH SCHOOL attendance area and as hereinabove provided shall become a part of GRANT JUNIOR HIGH SCHOOL attendance area.

Beginning at the intersection of the Union Pacific Railroad tracks and Dahlia Street, thence: Easterly along the Railroad tracks to Forest Street, South on Forest Street to Thrill Place, West on Thrill Place to Dahlia Street, and North on Dahlia Street to the point of beginning.

3. The following described area shall be detached from SMILEY JUNIOR HIGH SCHOOL attendance area and as hereinabove provided shall become a part of BYRNE JUNIOR HIGH SCHOOL attendance area.

Beginning at the intersection of East 35th Avenue and Cherry Street, thence: East on East 35th Avenue to Dahlia Street, South on Dahlia Street to Thrill Place, East on Thrill Place to Forest Street, South on Forest Street to East 28th Avenue, West on 28th Avenue to Dexter Street, North on Dexter Street to East 30th

Avenue, West on East 30th Avenue to Cherry Street, and North on Cherry Street to the point of beginning.

4. The following described area shall be detached from Shiley Junior High School attendance area and as hereinabove provided shall become a part of Kunsmiller Junior High School attendance area.

Beginning at the intersection of the Union Pacific Railroad tracks and Forest Street, thence: Southeasterly along the railroad tracks to Ivanhoe Street extended, South on Ivanhoe Street extended and Ivanhoe Street to East 29th Avenue, West on East 29th Avenue to Forest Street, and North on Forest Street to the point of beginning.

5. The following described area shall be detached from Shiley Junior High School attendance area and as hereinabove provided shall become a part of Hill Junior High School attendance area.

Beginning at the intersection of Interstate Highway 70 and Ivanhoe Street extended, thence: East along Interstate Highway 70 to Locust Street extended, South on Locust Street extended and Locust Street to East 29th Avenue, West on East 29th Avenue to Ivanhoe Street, and North on Ivanhoe Street and Ivanhoe Street extended to the point of beginning.

6. The following described area shall be detached from Shiley Junior High School attendance area and as hereinabove provided shall become a part of Hamilton Junior High School for 7th and 8th grade pupils and Thomas Jefferson Junior-Senior High School for 9th grade pupils residing therein from time to time.

Exhibit Annexed to Complaint

Beginning at the intersection of Interstate Highway 70 and Locust Street extended, thence: Easterly along Interstate Highway 70 to Syracuse Street extended, South along Syracuse Street extended and Syracuse Street to East 26th Avenue, West along East 26th Avenue to Locust Street, and North on Locust Street and Locust Street extended to the point of beginning.

7. The following described area shall be detached from COLE JUNIOR HIGH SCHOOL attendance area and shall become a part of SMILEY JUNIOR HIGH SCHOOL attendance area.

Beginning at the intersection of East 54th Avenue and the Burlington Railroad tracks, thence: East on East 54th Avenue to Colorado Boulevard, South on Colorado Boulevard to Vasquez Boulevard, Southwest on Vasquez Boulevard to East 46th Avenue, West on East 46th Avenue to the Burlington Railroad tracks, and Northeast along the Burlington Railroad tracks to the point of beginning.

8. The following described area shall be detached from HILL JUNIOR HIGH SCHOOL attendance area and shall become a part of the attendance areas of HAMILTON JUNIOR HIGH SCHOOL and THOMAS JEFFERSON JUNIOR-SENIOR HIGH SCHOOL effective as of the opening of school in September of 1969, and thereafter all 7th and 8th grade pupils from time to time residing therein shall attend HAMILTON JUNIOR HIGH SCHOOL: all 9th grade pupils from time to time residing therein shall attend THOMAS JEFFERSON JUNIOR-SENIOR HIGH SCHOOL.

Beginning at the intersection of East Kentucky Avenue and the centerline of Cherry Creek, thence: Easterly along East Kentucky Avenue and East Kentucky Ave-

nue extended to the east side of South Dayton Street, North on South Dayton Street to East Alameda Avenue, Northeasterly on East Alameda Avenue to South Havana Street, South on South Havana Street to the Highline Canal, Southeasterly along the Highline Canal to South Fulton Street, South along South Fulton Street to the boundary line of the City and County of Denver as it now exists, East along said boundary line to South Geneva Street, North along South Geneva Street to the said boundary line of the City and County of Denver, East along said boundary line to South Havana Street, South on South Havana Street to East Mississippi Avenue, West on East Mississippi Avenue (not including the Cunningham School Site) to the Parker Road, Westerly along the said boundary line of the City and County of Denver to South Quebec Street, South on South Quebec Street to South Quebec Way, Southeasterly on South Quebec Way to East Louisiana Avenue, West on East Louisiana Avenue to South Quebec Street, South on South Quebec Street to East Florida Avenue, West on East Florida Avenue to the centerline of Cherry Creek, and Northwest along the centerline of Cherry Creek to the point of beginning.

9. The following described area shall be detached from Mitchell Junior High School attendance area and shall become a part of the attendance areas of Hamilton Junior High School and Thomas Jefferson Junior-Senior High School effective as of the opening of school in September 1969, and thereafter all 7th and 8th grade pupils residing therein shall attend Hamilton Junior High School; all 9th grade pupils residing therein shall attend Thomas Jefferson Junior-Senior High School.

Exhibit Annexed to Complaint

Beginning at the intersection of East Florida Avenue and South Monaco Boulevard, thence: East along East Florida Avenue to South Quebec Street, South on South Quebec Street along the City Limits to East Yale Avenue, West on East Yale Avenue to South Kearney Street, North on South Kearney Street to the centerline of the Highline Canal, Northwesterly along the centerline of the Highline Canal to the intersection of East Iliff Avenue and South Ivanhoe Street extended, North along South Ivanhoe Street extended and Ivanhoe Street to East Evans Avenue, East along East Evans Avenue to South Kearney Street extended, North along South Kearney Street extended and South Kearney Way to East Jewell Avenue, East along East Jewell Avenue to South Leyden Street, North along South Leyden Street to East Mexico Avenue, East along East Mexico Avenue to South Monaco Boulevard, and North along South Monaco Boulevard to the point of beginning.

IT IS FURTHER RESOLVED that, the attendance area of HAMILTON JUNIOR HIGH SCHOOL for all 7th and 8th grade pupils shall be the attendance area of THOMAS JEFFERSON JUNIOR-SENIOR HIGH SCHOOL as of September 1968, and those attendance areas described in the foregoing Sections Numbered 6, 8, and 9.

IT IS FURTHER RESOLVED that the attendance area of THOMAS JEFFERSON JUNIOR-SENIOR HIGH SCHOOL for all 9th grade pupils shall consist of the attendance area of the THOMAS JEFFERSON JUNIOR-SENIOR HIGH SCHOOL as of September 1968, and those attendance areas described in the foregoing Sections Numbered 6, 8, and 9.

Exhibit Annexed to Complaint

IT IS FURTHER RESOLVED that, on and after the opening of school in September 1969 the boundaries of the attendance areas for the following junior high schools in this School District be, and they are hereby, changed as follows:

A. The following described area shall be detached from COLE JUNIOR HIGH SCHOOL attendance area and shall become a part of BYERS JUNIOR HIGH SCHOOL attendance area.

Beginning at the intersection of East 35th Avenue and York Street, thence: South on York Street to East 33rd Avenue, West on East 33rd Avenue to the alley between High Street and Williams Street, North along the alley between High Street and Williams Street to East 35th Avenue, and East along East 35th Avenue to the point of beginning.

B. The following described area shall be detached from COLE JUNIOR HIGH SCHOOL attendance area and shall become a part of KUNSMILLER JUNIOR HIGH SCHOOL attendance area.

Beginning at the intersection of East 34th Avenue and York Street, thence: East along East 34th Avenue to Elizabeth Street, South on Elizabeth Street to East 28th Avenue, East on East 28th Avenue to Steele Street, South on Steele Street to East 26th Avenue, West on East 26th Avenue to York Street, and North on York Street to the point of beginning.

C. The following described area shall be detached from COLE JUNIOR HIGH SCHOOL attendance area and shall become a part of RISHEL JUNIOR HIGH SCHOOL attendance area.

Exhibit Annexed to Complaint

Beginning at the intersection of East 34th Avenue and Elizabeth Street, thence: East on East 34th Avenue to Fillmore Street, South on Fillmore Street to East 32nd Avenue, East on East 32nd Avenue to Steele Street, South on Steele Street to East 31st Avenue, West on East 31st Avenue to Elizabeth Street, and North on Elizabeth Street to the point of beginning.

D. The following described area shall be detached from Cole Junior High School attendance area and shall become a part of Kepner Junior High School attendance area.

Beginning at the intersection of East 31st Avenue and Elizabeth Street, thence: East on East 31st Avenue to Steele Street South on Steele Street to East 28th Avenue West on East 28th Avenue to Elizabeth Street, and North on Elizabeth Street to the point of beginning.

Plaintiffs' Exhibit 5

Exhibit Annexed to Complaint

(Resolution No. 1531)

WHEREAS, pursuant to the Resolution of this Board of Education passed on May 16, 1969, and numbered 1490, in response to the subsequent specific direction of this Board of Education, and in accordance with Article VIII, Section 2 of the By Laws of this Board, the Superintendent of this School District has made a proposal for stabilization of memberships of elementary schools in Northeast Denver and for further integration of the Denver Public Schools which proposal suggests, among other things, certain changes in the boundaries of the attendance areas of certain elementary schools of this School District as one of the steps designed to improve educational opportunity in the public schools of this District;

WHEREAS, this Board of Education did receive said proposal of the Superintendent for study and action and did order that the citizens of this School District be given an opportunity to express their views on said proposal at public hearings set for that purpose; and

WHEREAS, this Board of Education, having heard the views of the citizens of this School District on the said proposal of the Superintendent; having considered racial and ethnic composition of pupil memberships in the elementary schools of this District, traffic patterns, distances, housing patterns, school building capacities, optimum pupil memberships for the schools concerned, pupil achievement data, potential quality of the instructional program, the need for providing transportation to pupils and the cost thereof; availability of time and staff to develop programs, communicate with parents and children, and to orient the personnel involved; and having otherwise informed itself on

the questions presented by the said proposal, FINDS that, because of the housing patterns in the City and County of Denver, certain elementary schools in Northeast Denver contain growing numbers of pupils of racial and ethnic minorities; that a reduction of such numbers is desirable as one of the steps to improve educational opportunity in such schools; and that the proposal of the Superintendent is consistent with the foregoing and, as hereinafter set forth, will reasonably accomplish such reduction and thereafter stabilize the racial and ethnic composition of pupil memberships in these schools and further the integration of the Denver Public Schools; and that the adoption of the said proposal is in the public interest;

NOW THEREFORE, IT IS RESOLVED by the Board of Education of School District No. 1 in the City and County of Denver and State of Colorado that the Superintendent is directed to develop plans in accordance with the concept of the Elementary School Complex as generally outlined in his report heretofore received by this Board of Education and entitled "Planning Quality Education," and to initiate implementation of such plans commencing with the opening of school in September of 1969, for the following two groupings of elementary schools of this District to be known as Complex 1 and Complex 2 respectively:

Complex 1	*Complex 2*
Ashley	Ashland
Carson	Barnum
Hallett	Boulevard
Montclair	Brown
Montclair Annex	Cheltenham
Palmer	Colfax

Exhibit Annexed to Complaint

Complex 1	*Complex 2*
Park Hill	Cowell
Philips	Eagleton
Steck	Edison
Teller	Fairview
Whiteman	Newlon
	Perry

It Is Further Resolved that, effective as of the opening of school in September 1969, the boundaries of the attendance areas of the following elementary schools in this School District be, and they are hereby, changed as follows:

The following described area shall be detached from the Montclair Elementary School area and shall become a part of the Philips Elementary School area:

Beginning at the intersection of East 16th Avenue and Kearney Street, thence; East along East 16th Avenue to Monaco Parkway, North on Monaco Parkway to Batavia Place, East on Batavia Place to Oneida Street, South on Oneida Street to East Colfax Avenue, West on East Colfax Avenue to Kearney Street, and North on Kearney Street to the point of beginning.

The following described area shall be detached from the Philips Elementary School area and shall become a part of the Ashley Elementary School area:

Beginning at the intersection of East 29th Avenue and Oneida Street, thence; East on East 29th Avenue to the alley between Olive and Pontiac Streets, South along the alley between Olive and Pontiac Streets to East 26th Avenue, West along East 26th Avenue to Oneida Street, and North along Oneida Street to the point of beginning.

Exhibit Annexed to Complaint

The following described area shall be detached from the PHILIPS ELEMENTARY SCHOOL attendance area and shall become a part of the PALMER ELEMENTARY SCHOOL attendance area:

Beginning at the intersection of East 26th Avenue and Kearney Street, thence; East along East 26th Avenue to Niagara Street, South on Niagara Street to East 23rd Avenue, West on East 23rd Avenue to Leyden Street, North on Leyden Street to East 25th Avenue, West on East 25th Avenue to Kearney Street, and North on Kearney Street to the point of beginning.

The following described area shall be detached from the PARK HILL ELEMENTARY SCHOOL area and shall become a part of the STECK ELEMENTARY SCHOOL area:

Beginning at the intersection of East 26th Avenue and Clermont Street, thence; East on East 26th Avenue to Dexter Street, South on Dexter Street to East 25th Avenue, West on East 25th Avenue to Clermont Street, and North on Clermont Street to the point of beginning.

The following described area shall be detached from the PARK HILL ELEMENTARY SCHOOL area and shall become a part of the STEELE ELEMENTARY SCHOOL area:

Beginning at the intersection of East 26th Avenue and Colorado Boulevard, thence; East on East 26th Avenue to Clermont Street, South on Clermont Street to East 25th Avenue, West on East 25th Avenue to Colorado Boulevard, and North on Colorado Boulevard to the point of beginning.

Exhibit Annexed to Complaint

The following described area shall be detached from the PALMER ELEMENTARY SCHOOL attendance area and shall become a part of the PHILLIPS ELEMENTARY SCHOOL attendance area:

Beginning at the intersection of East Louisiana Avenue and South Oneida Street, thence; East on East Louisiana Avenue to South Quebec Street, South on South Quebec Street to East Florida Avenue, West on East Florida Avenue to South Oneida Street, and North on South Oneida Street to the point of beginning.

The following described area shall be detached from the WHITEMAN, MOORE, MONTCLAIR, AND MONTCLAIR ANNEX ELEMENTARY SCHOOLS attendance areas and shall become a part of the BARRETT ELEMENTARY SCHOOL attendance area.

All of Lowry Air Force Base, east of Quebec Street, within the limits of the City and County of Denver.

The following described area shall be detached from the BARRETT ELEMENTARY SCHOOL attendance area and shall become a part of the MONTCLAIR ELEMENTARY SCHOOL attendance area.

Beginning at the intersection of East 32nd Avenue and Steele Street, thence; East along East 32nd Avenue to Jackson Street, South on Jackson Street to East 31st Avenue, West on East 31st Avenue to Garfield Street, South on Garfield Street to East 30th Avenue, West on East 30th Avenue to Monroe Street, South on Monroe Street to East 29th Avenue, East on East 29th Avenue to Garfield Street, South on Garfield Street to East 28th Avenue, West on East 28th Avenue to Cook Street, North on Cook Street to East 29th

Avenue, West on East 29th Avenue to Steele Street, and North on Steele Street to the point of beginning.

The following described area shall be detached from the BARRETT ELEMENTARY SCHOOL attendance area and shall become a part of the WHITEMAN ELEMENTARY SCHOOL attendance area.

Beginning at the intersection of East 34th Avenue and Steele Street, thence; East on East 34th Avenue to Monroe Street, South on Monroe Street to East 32nd Avenue, West on East 32nd Avenue to Steele Street, and North on Steele Street to the point of beginning.

The following described area shall be detached from the BARRETT ELEMENTARY SCHOOL attendance area and shall become a part of the MOORE ELEMENTARY SCHOOL attendance area.

Beginning at the intersection of East 36th Avenue and Jackson Street, thence; East on East 36th Avenue to Colorado Boulevard, South on Colorado Boulevard to the north boundary of the Clayton College property, West on the north boundary of the Clayton College property to Jackson Street, and North on Jackson Street to the point of beginning.

The following described area shall be detached from the BARRETT ELEMENTARY SCHOOL attendance area and shall become a part of the CARSON ELEMENTARY SCHOOL attendance area.

Beginning at the intersection of East 29th Avenue and Steele Street, thence; East on East 29th Avenue to Cook Street, South on Cook Street to East 28th

Avenue, East on East 28th Avenue to Monroe Street, South on Monroe Street to East 26th Avenue, West on East 26th Avenue to Steele Street, and North on Steele Street to the point of beginning.

The following described area shall be detached from the BARRETT ELEMENTARY SCHOOL attendance area and shall become a part of the ASBURY ELEMENTARY SCHOOL attendance area.

Beginning at the intersection of East 36th Avenue and Garfield Street, thence; East on East 36th Avenue to Jackson Street, South on Jackson Street to the north boundary of the Clayton College property, West on the north boundary of the Clayton College property to Monroe Street, North on Monroe Street to East 35th Avenue, East on East 35th Avenue to Garfield Street, and North on Garfield Street to the point of beginning.

Exhibit Annexed to Complaint

IT IS FURTHER RESOLVED that the Superintendent is directed to take steps to establish pre-primary educational programs in the schools of the North-Central portion of the District in September 1969, as proposed in his said report "Planning Quality Education."

IT IS FURTHER RESOLVED that the Superintendent is directed to develop and institute plans and programs to make Hallett Elementary School a demonstration integrated school as of September 1969, by use of voluntary transfer of pupils with transportation provided by the District.

IT IS FURTHER RESOLVED that the Superintendent is directed to continue the present practices of transporting pupils from Stedman Elementary School to relieve overcrowding at that school, and to obtain the reduction of a number of pupils attending the Stedman Elementary School necessary to permit removal of mobile classroom units from that school by providing transportation for such pupils to Denison, Force, and Schenck Elementary Schools.

IT IS FURTHER RESOLVED that the present practice of transporting pupils from Smith Elementary School to Alcott, Asbury, Doull, Force, McKinley, Moore, Slavens, and Stead Elementary Schools be continued.

IT IS FURTHER RESOLVED that, for the purpose of improving education and furthering of integration the schools included in Elementary School Complex 5 as described in the report "Planning Quality Education" that such schools be grouped for cooperative planning with the elementary schools of other elementary school complexes as follow, or with such other or different schools as the Superintendent

may designate from time to time, utilizing the criteria of ratio of school and group memberships, racial composition of memberships, potential for educational and social improvement, and school facilities; that such cooperative planning shall be accomplished by the local schools included within such groupings through planning committees composed of school staff members, P.T.A. representatives and other citizens in the community; that such planning committees shall be selected and shall operate under rules and regulations prescribed by the Superintendent; that any cooperative plans so developed shall be mutually agreed upon by such committees prior to implementation thereof; and that implementation of such cooperative plans may be undertaken by the Superintendent within the limitations of law and the policies of this Board of Education.

Schools in Complex 5	*Schools Grouped With Complex 5 Schools*
Crofton	Bradley
Harrington	Pitts
	Slavens
	University Park
Wyatt	Bromwell
	Moore
	Stevens
Columbine	Godsman
Gilpin	Goldrick
	Gust
	Sabin
	Schmitt
	Traylor

Exhibit Annexed to Complaint

Schools in Complex 5	*Schools Grouped With Complex 5 Schools*
Whittier	Asbury
	Lincoln
	Rosedale
	Thatcher
	Washington Park
Mitchell	Denison
Stedman	Doull
	Force
	Johnson
	Schenck
Smith	Ash Grove
	Cory
	Ellis
	Fallis
	Knight
	McMeen

Motion for Preliminary Injunction

(Filed June 19, 1969)

Come Now the Plaintiffs, by their attorneys, and move the Court for a preliminary injunction enjoining the defendants, and each and every of the defendant School District's officers, agents, servants, employees and each of them, and all other persons in active concert or participation with them be, preliminarily during the pendency of this action and permanently thereafter, restrained and enjoined

(a) from in any way interfering with, modifying, cancelling or rescinding the purchase order for said twenty-seven school buses;

(b) from destroying, changing or otherwise modifying in any manner whatsoever, or relocating those documents, contracts, schedules, or other writings and memoranda relating or pertaining to the implementation of Resolutions No. 1520, 1524 and 1531.

(c) from taking any action or making any communication to faculty, staff, parents or students during the pendency of this action or before permanent orders are issued by this Court which would make it impossible or substantially more difficult to proceed with the implementation of Resolutions No. 1520, 1524, and 1531 at the start of the school year in September, 1969, with the exception that defendants shall not otherwise during such time be prevented from simultaneously preparing for the implementation of alternate or additional plans concerning the matters described herein as they so desire.

Motion for Preliminary Injunction

As grounds therefor plaintiffs incorporate herein by reference the allegations contained in their Complaint and further allege that certain of the defendants have been directed to and are in fact implementing the recision of Resolutions No. 1520, 1524 and 1531, and the substitute Resolutions therefor, and in addition have been directed to review the school bus purchase contract; that unless plaintiffs are granted preliminary relief, said implementation and review by the defendants may destroy, alter, modify, revoke or otherwise irreparably injure or prevent reinstatement and implementation of Resolutions No. 1520, 1524 and 1531. Plaintiffs will thereby sustain immediate and irreparable injury and damage for which they have no adequate remedy at law. This motion will be made and based upon the pleadings, records and proceeding herein.

BARNES & JENSEN
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Attorneys For Plaintiffs

Answer of Defendants John H. Amesse, Rachel B. Noel and James D. Voorhees, Jr.

(Filed July 16, 1969)

Come Now defendants John H. Amesse, Rachel B. Noel and James D. Voorhees, Jr., individually and as members, Board of Education, School District Number One, Denver, Colorado, and for answer to plaintiff's Complaint admit, deny and state:

I

Admit the allegations of Article I. Jurisdiction.

II

Admit the allegations of Article II. Parties.

III

For answer to the First Cause of Action:

1. Admit the General Factual allegations of the First Cause of Action.

2. Admit the allegations of the First Count.

3. As to the Second Count:

A. Admit the allegations referred to in paragraph A.

B. Answering paragraph B, deny that these answering defendant Board members participated in the recission of Resolutions No. 1520, 1524 and 1531 and state that their acts in voting against recission were motivated by the educational needs of the children of Denver. Further answering, these answering defendants are not advised as to the motivation of those defendant Board members voting to

rescind Resolutions No. 1520, 1524 and 1531 in so acting but that said Board members have stated repeatedly to these defendants that they so acted because of a mandate from the people of the City of Denver requiring said defendants so to act, and in order to restore the confidence of the people of Denver in the Board of Education so that a bond issue may be passed.

C. Admit the allegations of paragraph C.

4. As to the Third Count:

A. Admit the allegations referred to in paragraph A and the allegations of paragraphs B and C, except that these answering defendants allege that the pupil populations of East High School, Phillips Elementary School and Park Hill Elementary School were not, prior to the passage of Resolutions No. 1520, 1524 and 1531, substantially segregated on the basis of race and ethnicity, but that the pupil populations of said schools, without the passage and implementation of said resolutions, would inevitably and predictably have become segregated on the basis of race and ethnicity.

B. Answering paragraph D of the Third Count, these answering defendants are not advised as to the motivation of those defendant Board members voting in favor of rescission except as reflected in their statements quoted herein in answer to paragraph B of the Second Count. Further answering, admit that racial and ethnic separation existing in the schools affected prior to the passage of Resolutions No. 1520, 1524 and 1531 would have been significantly alleviated by the implementation of such resolutions.

Answer of Defendants John H. Amesse, Rachel B. Noel and James D. Voorhees, Jr.

5. Admit the allegations of the Fourth Count, except that these answering defendants deny that they acted as alleged in paragraph B.

6. As to the Fifth Count:

A. Admit the allegations referred to in paragraph A and the allegations of paragraphs C and D.

B. Answering paragraph B, admit that the pupil population of the schools affected by Resolutions No. 1520, 1524 and 1531 were, or were inevitably becoming, segregated on the basis of race and ethnicity and admit the remaining allegations of paragraph B, except that these answering defendants deny that assignment of large numbers of Negro or Hispano faculty is in and of itself a necessary cause of unequal educational opportunity where such teachers are qualified and experienced, unless the presence of concentrations of such teachers is viewed by the students as a confirmation and reinforcement of the separate and segregated racial or ethnic character of such schools.

7. As to the Sixth Count, admit the allegations thereof, except that these answering defendants deny that they acted as alleged in paragraph D and allege that the pupil populations of East High School, Phillips Elementary School and Park Hill Elementary School were not, prior to the passage of Resolutions No. 1520, 1524 and 1531, substantially segregated on the basis of race or ethnicity but that the pupil populations of such schools without the passage and implementation of said resolutions would inevitably and predictably have become segregated on the basis of race and ethnicity.

Answer of Defendants John H. Amesse, Rachel B. Noel and James D. Voorhees, Jr.

8. For further affirmative answer to the First Cause of Action, these answering defendants state:

(A) The increasing urbanization of American society has produced educational problems for big city public school systems (including Denver) unique to this time and place and not subject to solution by traditional educational patterns of staffing, of attendance, of curriculum, and of facility needs. These inadequacies in urban public education are generally not recognized, or if recognized, are not accepted by the majority population.

(B) Unmet, these new urban educational problems result in inevitable and substantially irreversible educational inequality for a large and increasing number of American urban children, a high proportion of whom are from racial or ethnic minorities and/or are the products of the subculture of urban poverty. In Denver the fact of such inequality is demonstrated by differences between and among schools in standard achievement scores, the incidence of dropouts, differences as to individual course offerings, the quality of teaching and numbers of faculty transfers, school discipline, the degree of motivation and achievement in students, and other observable factors.

(C) The presence of large numbers of children affected by educational and learning disabilities caused by race, ethnicity and/or poverty in any school reduces, and may substantially eliminate, the effect in such school of any known remedial or compensatory programs which are economically feasible.

(D) Against this background and upon the professional recommendation of its Superintendent of Schools as being

educationally valid, defendant Board of Education enacted Resolutions No. 1520, 1524 and 1531. Its intent, in so acting, was to begin to meet and to overcome the conditions stated herein which had resulted and are now resulting in grossly unequal educational opportunity for many children.

(E) Resolutions No. 1520, 1524 and 1531 were adopted after citywide publicity, public hearings (including television presentations), neighborhood meetings and widespread opportunity for interested and concerned citizens to comment. Comments communicated to defendant Board of Education in public meetings and to these defendants both publicly, and privately, were in general favorable to the educational purpose and intent of said resolutions, but were critical of them for non-educational reasons, among which were:

(a) On one hand, that the resolutions represented only a token approach to the problems of the School District, and on the other, that some alleged constitutionally protected right of parents to select the school their children should attend was threatened.

(b) That in individual cases the resolutions might result in inconvenience to individual citizens.

(c) That the resolutions did not reflect the will of the majority of the people of the School District and were being imposed upon the majority by a vocal and dangerous minority as a sociological experiment.

(d) That the resolutions represented an interference on the part of the School District with the right of

citizens to purchase and reside in residences of their choosing.

(e) That the resolutions would require Anglo children to attend school with minority children and would subject such Anglo children to an inadequate educational opportunity and/or the possibility of physical harm. Certain parents of minority children affected by the resolutions also expressed fears for their children in primarily Anglo schools.

(f) That the resolutions and their implementation would require expenditure of School District funds for transportation, which expenditure was stated to be unnecessary and uncalled for.

(F) Few, if any, objections asserted that the educational purpose of the resolutions was improper.

(G) The decision of defendant Board of Education to adopt and thereafter to implement Resolutions No. 1520, 1524 and 1531 was made after the most careful balancing of the objections presented, against the known existence of the conditions requiring change, in order to begin to equalize the educational opportunities of those many children not now receiving equal opportunity. The programs established by said resolutions were and are deemed educationally sound, economically feasible and conceptually valid for the alleviation of educational inequalities in this School District, and were recommended for such purpose by the Superintendent of Schools and his staff. They represent a beginning, at various levels and with various approaches, of the development of programs designed to meet the peculiar learning problems of children disabled from achieve-

ment by the fact of minority racial or ethnic isolation and/or isolation by the culture of poverty.

(H) No viable alternative to said resolutions has been proposed by those defendant members of the Board of Education who voted to rescind said resolutions, except to propose certain minimal voluntary programs. Such a proposal appears to constitute on the one hand recognition by the present majority of this Board that educational inequality exists in the public schools of this District, and at the same time limits solutions designed to establish equality of opportunity to those approved by a majority of the electors of this District, such majority comprising, in general, persons not affected by the problems which require solution.

(I) The apparent assumption on the part of many citizens and of the majority Board members voting to rescind said resolutions that the resolutions represent the first step toward a program of total racial and ethnic balance throughout the School District is not justified by any past Board action; said resolutions represent an attempt to ascertain on a broad pilot basis whether and to what extent integregation of pupil populations does result in equalization of educational opportunity and are designed to develop and prove the validity (or invalidity) of various programs and approaches to the unmet needs of modern urban education.

(J) These answering defendants submit that failure to implement Resolutions No. 1520, 1524 and 1531 in September of 1969 will, in addition to the consequences alleged in plaintiffs' First Cause of Action, effectively terminate any possibility of material improvement in the unequal educa-

tional opportunity now offered to a large number of minority racial and ethnic children in the Denver public schools and will, therefore, in a real sense, condemn very many children of this School District to continuing inequality in the education available to them.

WHEREFORE, these answering defendants, having fully answered plaintiffs' First Cause of Action, pray that the Court grant the relief prayed for in plaintiffs' Prayer for First Cause of Action, except that no recovery of costs be adjudicated against these defendants.

For answer to the Second Cause of Action:

1. As to the First Count:

A. Incorporate herein by reference their answer to the First Cause of Action.

B. Answering paragraph B, admit that the acts described in paragraph B have resulted in and have maintained racial and ethnic segregation within the School District but deny that said acts were taken deliberately and purposely by these answering defendants to create, foster or maintain racial and ethnic segregation.

Further answering the allegations of paragraph B of the First Count, these answering defendants:

1. Admit that the use of a so-called "neighborhood school" attendance policy results, and has resulted, in significant racial and ethnic segregation in the School District, reflective of segregated residential patterns but deny that they acted with respect to any "neighborhood school" policy with the intent and purpose to create, foster and maintain racially and ethnically segregated schools.

Answer of Defendants John H. Amesse, Rachel B. Noel and James D. Voorhees, Jr.

2. Admit that school attendance area boundaries have been created, altered and enforced with the effect of establishing and maintaining racial and ethnic segregation within the School District but deny that they acted with respect to said boundaries with the purpose and intent of creating, fostering and maintaining racial and ethnic segregation within the School District.

3. Admit that historically from time to time optional attendance areas have been established for various schools within the School District but deny that said optional attendance areas are or at any time were in contravention of the defendant Board of Education's existing published policies and resolutions; deny that these answering defendants participated in the establishment of any optional attendance area; and deny that any optional attendance areas were applicable only to Anglo children.

4. Admit that historically a disproportionate number of Negro and Hispano faculty and staff have on occasion been assigned to those schools having predominantly Negro and Hispano pupil populations; admit that such assignments may have further confirmed and solidified the racially and ethnically segregated character of such schools; but deny that these answering defendants acted with respect to such assignment of Negro and Hispano faculty and staff with the purpose and intent to create, foster and maintain racial and ethnic segregation in the School District.

5. Admit that historically optional attendance areas have from time to time been created for certain

schools undergoing transition to gradually increasing proportions of Negro and/or Hispano pupil population; deny that these answering defendants participated in the establishment of any optional area; and admit that optional areas may have had the result alleged, that is, the retention and confinement of Negro and/or Hispano pupils to schools of predominantly Negro and/or Hispano pupil populations.

C. Admit the allegations of paragraph C of the First Count.

2. As to the Second Count:

A. Incorporate by reference their answer to the First Cause of Action and their answer to paragraph C of the First Count of the Second Cause of Action.

B. Answering paragraph B:

1. Admit that certain schools in predominantly Negro and Hispano attendance areas may have physical plants, equipment and curricula inferior to some schools with predominantly Anglo student pupil populations but deny that all predominantly Negro and Hispano schools have physical plants and equipment inferior to that provided to schools with predominantly Anglo student pupil populations and deny that to their knowledge inferior materials and supplies have been furnished to predominantly Negro and Hispano schools.

2. Admit that in certain schools with predominantly Negro or Hispano pupil populations there has been

a disproportionately large number of less experienced faculty assigned and at the same time, as to certain schools with predominantly Anglo pupil populations, that there has been a disproportionately large number of more experienced faculty assigned.

C. Answering paragraph C, admit that schools provided with resources inferior to other schools do provide for the students assigned to such schools an educational opportunity unequal and inferior to that provided by other schools in the School District.

3. As to the Third Count:

A. Incorporate by reference their answer to the First Cause of Action.

B. Incorporate by reference their answer to paragraph C of the First Count of this Second Cause of Action.

C. Admit the allegations of paragraph C.

D. Admit the allegations of paragraph D.

4. As to the Fourth Count:

A. Incorporate by reference their answer to the First Cause of Action.

B. Answering paragraph B, admit the existence in certain schools of the School District of various systems of pupil ability grouping.

C. Answering paragraph C, admit that among other criteria used in ability grouping is the ability to learn, and admit that classification as alleged may result in assignment to regular or accelerated educational programs in individual courses.

Answer of Defendants John H. Amesse, Rachel B. Noel and James D. Voorhees, Jr.

D. Answering paragraph D, admit that under certain circumstances the application and administration of systems of ability grouping may result in the denial to students subject thereto of an educational opportunity equal to that offered to other students but deny that such ability grouping will always afford an unequal educational opportunity as between the minor Negro and Hispano plaintiffs and Anglo students of comparable ability and qualification.

WHEREFORE, having fully answered the Second Cause of Action these defendants pray that the relief prayed for in plaintiffs' Prayer for Second Cause of Action be granted, except that should the Court order that any comprehensive plan be submitted as prayed in paragraph A 1.(b) and/or paragraph A 3.(b) thereof, these defendants suggest that any such plan should be educationally sound and should be implemented within a time schedule fixed by the Court, and except that no recovery of costs be adjudicated against these answering defendants.

Respectfully submitted,

/s/ RACHEL B. NOEL
Rachel B. Noel

/s/ JOHN H. AMESSE
John H. Amesse

/s/ JAMES D. VOORHEES, JR.
James D. Voorhees, Jr.

(Addresses of the Answering Defendants omitted)

* * * * *

(Certificate of Service omitted)

Hearing on Preliminary Injunction July 16-22, 1969

[25] • • •

RACHEL B. NOEL, a witness called by and on behalf of Plaintiffs, having been first duly sworn was examined and testified as follows:

Direct Examination by Mr. Greiner:

The Court: Give us your name and address, please.

The Witness: Rachel B. Noel, 2601 Adams.

By Mr. Greiner:

Q. Mrs. Noel, you are one of the Defendants in this case? A. Yes.

Q. You're a member of the Board of Education of School District Number 1? A. Yes.

Q. And how long have you been a member of the Board [26] of Education? A. I was elected to the Board in May 1965.

Q. What was your current address? A. 2601 Adams.

Q. How long have you lived at that address, Mrs. Noel? A. About ten years.

Q. So you moved there in approximately 1958? A. Right.

Q. In 1958, Mrs. Noel, did you have any children going to the elementary schools of the Denver School District? A. Yes, I did. I had two children attending Park Hill School.

Q. Now during the course of your residence or during the course of their progress through elementary school was there any change made in the school of their attendance? A. My daughter was in second grade when

she went to Park Hill and she attended second, third and fourth grades, but when she went to fifth grade Barrett School had been built and she completed her elementary education at Barrett.

Q. Barrett opened in 1960? A. 1960.

Q. Do you recall approximately what the racial composition of Park Hill Elementary School was back in 1958 and 1959? A. Predominantly white.

[27] Q. And when Barrett opened, do you recall whether or not it was predominantly Anglo or predominantly Black? A. Predominantly Black.

Q. So then your child was sent from an integrated school to a segregated school? A. That's right.

Q. How if at all, Mrs. Noel, did that event affect your awareness of school board policy? A. Well, it was very clear that when she started to Park Hill School in the second grade and she was being transported to Park Hill School by a bus, at that time the bus was just taking—was taking at least half and half if not more white kids to Park Hill School, and in the course of the time she was attending, and I would say as I can recollect, a year or year and a half, more Black kids were riding that bus to Park Hill School, and it seemed very clear to me and to many other parents that Barrett School was built—Discussions began about it being needed because so many Black kids were coming into Park Hill School, the bus was practically carrying Black kids to Park Hill School and Barrett School was built at that time. It just seemed so clear to us that this was the reason.

Q. Now, Mrs. Noel, with respect to your daughter's change in school, from Park Hill School, which was integrated to the Barrett School, which was segregated, did that event [28] lead you to any sort of an appraisal or

an awareness of differences in the educational programs at those two schools? A. Well, my daughter told me—she was in the fifth grade at Barret School when she entered, when Barrett opened; that she was having the same thing in the fifth grade that she had had in the fourth grade at Park Hill during several conversations with her about not having much homework or not seemingly having much interest. And I went to school and I talked to the teachers—to her teacher and I talked to the principal and—as a parent, trying to find out what it was. I sat in on the classes. And I wanted to see what it was. And to the best of my judgment and certainly my great concern based on her statements to me—it seemed that she was not getting what she should have gotten and what she would have gotten at Park Hill since she was having the same thing over in the fifth grade as she had had in the fourth.

Q. Now that event occurred sometime in 1960 with the opening of Barrett School? A. Right.

Q. Within the next two years, Mrs. Noel, did any other event occur that again raised the issue of whether additional new schools be built in northeast Denver? A. I'm sorry. I didn't get the first part of your question.

[29] Q. Between 1960 and 1962 was there any proposal of the School Board which again, as had Barrett, brought into focus the question of whether new schools should be constructed in northeast Denver? A. It was at that time—the then superintendent of schools recommended the building of a junior high school at 32nd and Colorado which is the Barrett side, actually.

Q. Was there any community concern over that proposal? A. There was great community concern, not only in

the Black community but throughout the city that the day that school opened it would be a segregated school.

Q. Mrs. Noel, did that concern lead to any affirmative action by the Board in 1962? A. The Board of Education appointed a special committee on equality of educational opportunity in November I believe of 1962.

Q. Is it not a fact, Mrs. Noel, that you served on that committee? A. I was a member of that committee?

Q. Now how long approximately did the committee deliberate? A. Let's see, the report was presented in 1964. So, it's about 18 months.

Q. What sort of responsibilities were given to this special committee? [30] A. The committee was asked to look throughout the school system concerning equality of educational opportunity with special reference to racial and ethnic factors.

Q. During the course of its deliberation, Mrs. Noel, while the committee was deliberating, did the Board of Education formulate any new policy with respect to the racial characteristics of the schools? A. This policy 5100 was formulated by the Board after the recommendations to the Board of Education from our committee had been made.

Q. Does policy 5100 set forth in Plaintiffs' Exhibit 1 which you now have in front of you— A. Yes.

Q. Was policy 5100 passed by the Board at the request of this special committee? A. Yes.

Q. Was that one of the recommendations of the committee? A. Yes.

Mr. Greiner: Your Honor, we would move the introduction of Plaintiffs' Exhibit 1.

The Court: Do you have any objection?

Mr. Craig: Your Honor, we have already stipulated to the admission of that exhibit.

The Court. Very well. It's received.

(Whereupon, Plaintiffs' Exhibit 1 received in evidence.)

[31] The Court: It hasn't been before. Those stipulated exhibits I think the order should provide they are all received and you can draw up a list when you have an opportunity for both sides, Mr. Kerr.

The Clerk: Yes, Your Honor.

By Mr. Greiner:

Q. Mrs. Noel, the next exhibit is Plaintiffs' Exhibit 20G which is also, Your Honor, one of the stipulated exhibits. Calling your attention, Mrs. Noel, to Plaintiffs' Exhibit 20, during the course of its deliberations did the committee come to any kind of conclusion as to whether or not it made any difference whether the segregated schools were segregated by force of law or simply by intent?

Mr. Craig: Your Honor, I'm going to object to that question. I think the exhibit speaks for itself and the result of a deliberation of that committee.

The Court: True. Sustained.

Mr. Greiner: Your Honor, I might point out—

The Court: I'll read the report.

Mr. Greiner: Well, it's a hundred some pages long and I was trying to point out the particular aspects of the report upon which we will rely, Your Honor.

The Court: Well, that's different. You go ahead. Are you going to have her sum it up?

Mr. Greiner: Yes, Your Honor.

[32] The Court: Do you object to this?

Mr. Craig: I do object, Your Honor. I object to the witness just reading back what the report says.

The Court: May I take a look at it?

Mr. Craig: Your Honor, I think counsel can point to the sections in which he relies in his summary of this case.

The Court: That's better, I think. Why don't you just call her attention to the recommendations and the conclusions that you wish to bring forward?

Mr. Greiner: That was my intention, Your Honor.

Q. Mrs. Noel, directing your attention to Page 6 of the report did the committee reach any conclusion whether there was a possibility of unequal educational opportunity existing due to the fact of segregation in the schools? A. Yes, it did.

Q. In summary, Mrs. Noel, what was the committee's conclusion? A. That there was in Denver real possibility of unequal educational opportunity because of the existence of clusters of minorities, racial and ethnic groups within the city.

Q. Now during the course of its deliberations, Mrs. Noel, did the committee consider the Board's—the School Board's boundary policies? [33] A. Yes, it did.

Q. Were those policies then in writing? A. They were not in writing at the time the committee was investigated.

Q. Did the committee make any recommendation to the Board as to whether or not those policies should be reduced to writing? A. Yes, it did.

Q. Was that recommendation followed? A. This recommendation was followed.

Q. Again, Mrs. Noel, calling your attention to Page A-5 of the exhibit, did the committee reach any conclusions as to whether because of segregation, whether the cause of segregation had any effect upon the detrimental effect of that segregation?

Mr. Craig: I'm going to make the same objection. I think Page A-5 speaks for itself.

The Court: True, but he is just calling attention to the fact that it did make a recommendation. I don't think we're in any trouble yet. Overruled.

Mr. Craig: My point is, if the testimony paraphrases what the report says then we could have some conflict, and I think we ought to stick to what the report does say.

The Court: Well, we will see what it's leading to.

Q. Do you have the question in mind, Mrs. Noel? [34] A. I think as I look at this that the statement in 1954, the United States Supreme Court stated that segregated education is inherently unequal education. And that there was ample authority for such a statement. While the Court in that instance was concerned with segregation established by law—

The Court: Is she reading from the report now?

Mr. Greiner: Yes.

A. —the committee is persuaded that the statement can correctly be made where de facto segregation and minority races occur because the factors which—the most obvious of which is a pattern of housing restriction.

Q. So then the commission's conclusion was that the cause of the segregation didn't make any difference? A. That's right.

Q. Calling your attention to Page D-12 of this report, Mrs. Noel, in the course of its duties, did the commission have occasion to examine the Board's policy regarding the assignment of minority teachers? A. Yes, it did.

Q. What conclusions did the committee reach regarding these policies of the Board? A. The committee felt because of the great and high proportion of minority teachers and in minority schools that there was a policy of assigning them to schools that had high [35] percentages of minority population. And there is a table—or there should be—that shows this very definite—

Q. That's at Page 36 in the appendix of the exhibit? A. Yes, I think it is.

Q. And that shows the concentration of minority teachers in minority schools? A. Right.

Q. Mrs. Noel, in view of that conclusion of the committee, did it make any recommendations to the Board? A. Yes, it did. The committee recommended that the Board of Education should establish—this is the first recommendation in this group—and enforce a policy that requested teachers of minority background, that they will be assigned throughout the system.

Q. Was that recommendation accepted by the Board? A. I don't believe that that is a part of the policy in regard to teachers—teacher assignments today. However, this was a recommendation.

Q. Mrs. Noel, I'd like to call your attention to Plaintiffs' Exhibit 26. This I don't believe has been stipulated to, Your Honor. And, I would ask you if you can identify

Plaintiffs' Exhibit 26? A. This is Denver School policy employees' change of assignment, 1617(a).

Q. That's a policy 1617(a). Now, can you tell from [36] the exhibit, Mrs. Noel, when that policy was adopted by the Board?

Mr. Craig: Your Honor, at this point I just want to interrupt to state that this is a policy—this policy is incorporated in Exhibit 20 which we believe we have agreed to the admission of.

Mr. Greiner: Fine.

A. The date is April 1st, 1963.

Q. So then this was the policy on teacher assignment that was in existence when your committee made this conclusion about the assignment of minority teachers? A. Yes, because this report was issued in 1964.

Q. And there has been no change in policy 1617(a) since the issuance of your report? A. Not to my knowledge.

Mr. Greiner: I take it then, Your Honor, that Exhibit 26 will be received?

The Court: Well, it's part of Exhibit 20 he says and stipulated to.

Mr. Craig: Yes, Your Honor, we didn't think it necessary to stipulate to these individually if they're part of another exhibit.

The Court: We will receive 26 anyway.

(Whereupon, Plaintiffs' Exhibit 26 was received in evidence.)

[37] Q. Mrs. Noel, can you tell us then after the report of this special committee, what actions the Board took

which again brought up for the community's consideration the issue of whether schools in northeast Denver—whether there should be built new school? A. Well, to the next concern of the Board of Education in regard to building new schools, as I remember, was the building of the addition to Hallett School.

Q. That's an elementary school? A. That's an elementary school. And discussions concerning this began soon after I became a member of the Board.

Q. And that was in— A. In 1965.

Q. In May? A. I think it began in June.

Q. Now again, what was the concern about building an addition to Hallett School? A. The Superintendent had recommended that eight classrooms should be added to Hallett because of its overcrowdedness and I felt that this would be adding more classrooms—would be really making more space for segregation and opposed it on those grounds.

Q. Now at that time in 1965 was Hallett a predominantly a Negro school? [38] A. Hallett was becoming—growing more predominantly Negro every day.

Q. Now did that community concern, Mrs. Noel, about those additions to Hallett—and by the way those additions were built were they not? A. Yes.

Q. Did that concern lead to the formation of another study committee? A. The concern about Hallett—there was also a request for additions to Stedman. There was a realization of overcrowdedness at both Hallett and Stedman, and in addition, Smith Schools. And the fact that they were predominantly segregated and all of this I think in the discussions about what to do led to the appointment by the Board of another committee called the Advisory Council.

Q. Do you recall approximately when that committee was appointed? A. Let's see. In 1966, I think.

Q. Handing you what's been received into evidence as Plaintiffs' Exhibit 21, Mrs. Noel, that is the report of this committee which you have been describing? A. Yes.

Q. The Advisory Council? A. The Advisory Council on equality of educational opportunities.

[39] Q. Now was any particular charge given or any set of responsibilities defined by the Board of Education with respect to the responsibilities of this Advisory Council? A. In the charge the Advisory Council was asked to advise the Board—recommend to the Board about location of new schools and additions in northeast Denver. And about changes in policies the Board had in this regard.

Q. Mrs. Noel, through that report, Exhibit 21, how did the Council answer those questions which were put to them by the Board?

Mrs. Craig: Your Honor, I'm going to object to that question again. It isn't clear that Mrs. Noel was a member of that Council, and again the report speaks for itself.

The Court: True. But, am I going to have to read all these? Eventually I suppose I am, but as I understand it she's just going to call attention to the recommendations of the Council, is that correct?

The Witness: That's correct, as I understand it.

The Court: On the opening of new schools? I'll permit her to do that.

The Witness: In the answer to the charge on Page 84, the Committee came to the conclusion that no schools should be built in northeast Denver until plans are developed to implement Paragraph 1(b)

of Policy 21-C and Policy 4, 5100, and this calls attention to consideration of [40] the ethnic and racial characteristics of the school population making it to the extent of a heterogenous school community in the consideration of the building of new schools and the fact that the continuation of the neighborhood schools has resulted in the concentration and reduction of this concentration, should be considered in the location of new schools.

Q. Now, Mrs. Noel, during the period of 19—

The Court: Well, what happened? What happened to Hallett?

The Witness: The additions were built to Hallett. And, I voted against it.

The Court: Go ahead.

Q. During the period 1960, Mrs. Noel, through today, what in general has been the trend of racial composition in northeast Denver? A. The schools are becoming more segregated.

Q. Can you think of some example, and I'm referring you now to Page 7 of the report where there is detailed some of the rather dramatic changes that occurred at such schools as Stedman, Hallett and Barrett? A. This refers to the rapid change in the student population, rapid racial change composition of the student population at Stedman and at Stedman, in 1960, there were four percent Negroes in the total student population.

[41] Q. At Stedman? A. Yes. In 1966 the pupil population was then 89 percent Black.

Q. What is it today, Mrs. Noel? A. My guess is 99

percent Black and 44/100. And there is another statement also I'd like to call attention to, in October in 1960 at Hallett there was less than one percent and in October, 1966 the pupil population at Hallett was about 75 percent Black. Today I would judge that that is in the 90 percent category.

Q. So then this trend has continued over this whole period and still continues today? A. Yes.

Q. Now the 1967 report, did it make any recommendations as to possible method by which the Board could alleviate the segregated—the segregation which it found to exist? A. It made a recommendation of a study of an educational park as I recall and there was some other recommendations in regard to cultural and arts programs.

Q. Now about this time was the Board considering proposing a bond issue to the electorate in Denver? A. Yes.

Q. With respect to that bond issue was there a proposal for a program which might have served to relieve some of the segregation in the schools? [42] A. Yes as a part of the bond proposal there was presented to the electorate in 1967—in the fall of 1967, in the middle of the school concept as envisioned in the proposal would have alleviated some of the segregation in the schools in northeast Denver.

Q. Those middle schools would have drawn their students from a wider geographic area? A. Yes, from a wider area and transportation was to be involved.

Q. What happened to that bond issue proposal? A. Well, the bond proposal was defeated.

Q. Was it close? A. No, not really.

Mr. Greiner: Your Honor, at this time I would like to call the Court's attention to Plaintiffs' Exhibit 24 which has already been received.

The Court: Very well.

Q. Now from the time that the bond issue was defeated, Mrs. Noel, was that in the fall of 1967? A. Yes, 1967.

Q. Was there any other affirmative step between the fall of 1967 and the spring of 1968 taken by the Board to relieve this problem of segregation? A. There was continued pressure from parents in northeast Denver particularly Smiley about the need for [43] relief for that school and the growing segregation at that school and there was a proposal in the consideration of Hamilton Junior High that students from Smiley could be bused for an addition at Hamilton, as I recall.

Q. That was busing out from Smiley to Hamilton? A. Right.

Q. And was that going to do anything to help integrate Smiley? A. No, this was one-way busing into the new junior high school. It would have relieved the overcrowding at Smiley but the school would have remained segregated.

Q. So as late as 1967 and 1968 the Board had still not built a new junior high school to serve northeast Denver? A. No.

Q. During the course of that period did the Board receive proposals from the Division of Planning and Engineering Services with respect to the location of such new schools? A. Yes.

Q. Are Exhibits 22 and 23 examples of such proposals? A. Yes.

Mr. Greiner: Your Honor, these exhibits have also been stipulated into evidence.

The Court: Very well.

Rachel B. Noel—for Plaintiffs—Direct

Q. Mrs. Noel, was there any one event that occurred in April of 1968 which had an impact upon the future actions [44] of the Board with respect to this problem? A. I would have to say there were two events: one was the death of Martin Luther King and the second was the introduction of the resolution in regard to a plan for integrating the schools of Denver, and the reason I say two events is because the death of Martin Luther King and the meaning of that event to me as a member of the School Board, I think is of great importance because I felt that as a Black person in a policy making position, as well as Black people throughout this country, needed to see that equality of opportunities was available in this country. My role as a School Board member—I felt affected or should affect those Black children in these schools and I felt integration was important and because of that I introduced the resolution.

Q. Mrs. Noel, the resolution you refer to was Number 1490? A. Yes.

Q. And that's Plaintiffs' Exhibit 2. Well, Mrs. Noel, what did 1490 do with respect to School Board policy? A. I felt that it would implement a policy really that we already had, 5100, that had to do with equality of educational opportunity and that it really would make it real, would make it meaningful. And this direction to the Superintendent to draw up a plan for integrating the schools was then directed in order to bring about this. There are [45] two parts to this resolution. Part two is clarified in regard to certain points. That had to do with the plan.

Q. With regard to those points, Mrs. Noel, did 1490 recognize the effect of the continuance of the neighborhood school policy? A. Yes.

Q. What would that effect have been? A. It would have been more concentration, more segregation.

Q. Now also with respect to Policy 1490, Mrs. Noel, was there any indication in that policy regarding the desirability of integration? A. You mean 5100? Yes.

Q. Now with respect to 1490, your own resolution, was there an equation of integration with equality of educational opportunity? A. This was a part of the understanding of what it meant.

Q. So 1490 was introduced. Was it later passed by the Board? A. It was passed by the Board in May of 1968.

Q. And were there public hearings or meetings with respect to 1490? A. There was.

Q. Prior to its passage? [46] A. Yes, and great public interest and comment.

Q. So then under that it became the Board's official policy that the integration of the schools was one of the objectives of the Board? A. In the acceptance of the resolution in this regard, by a vote of five to two. Then the Board did in my view set then on a course toward integration.

Q. That was in May of 1968? A. Right.

Q. Now between May 1968 and the fall of 1968 that was the period during which Dr. Gilberts was developing the plan which he had been directed to propose? A. Right, the resolution stipulated that the plan was to be presented to the Board—submitted to the Board no later than September 30.

Q. Now calling your attention, Mrs. Noel, to November of 1968, going back in time for a moment, in October of 1968, the Superintendent presented his report? A. Yes, October 10, 1968.

Q. Now that was merely a report of an overall proposal for the integration of Denver schools? A. It was his plan in response to the direction of 1490.

Q. Now by the simple presentation of that report were there any affirmative steps taken to integrate any particular [47] school? A. There was a beginning implementation of the proposals from the Superintendent based on his plan.

Q. So that then in November of 1968 the Superintendent was directed by the Board to come up with a more specific proposal? A. I was not present at that November meeting, but as I recall the minutes, the Superintendent was asked—and it was in regard to what was going to happen in February that would need to be approved by the Board. As part of his plan only some parts of it were to take effect in the second semester and it was in this regard that he was asked to bring in these more specifics.

Q. Mrs. Noel, with respect to the minutes of the meeting of the Board of Education, are minutes taken at those meetings? A. Yes.

Q. And are they then prepared and in written form? A. Yes.

Q. I'm handing you what has been marked for identification as Exhibits 28, 29 and 32 and ask you if you can identify these.

The Court: Are those minutes?

Mr. Greiner: These are the official minutes. I really don't understand why the Defendants can't authenticate [48] their own minutes, Your Honor, but—

Mr. Creighton: Well those were the ones we got at 9:30 last night. We haven't looked at them but

certainly they may go in as authentic. We consider it admissible here.

The Court: Very well. Exhibits 28, 29 and 30 are received.

Mr. Greiner: The other one I believe was 32, Your Honor.

The Court: And 32.

(Whereupon, Plaintiffs' Exhibits 28, 29, 30 and 32 were received in evidence.)

Q. Mrs. Noel, was the policy of the school board with respect to school attendance area boundaries reduced to writing? A. Yes.

Q. And is that policy reflected in Plaintiffs' Exhibit 23? A. Yes, in 33.

Q. 33. Pardon me.

Mr. Greiner: Your Honor, again we would introduce Exhibit 33 which is in effect the neighborhood school policy of the district.

Mr. Creighton: That, Your Honor, is part of Exhibit 23 previously agreed to. That may go in.

The Court: We will receive it.

(Whereupon, Plaintiffs' Exhibit 33 was received in evidence.)

【49】 Q. Then finally, Mrs. Noel, with the giving of those instructions to the Superintendent is that the event then which began the process which ultimately led to resolutions 1520, 1524 and 1531? A. That's correct.

Mr. Greiner: Thank you, Mrs. Noel. Your witness.

* * * * *

[49] • • •

Cross-Examination by Mr. Craig:

Q. Mrs. Noel, during your direct examination you testified as to your daughter's educational experience in both Park Hill and Barrett Elementary Schools. A. Right.

Q. Where did she later go to junior high school? A. To Smiley.

Q. Where did she later go? A. To East.

Q. East Senior High School? A. Yes.

Q. And has she graduated from East? A. Yes.

Q. Has she been admitted to college? [50] A. Right.

Q. Which college is she— A. She attends Smith College.

Q. Has she graduated from Smith? A. No, she was a freshman last year.

Q. Could you give us your general impression of her academic achievements there at Smith? A. Well—

Q. Was it good, bad or poor or— A. It was good. I wished it had been better.

• • • • •

[51] • • •

Q. Mrs. Noel, you testified as to the proposal of the administration I believe to build a junior high school at East 32nd and Colorado Boulevard. To your knowledge, has that school been built? A. No.

Q. Have any other junior high schools been built since 1962 in this city? A. Well, Jesse Hamilton has been built.

Q. And where is Jesse Hamilton located? [52] A. I don't know the exact address; East Dartmouth and something.

The Court: I beg your pardon? Where?

The Witness: East Dartmouth. I don't know what the crossing street is. It's way out in southeast Denver.

Q. Has the Board approved plans and is it in the process of building or planning another new junior high school in southeast Denver? A. Also in southeast Denver, yes.

Q. Do you know if the Board has any present plans to build any new Junior high schools in northeast Denver? A. Present plans?

Q. Yes. A. Not to my knowledge.

Q. Do you know if there are present plans to utilize excess capacity in these new junior high schools to relieve some of the junior high schools in northeast Denver? A. Yes.

* * * * *

[54] * * *

Q. Mrs. Noel, you testified that in your opinion there was a trend in northeast Denver toward more segregation in the schools and Hallett Elementary School in particular. Can you tell us whether or not it was true that at the same time there was a parallel change in the racial composition of the residential area of that part of the city? A. Right.

* * * * *

[56] * * *

Redirect Examination by Mr. Greiner:

Q. Mrs. Noel, you mentioned in answer to the question, what is a segregated school. Some of the indicia of a

segregated school. What are some other indicia? Do segregated schools have for example higher drop out rates? A. I neglected to mention that. That's one of the—

Q. They do? A. That's one of the measurable—

Q. They tend here in Denver to have less experienced teachers?

Mr. Craig: Your Honor, I'm going to object to the form of the question that counsel is using. I believe they're leading and he has called Mrs. Noel as his witness.

The Court: Overruled.

Q. You may answer the questions, Mrs. Noel. Do they [57] have less experienced teachers? A. By and large this is true.

Q. Do they have fewer teachers with say more than ten years experience? A. I think this is correct.

Q. Do they have fewer children going on to college, Mrs. Noel? A. This is correct.

Q. So I take it that your daughter's example is not typical of what happens to minority children in this country? A. I would say the percentages are different.

Q. That's all reflected in the drop out rate for minority children, is it not? A. The percentages are higher in the drop out rate for minority children.

Q. Mrs. Noel, the 1964 report was unanimous, was it not? A. Yes.

Q. Now in reaching that unanimity was it necessary to reach any compromises on language? A. Yes, in the discussions of the committee as a whole, and this is what

this report is, a result of these discussions of the committee as a whole. The discussions were free and complete and so that all points of view were considered. And in the acceptance of the wording, in many cases there was a feeling by some that it should be stronger wording or [58] weaker and a more acceptable word than was used.

Q. Now, Mrs. Noel, with regard to the addition of Hallett, I believe you said that your quarrel with that decision was it kept those children in a segregated school. A. Yes, and it made more space for segregation.

Q. Does the same effect, the same confinement effect obtain when mobile units are brought into a segregated school? A. Yes.

Q. Also with respect to new additions that are being constructing in the Park Hill area, is there not now the building of a new addition to the new Park Hill Elementary School? A. Yes.

Q. So that is another case, another instance where there has been some additional construction? A. Yes.

Q. With respect to the mobile units in northeast Denver school, is it fair to say, Mrs. Noel, that there are more mobile units in that area than in any other area of the city? A. Yes.

Q. Do you have any idea approximately how many are being used there? A. Not really. I think there are twelve now at Stedman. Not Stedman, I mean Smith.

[59] Q. Smith is predominantly Black? A. About 99 percent Black. I believe there are four still at Stedman. I'm not positive.

Q. Are you aware of any mobile units at Anglo schools in northeast Denver, such as Ashley, for example? A. I'm not aware of them.

Rachel B. Noel—for Plaintiffs—Redirect

Q. Now, counsel inquired about the trend in the racial composition of the neighborhood. Mrs. Noel, when did the direction of that trend become apparent? A. At the building of Manual High School.

Q. Approximately when was that? A. That began in 1950; in the 50's. Now, I'm not certain of that date.

Q. Now, when you came on the school board in 1965, was the school board aware of this trend? A. Yes.

Q. Did the school board make any changes in its policies in view of its awareness of this trend? A. Well, the consideration of racial and ethnic factors was a part of the policy and this is policy 1222-C, I think is the number.

Q. Mrs. Noel, since you have been on the Board, do you recall any school attendance area boundary changes in northeast Denver which have had the effect of improving the racial composition of the school affected? [60] A. Boundary changes?

Q. Up until the time of the passing of these resolutions. A. I don't recall any.

Mr. Greiner: No further questions.

The Court: What is a mobile unit?

The Witness: It's a separate unit that holds one classroom and teacher and I think up to thirty students can be in there. It's located close to the school building.

The Court: They have some at Gove? Are those mobile units?

The Witness: Those were I think supposed to be when they were first put in. You were talking about the things still there. But, these I'm talking about can be really moved.

The Court: I see.

A. Edgar Benton—for Plaintiffs—Direct

[61] * * *

A. Edgar Benton, a witness, called by and on behalf of plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Barnes:

The Court: Please state your name and address.

The Witness: My name is A. Edgar Benton, 901 Race Street, Denver, Colorado.

By Mr. Barnes:

Q. Mr. Benton, were you ever a member of the Board of Education of School District No. 1, a defendant in this action? A. I was.

Q. Will you give the dates during which you were a member? A. I was elected in May, 1961 and served until May, 1969.

Q. You were on the Board then during the period described by Mrs. Noel in the previous testimony? A. I was.

Q. And you were on the Board in the Fall of 1968 [62] when Dr. Gilberts, the superintendent, presented his plans in response to 1490? A. Yes.

Q. The date of that presentation was approximately October 10, 1968? A. That's correct.

Q. What was the response of the Board following that presentation?

The Court: What do you mean? Did they approve it or what—

Q. Did they approve and enforce the plan in its entirety? A. Dr. Gilberts presented his plan not for enforcement or for approval at that time, but for considera-

tion and study by the Board of Education and by the community so the Board not officially at that time, but I think informally received Dr. Gilberts' report for consideration and for evaluation, and this led to a series of conferences with the superintendent and other meetings for purposes of the consideration and evaluation of the report.

Q. Did this lead to action by you at the meeting of the Board, November 21st, 1968? A. Oh, the meeting indicated the question which had been presented to the Board for its consideration stemming primarily from interested parents in the Park Hill area and [63] particularly the Smiley Junior High School area, was what steps could be taken effective in the Spring semester of 1969 to alleviate not only the overcrowding but also the intensified segregation at Smiley Junior High School. In response to that request and concern of the citizenry of that area, I suggested not in the form of a motion but in the form of a suggestion to the superintendent for his consideration that there might be a possibility of alleviating the problem at Smiley by removing some of the Black children from Smiley and putting those children in non-segregated schools and replacing them with children already riding buses then being transported to Hill Junior High School, Merrill Junior High School and perhaps some others. So the effect of my suggestion would have been to reduce the population at Smiley and to improve the racial balance at Smiley. Dr. Gilberts indicated he would consider this suggestion and report to the Board.

Q. During that period of time, Mr. Benton, that you were on the Board, had there been prior discussion of the problems at Smiley? A. The problem at Smiley came forcibly to the attention of the Board of Education in 1962 when Dr. Oberholtzer, the then superintendent, made his sugges-

tion for consideration by the Board that a new Junior High School be built at 32nd and Colorado and the Smiley problem, as it were, was a [64] matter of constant concern, consideration and attention by the Board from that time through the present period, really.

Q. Have there been expressions—was there evidence of citizenry concern throughout this period? A. Yes, there was constant evidence of concern on the part of the citizens in the community with the need for the Board of Education to take action to deal with intensifying segregation at Smiley Junior High School and the overcrowding that was present there.

Q. You say there was constant concern by the Board about this problem since 1962? What do you mean by that? A. By that I mean that the matter was constantly before the Board for its consideration. It represented a difficult question for the Board which the Board of Education had not previously had to consider and the debate which occurred I would say was a constant debate. That isn't to say it occurred on every occasion when the Board of Education was either in formal or informal session, but it continued to be one of the dominant elements of the Board's activity during that period to debate. The debate was not only constant; it was of an interesting characteristic in that it ranged all the way from fairly mild dialog to very vigorous confrontation of viewpoints among members of the Board.

Q. Were the educational disadvantages of segregation discussed in those meetings? [65] A. The educational disadvantage of segregated education were always urged by members—certain members of the Board as a basis for modifying Board policy with respect to the school and the

schools generally, and therefore the debate often involved a consideration of the disadvantages of segregated schools.

Q. Now, throughout this period, what had been the racial composition of Smiley Junior High School? A. I can't recall of course the precise percentages but it's my recollection that at the outset of this consideration Smiley was predominantly Anglo in its pupil composition. But it was changing at a progressive rate by significant percentages each year to the point where it has now achieved which I understand to be perhaps 70 percent Black in its composition. So that this was a progressive rate of change from predominantly Anglo to predominantly minority school.

Q. And throughout this period was there not only consideration by the Board of the problem, but were there expressions of interest from the citizenry? A. Yes. I think it would be fair to say that a common presentation at meetings of the Board of Education would be delegations of citizens and organizations from the Park Hill area calling the Board's attention to the unresolved problems of declining educational opportunities in the Park [66] Hill and particularly Smiley area.

Q. During this period in your judgment, had any effective acts or were there any effective steps taken to prevent the gradual segregation of Smiley Junior High School? A. There were steps taken and I suppose if one tried to look at the seven year period in its totality, one could see the significance of steps which at the time seemed perhaps very minor. I would say that one of the first steps that was important was the creation by the Board of the special study committee appointed by the Board I believe in 1962. The deliberations of that committee, the involvement of the citizenry, the recommendations made by it was an important step to sharpen the focus of the understand-

ing of the school district of the problem. Following upon that, and certain limited steps taken by the Board in response to that report, I think the creation of the advisory council was a continuing effort to improve the quality of insight which the Board of Education had with respect to these questions. Now specifically in my view, one of the most significant steps that the Board took as a result of this important study that it was engaged in was the policy which had been previously testified by Mrs. Noel which precluded additional school construction in northeast Denver. This was important because it stated as a matter of public policy of this community that we would not create additional capacity in that [67] area with the increasing racial segregation of the neighborhood for increased segregated education.

Q. In Smiley Junior High School itself, by November 21st, 1968, state if you recall the approximate racial composition. A. I would think it would have been approximately 70 percent Black and perhaps four or five percent Hispano. The balance would have been Anglo.

Q. So that in spite of the continuing concern of the Board and the citizenry over the years described, Smiley had still become substantially segregated? A. That's correct. The Boards had really been as I have indicated in the form of continuing study, continuing education, continuing information rather than specific concrete tangible steps that would lead to an alleviation of the condition.

Q. And your suggestion of November 21st was a specific tangible step to alleviate that condition? A. That's correct.

Q. Following the receipt of your suggestion by the superintendent, what were the next steps taken by the district and the superintendent concerning Smiley Junior High School? A. It was my understanding that Dr. Gilberts

and his staff were engaged in a careful evaluation; not just of the suggestion I had made for his consideration, but of other [68] alternatives that would achieve substantially the same result; namely, the reduction of the pupil population at Smiley and the alleviation of the adverse racial balance in the school. And that during the period from November 21 through the month of December, Dr. Gilberts and his staff were engaged in this investigation and this study.

Q. And did this study result in recommendations to the Board? A. Yes.

Q. Mr. Benton, I hand you what have been marked as Plaintiff's Exhibits 3, 4-A, 4, 5, and 5-A and ask you if you can identify those.

The Court: He doesn't have to if they're already identified and admitted.

Mr. Barnes: They are admitted.

The Court: We don't have to do it again. That's the whole purpose of this preliminary identification; the agreement as to authenticity. If you want him to refer to any of them or testify from them, you may do that.

Do you have a question concerning those?

Mr. Barnes: Yes, Your Honor. I'm just formulating my question.

Q. Mr. Benton, what was the first of these resolutions or—or these recommendations which was offered by the superintendent? [69] A. I believe resolution 1520, Plaintiff's Exhibit 3, would have been the first recommendation that the superintendent presented to the Board.

Q. And to what did that pertain? A. This pertained to certain secondary schools, notably East High School and

Smiley as a point of focus with incidental relationships to other schools.

Q. What was the action of the Board upon receipt of that recommendation? A. As was typical of the Board of Education during my tenure, the Board received these resolutions for consideration and evaluation and in connection with that the valuation I believe there were conferences held among members of the Board and the superintendent and the administrative staff in which the details of this resolution were considered and evaluated and my recollection is also that there were at least one—perhaps more—public meetings where the public had an opportunity to present its views with respect to these matters.

Q. Following the presentation that is contained in 1520, were there further presentations made to the Board concerning junior high schools and elementary schools? A. Yes, there were two other resolutions of importance here; one was resolution 1524 which I believe represented a further implementation of resolution 1520, and resolution [70] 1531 which related to certain elementary schools.

Q. Resolution 1524 was with regard to implementation in the junior high schools? A. That's correct.

Q. So that a discussion began beginning in January of 1969 concerning the contents of these resolutions presented by the superintendent. Can you tell the Court whether there were also public hearings concerning resolutions 1524 and 1531? A. There were public hearings relating to both of those as I recall. And I might add that I believe there was also consideration of perhaps of a highly general nature given to these matters during the month of December, 1968.

Q. Does 1524 contain a plan pertaining to Smiley Junior High School? A. It does.

Q. And does 1531 contain a plan pertaining to Barrett Elementary School? A. It does.

Q. In your judgment were these two schools the focus of these resolutions? A. Well, Smiley I think was the focal point at the secondary level because of the fact that Smiley had been a school of concern to the district and to the community for a number of years. The difficulties of maintaining and even [71] creating equality of educational opportunity there had not been resolved satisfactorily. Smiley, because of its profound impact upon the Park Hill area, which it serves, was important. It was important because it's one of the major contributing schools to East High School, which of course is important to the whole community so that Smiley because of its historical importance and its then importance in terms of its relationship to the high schools and to the residential areas of Park Hill, was the matter of principal concern in resolution 1524. This produces of course the junior high schools' problems; whether they are resolved or not, has an impact on the elementary schools. And in order to maintain the beneficial changes at Smiley Junior High School contemplated by resolution 1524, it was necessary to make certain adjustments at the elementary level so that schools—the elementary schools and Park Hill feeding into Smiley would bear an appropriate educational relationship to Smiley.

Q. One of these elementary schools was Barrett Elementary School? A. One of the schools was Barrett. And Barrett I believe was selected for inclusion, I think not originally recommended by Dr. Gilberts but subsequently included in his recommendation, the concern being that the profound impact of segregated schools in Denver was not only in Park Hill but also in the residential areas to the west of Park Hill and [72] that as a means within the

limits of physical and personal capability of drawing those schools into the comprehensive solution of segregated schooling in Denver, Barrett was included because it was geographically contiguous to the Park Hill area which was a matter of principal focus and it was a small school which did not pose the more serious problems of money and personnel that would have been perhaps involved if other larger schools had been included.

Q. Were Barrett and Smiley the only segregated schools in the system? A. No.

Q. So that this was not a plan involving all the segregated schools in the school district? A. Clearly not.

Q. Was it a drastic step forward in your judgment? A. It was not a drastic step forward. It was in the discussion relating to resolution 1531 that I urged that Gilpin School, which is located substantially further to the west of Barrett, in near the so-called Five Points Area of Denver—that that school be included because of its location in the heart of the ghetto, as it were. I felt that Dr. Gilberts' recommendation was not only not drastic but was not fully adequate to cope with the problem as it existed in the community.

Q. Now, were there supporting documents that the [73] superintendent presented which implemented or described the implementation of resolutions 1520, 1524 and 1531? A. My recollection is that there were such documents.

Q. And those are contained in Plaintiff's Exhibit 4-A and 5-A? A. That's correct.

Q. And the resolutions themselves are Plaintiff's Exhibits 3, 4 and 5? A. Correct.

Q. You have stated that there were public hearings. Can you give an idea of the scope of the contribution of the public to the Board's consideration? A. The public hear-

ings were held as has been customary in the school district each time a secondary school boundary is changed. This I understand to be the traditional practice of the district, going back many many years. And these hearings were ordered for that purpose to give the public an opportunity to respond so that there was an opportunity for any interested citizen to appear before the Board and present his views with respect to the wisdom or lack of wisdom involved in the adoption of the proposed boundary changes. It had not been customary in the school district as I understand it to have public hearings when elementary schools are bounds changed. These are ordinarily changed by [74] the superintendent as an administrative matter and do not require Board action and therefore the Board customarily has not had hearings. But, because of the particular public interest in this question and the notoriety that it had achieved in the community, it was determined that it would be appropriate to have a public hearing with respect to 1531 even though traditionally it would not have been indicated.

Q. Were such things as educational and psychological and economic factors considered and offered for consideration by the public? A. There was a broad variety of testimony as it were presented to the Board in these proceedings. Individual citizens spoke in their own behalf about the educational and the other significance of the Board's proposed action. There were representatives of groups including professional groups of doctors, psychiatrists, psychologists, social workers; the clergy was there and representatives of the Chamber of Commerce and all these groups were in strong support of the proposed action of the Board on the three items indicated.

Q. Were the resolutions eventually passed? A. The resolutions were eventually passed. I might say I did not create the impression in my testimony that there was no opposing testimony at these hearings. There were individuals who opposed the resolutions and there were also representatives for the most part of neighborhood organizations [75] from southeast and southwest Denver. But, the resolutions were adopted by the Board of Education in all three cases I believe by a vote of five to two.

Q. And were you voting with the majority? A. I was a member of the majority?

Q. What general objective was behind these resolutions with regard to Smiley and Barrett? A. The objective was the creation and maintenance of equal educational opportunity for the children involved. They were founded upon the superintendent's recommendations. They were based upon his professional judgment that they were reasonable. They were within the physical and administrative personnel capabilities of the district and they were designed to reduce the concentration of minority children in those schools so that the program could be improved and the quality of education could be raised.

Q. Would the racial composition of those schools have been changed? A. The racial composition of Barrett School would have been changed from approximately 100 percent Black to approximately 80 percent Anglo effective September, 1969, and at Smiley—I believe these figures are approximately correct—the racial balance would have changed from about 70 to 75 percent minority to approximately 70 to 75 percent Anglo, in September, 1969.

[76] Q. What was the general objective behind these resolutions with regard to East High School and Philips Elementary School and Park Hill School? A. Let me

speak first to Philips and Park Hill. Both of those schools were integrated schools. However, there were disturbing trends to the principals, to the faculty, to the citizenry that unless aggressive and thoughtful action was taken by the school district that they would become perhaps at a slower rate but nevertheless they would become segregated schools. So the purpose of the resolution with respect to those two schools was to insure the maintenance of the integrated education where it existed, this being consistent with one of the principal elements of Dr. Gilberts' plan to be presented to the Board, that is to say, the stabilization of neighborhoods through the maintenance of integrated education where it existed. Now, East High School came to be a critical point of focus for the Board of Education because of its realization that East was becoming Black in its pupil composition by significant percentages each year and that unless some intervention was made through Board policy and administrative practice, East High School reasonably could be predicted to become another Black high school in Denver. The Board concluded—the superintendent I believe concurred—that it was in the best educational interest of the students at East High School as well [77] as in the best interests of this community to not permit East High School to become a Black high school. Therefore, resolution 1520 as it related to East High School was proposed and adopted.

Q. Was the racial composition of these schools affected by these resolutions? A. Yes, I don't have the percentages in mind with respect to Park Hill and Philips, but the effect of the resolution would have been to reduce the number of Black children in both schools and to increase the number of Anglo. At East High School, which I believe presently is approximately 40 percent Black, there

would have been in September, 1969, a reduction of the Black population by significant amounts and then a progressive reduction of the Black population in succeeding years.

Q. What was the objective of the Board with regard to Stedman Elementary School? A. Stedman Elementary School I believe would have been affected by the resolution primarily through the elimination of certain mobile units and the transportation of children from Stedman to certain Anglo schools I believe primarily in southwest Denver. So the effect of the resolution I believe that Stedman would not have been to improve the racial balance particularly but to reduce the population at Stedman and I might say as I indicated earlier in my testimony [78] the schools directly affected by the resolutions were those that had been indicated. The incidental effect of this resolution if it were to be implemented would have been to have integrated a substantial number of additional schools in other parts of the city which are presently near 100 percent Anglo. In other words the schools would have had a significant minority population had the resolutions been carried out.

Q. What methods were employed by the Board to obtain these objectives? A. Primarily the modification of attendance area boundaries and the use of transportation, both long established administrative practices of the school district.

Q. Now, Mr. Benton, I direct your attention to Plaintiff's Exhibit C-3 and ask you to state whether the Board specifies their considerations and the conclusions with regard to educational purposes that were to be achieved by these resolutions? A. Yes, I would say this is reflected in the resolution. These resolutions were all based as I

understood it upon a careful and extensive professional evaluation of the educational problem and the educational solutions represented here and by a policy determination by the Board of Education that that professional judgment was competent. I think those considerations are reflected in the language of the resolution.

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[79] • • •

Cross-Examination by Mr. Craig:

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[81] Q. I believe you testified that there was a trend in some of these schools at least toward increasing segregation as you used the term? A. Yes.

Q. Was there also a parallel change in the racial composition of the neighborhoods of these schools at the same time? A. Yes, there was. There was a change in the neighborhood.

Q. So could we say that the result of the—or the [82] cause of the change in the composition of the schools was the result of the change in the neighborhood? A. Well it was a result of more than that. It was a result of rigid adherence to the so-called neighborhood school policy which precluded the policy of alleviating in the schools the impact of increasing segregation in the neighborhood. It wasn't just the increase of the neighborhood segregation that produced the results; it was the inability until resolutions 1520, -24 and -31 of the Board of Education to make a judgment that it would intervene in that process and cause it not to be inevitable but cause it to be amenable to education decisionmaking.

Q. Do you see as one of the purposes of these resolutions to the role of schools as an instrument in creating social change in the community? [83] A. I was momentarily distracted, Mr. Craig. Could you repeat the question?

Q. Do you see as one of the purposes of the resolution as it relates to the role of the school, as using the school as an instrument for social change in the community? A. Well, this question raises I think a very fundamental issue and that is what is the purpose of education. I take it that one of the essential purposes of education, public and private, is to have an impact upon humanity in the form of the individual who is involved in the formal process of education. So that what he learns or does not learn in school ought to have a significant bearing on what he does or does not do; what he thinks or does not think; what he believes or does not believe, as a citizen and as an adult. So that to create and maintain an effective program of education in the schools, so that true equality of educational opportunity exists for the development of the potential of all people who are subjected to the process of education, ought to have—must have a beneficial impact on the community; on society. If it doesn't have, then the game isn't worth the candle. And that we are engaged in a massive and irresponsible expenditure of public resources that perhaps could be better put elsewhere. So there is a distinct relationship between what you are able to do in the schools and what ultimately you are able to do with mankind. Now, I'm not sure that's responsive to your [84] question.

The Court: I'm not either.

The Witness: If not, I apologize.

The Court: Does that answer your question?

Mr. Craig: I'm not sure it is either, Your Honor, but I think it is—it has touched on it.

The Court: I gather from your question that you wanted him to say whether he views using schools as an instrument or weapon to bring about social change, generally. Is that what you asked him?

Mr. Craig: That's essentially what I asked him.

The Court: In other words, it is just part of an overall plan to change the system? Is that what you wanted him to answer?

Mr. Craig: Yes, Your Honor, that's essentially what I wanted to ask.

The Court: Did he answer that?

Did you answer that?

The Witness: I believe I did, Your Honor, but if additional comments are indicated, I'd be glad to—

The Court: I don't care.

The Witness: I'd be glad to accommodate the Court or counsel.

The Court: Maybe he wishes to ask another question.

Mr. Craig: I believe the witness' philosophy on that [85] was covered in the answer.

No further questions, Your Honor.

Redirect Examination by Mr. Barnes:

Q. Mr. Benton, is there any statement within the resolutions that we have been discussing, 1520, 1524 and 1531, which requires racial balance in the schools in the school district? A. I don't recall any such statements.

Q. Mr. Benton, you spoke in response to a question by Mr. Craig of the deterioration of the schools in northeast Denver. Was the Board aware of this deterioration? A. Yes, I think the Board was aware during this entire period from 1962 on, the fact that academic achievement was declining in some schools; was chronically low in others. I suppose it wasn't made as dramatically clear to the Board as perhaps—in the past as it was when Dr. Gilberts, upon assuming the superintendency, released the standard test scores on a school by school basis and this enabled not only the board but I think the community for the first time to

make a very clear judgment as to the deteriorating and chronically deteriorated quality of education in segregated schools.

Q. Is the neighborhood school policy the only method of assignment which can be used by a board of its students? [86] A. You mean in general terms?

Q. Yes. A. No, there have been many other policies that have been adopted by the School Board and implemented by them in other communities.

Q. Keeping in mind the awareness of the Board of the deterioration of the school we have been considering, what was the effect of the choice of their policy for the assignment of students? A. Well, this policy as I understood from Dr. Gilberts' recommendation was among alternatives perhaps that might have been selected.

Q. Let me clarify my question. What was the effect of the choice of the neighborhood school policy by the Board on the deterioration that you described? A. I'm sorry. Well, my view was that—and I think this was the view shared by the majority of the Board, by the members of the Board—that the adherence to the neighborhood school policy without modification and without any attempt to intervene in this process of changing neighborhood, therefore, impact upon the schools was to maintain and perpetuate the decline in education and the absence of true educational opportunity—equality of opportunities.

Q. Is there any statute requiring the Board to adopt the neighborhood school policy? [87] A. I'm aware of none.

Mr. Barnes: I have no further questions.

Mr. Craig: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: We will take our noon recess now and resume at two o'clock.

(Whereupon, the trial recessed at 12:25 p.m. and resumed at 2:10 p.m.)

The Court: One of the spectators complained that nobody can hear. I think probably the public does have some interest in hearing what the witnesses say. We have never had any trouble with accoustics in this courtroom before. It's built as a soundproof room and I don't seé why we should have this difficulty here today. I think the lawyers ought to speak up and the witnesses. Now, if you have to get further back, why, do so. But, encourage them to raise their voices just a little bit. They don't have to yell but they can speak up, you know. Make themselves heard. Now, somebody filed a special motion to be heard. I think it ought to be made clear that this is no legislative body. It's not an administrative tribunal. We don't allow the citizenry to be lobbyists. We will not receive any petitions or letters. I would like to make that absolutely clear right here in the outset. We are seeking out the truth on the merits of this case and it's an [88] ordinary lawsuit in which we do it by adversary method. We don't allow the public to participate, nor the newspapers. We will do our very best to find the merits and then decide the case upon those merits. But, we're not going to hear from the public and I'm not going to receive any letters from anybody. My wife will intercept them at home and my secretary will intercept them here. They will not be read. If they contain any threats, of course, to the interference of the administration of justice, we will deal with them when the case is over.

Very well. Proceed.

Mr. Greiner: Before proceeding with calling our next witness which is Dr. Paul Klite, you will recall

that at the hearing on June 27 the Court asked counsel to submit proposed findings of facts and conclusions of law. We have prepared on behalf of Plaintiffs certain proposed findings of fact and I would like to submit them to the Court and opposing counsel at this time.

The Court: Very good.

Mr. Greiner: Our next witness will be Dr. Paul Klite.

Paul D. Klite, a witness called by and on behalf of Plaintiffs, having been first duly sworn was examined and testified as follows:

Direct Examination [89] *by Mr. Greiner:*

The Court: Give us your name and address, please.

The Witness: Paul D. Klite. My address is 1434 Birch Street.

The Court: How do you spell your last name?

The Witness: K-l-i-t-e.

By Mr. Greiner:

Q. Dr. Klite in order to assist Plaintiffs' counsel have you prepared certain exhibits for presentation in this case? A. Yes, I have.

Q. I'd like to first direct your attention to what's been marked as Plaintiffs' Exhibit 7. This is one of the exhibits, the authenticity of which is admitted. And I wonder if you would just briefly describe for us what Plaintiffs' Exhibit 7 and the overlays attached thereto illustrate with respect to the effect of these resolutions upon first of all the senior high schools. A. May I leave the witness box to show that?

Q. Yes.

The Court: Are the qualifications of the witness Klite admitted?

Mr. Greiner: Your Honor, he is not here as an expert witness and he is not going to render any expert testimony. He is simply going to state what the objective data, the numbers of students to be moved and the racial [90] compositions, and so forth.

A. This map which is a 1966 boundary map of the senior high schools shows three high schools affected by Resolution 1520; East, South and George Washington. The present boundaries and those which obtained until the time of the resolutions, are depicted in black on the map. The overlay, Exhibit 7A, shows the effective resolution 1520 on these three senior high schools. In red are depicted areas that had been within the East High district. This area would be moved to South. This area to the east would be moved to George Washington. In green, are two areas that had been part of the George Washington district. This would be moved to East and this to South. And in yellow is an area from South High School that would be moved to East High.

Q. Pardon me, Dr. Klite. With respect to the areas of red which were detached from as I understand it, East High School, can you tell us anything about the racial composition of those areas? A. Well, the predominant racial composition of both these areas is Negro. The predominant racial composition of the remaining three areas, that is, those detached from George Washington and South, are Anglo.

Q. So then the Blacks were being bused away from East and to predominantly Anglo schools? A. That's correct.

[91] Q. And certain Anglos at those schools were being bused back to East High? Is that correct? A. That's correct.

Q. Are the numbers of students involved reflected on the overlay? A. Yes, they are. In this area there are 141 students, and in this area 249. And in effect removing from East, approximately 390 students. To East, would come 195 students from George Washington and 172 students from South, a total of approximately 367 pupils. And then 100 switched to South from George Washington.

Q. Now while I still have you on your feet, Doctor, why don't we consider Exhibit 8 which I believe pertains to the junior high schools.

Dr. Klite calling your attention first to Exhibit 8, would you identify what is depicted on that exhibit? A. This is a 1967 boundary map of the junior high boundaries. In blue are listed the names of the schools affected by Resolution 1520 and 1524. Ten of the junior high schools are so affected. It looks like this is 11 of the junior high schools so affected. The first overlay shows the main thrust of Resolutions 1520 and 1524 as they pertain to junior high schools.

Q. That's Exhibit 8A? A. Yes, that's correct. In green are depicted areas [92] that will be detached from the Smiley Junior High School boundary and changed to be part of the boundaries of other junior high schools across the city. These are color coded on this overlay in green, indicating the schools to which these children will be transported. The numbers in each of these areas are indicated and a code letter for the receiving school. For example, in this area 200 children from Smiley will now be switched to Merrill. The other junior high schools also affected by this movement with the numbers of stu-

dents to be transported are listed. In yellow, is listed an area south of the present boundaries of Smiley Junior High School which is Colfax Avenue which will not become part of the Smiley Junior High School area. In red are depicted areas from Cole Junior High School that will be detached to other schools across the city. These are color coded in red. These students for example would go to Smiley. Thirty-three students to Byers and 110 students to Kunsmiller, 46 students to Kepner and 36 students to Rishel. There is one other aspect to the movement of students among the junior high schools and this is shown in the next overlay, Exhibit 8B. This shows the adjustment of population in two of the southeast Denver schools; 100 children presently assigned to Hill will now be switched to Hamilton and Thomas Jefferson. Similarly, 200 students from the Merrill area will be switched to Thomas Jefferson and Hamilton.

[93] Q. Those are provisions that pertain only to the sending of Anglo students to Anglo schools? A. That is correct.

Q. Then is there a similar exhibit prepared with respect to the effective Resolution 1531 on the elementary schools? A. Yes. This is Exhibit 9. Exhibit 9 is a 1967 boundary map of the elementary schools of Denver, Colorado and coded in yellow are the 17 elementary schools affected by Resolution 1531. The first overlay, Exhibit 9A, depicts the changes that were made at Barrett School. The area in green was in the Barrett boundary, was detached from the Barrett area and sent to five other predominantly Anglo schools across the city. This is depicted by the arrows showing students to Moore, 42; students to Montclair, 100; to Whiteman, to Carson, and to Ashley; a total of slightly more than 300 students than detached from

the Barrett area. Brought to the Barrett area was an area containing 225 students in the Lowry Air Force Base area who had been going to Montclair and Whiteman. They would now be assigned to the Barrett area and 42 students from Moore to Barrett, to balance the 42 from Barrett to Moore.

Q. So then there would have been two Anglos sending schools and the Anglos sent to Barrett would have been balanced by Negroes sent from Barrett into those other receiving schools? [94] A. Well, two sending areas; one, the Moore School area and the other, the Lowry Air Force Base area. Exhibit 9B shows a second aspect of Resolution 1531. This is the busing of students from Stedman Elementary School to three schools in southwest Denver, Force, Denison, and Schenck. They would receive 60, 30 and 30 pupils respectively.

Q. This is strictly one-way busing, is that correct? A. That's correct.

Q. No whites are being bused back instead? A. That's correct.

Q. Do you recall what the racial composition of Stedman was prior to these resolutions? A. Stedman is greater than 95 percent Negro.

Q. And after the resolutions the Negro racial composition changed? A. Not appreciably, no.

Q. So this was to relieve overcrowding? A. This was what the purpose of removing the four mobile units from Stedman. There are approximately 235 I believe or somewhere in that neighborhood students presently being bused from Stedman because of overcrowdness. This is an additional busing of 120 students from Stedman.

The next exhibit overlay 9C, shows additional aspects of Resolution 1531 pertaining to elementary schools. This

exhibit depicts the steps that are being taken to [95] stabilize the membership in the Park Hill and Philips Elementary School district. In Park Hill School for example, as depicted in yellow, 70 students will be detached from Park Hill area and put in the Steele attendance area. Thirty in this small yellow, spots to the Steck area.

Q. Those are Negro students? A. We don't know the exact racial or ethnic makeup of the students to be bused. For assumption purposes, however, these students have been considered to be Negro. A block by block census is not available to know the exact racial and ethnic membership of these students. In the Philips area depicted in red is an area to be detached to Palmer containing 50 students. In red here is an area detached to Ashley containing 30 students. Two other changes are in the Philips area, an area north of Colfax from Montclair is detached to Philips and an area in southeast Denver that had had children transported to Palmer is now moved to the Philips area to equalize the 50 students detached to Palmer.

Q. Thank you, Doctor. I think you can return to the witness box.

Dr. Klite, turning your attention first to the effect of these resolutions upon the senior high school schools which were depicted in Exhibit C, as I understood your testimony the principal high school to be affected was East High School? [96] A. East High School is the focus of the resolutions.

Q. Calling your attention to Plaintiffs' Exhibit 7C, does that exhibit reflect what the racial composition at East High School would be under Resolution 1520? A. That is correct. It shows that East High School would have approximately 25 percent Negro population under Resolution 1520.

Q. Now turning your attention to what's been marked for identification as Plaintiffs' Exhibit 7D does that exhibit purport to reflect what the racial composition of East High will be under the recision of 1520? A. Yes, it does.

Mr. Greiner: Your Honor, this was one of the exhibits I believe which counsel had some question concerning.

Would you wish to examine on voir dire or I can establish a foundation for it.

Mr, Creighton: I think if you will let me ask a couple of questions, you will understand our problem with this.

Mr. Greiner: I know what your problem is.

Voir Dire Examination by Mr. Creighton:

Q. Mr. Klite, what figures do you—how do you arrive at your figures on what you call post recision proportion? A. Since there would be no boundary changes we have assumed that the racial and ethnic composition of those three [97] high schools would be what it was in 1968.

Q. So that when you say post recision or after recision, you're using last year's figures? A. That's correct.

Q. Are you taking into account the alternative planning the School District made under Resolution 1533? A. We have not until a few days ago had the figures of the numbers of students who had volunteered to be transported. Therefore those figures are not taken into account in these figures.

Mr. Creighton: Your Honor, so long as it's understood by the Court that post recision data here really represents last year's racial figures and proportions, this may go in.

Mr. Greiner: I think I might also—it might also save time, Your Honor, to note that this same factual premise is present with regard to Plaintiffs' exhibit 8D and 9E. And these then would be introduced with the same understanding.

Mr. Creighton: With that understanding they may be introduced, Your Honor.

The Court: Very well. What's the number of that one?

Mr. Greiner: 7D.

And then, there is 7C and then there is 8D and 9E, Your Honor.

[98] The Court: Very well. All of those three will be received.

(Whereupon, Plaintiffs' Exhibits 7C, 7D, 8D, and 9E were received in evidence.)

Direct Examination by Mr. Greiner (Continued):

Q. Calling your attention, Dr. Klite, to Plaintiffs' Exhibit 7D, that exhibit does purport to show what the racial composition of East High School will be is Resolution 1520 is rescinded? A. Yes.

Q. What is shown there? A. It shows that East High School will be 54 percent Anglo and 40 percent Negro with 7 percent Hispano.

Q. Do we have a large graph that depicts this change? A. Yes, we do. We prepared Exhibit 7E which demonstrates with a two color code the percent Negro and Hispano population of the three subject high schools. In red under Resolution 1520; in yellow after recision of that resolution. It shows that the Negro population, Negro and Hispano population of East High School is above 40 per-

cent if the resolution is rescinded and it is close to 30 percent in 1969 with implementation of the resolution. I might add that the school district projects that by 1971 the percent of Negro and Hispano of East High School will be about 25 percent.

[99] Dr. Klite, this then was one of the stabilizing moves as described by Mr. Benton in his testimony this morning? A. Yes, it was and I think that can best be demonstrated with Table Exhibit 7F which shows the percent Anglo enrollment at the three subject senior high schools from 1963 to 1968. In 1963 East High School was 83 percent Anglo. It was in 1968 54 percent Anglo, showing a marked decrease in the number of Anglo students at that school. The racial and ethnic composition of the other two subject high schools was more stable.

Q. This then demonstrates that East High School is a school in transition?

Mr. Creighton: Objection, Your Honor. That's leading.

The Court: Sustained. I think we can draw that inference, anyway, from the facts.

Q. Calling your attention next, Dr. Klite, to the effect upon the junior high schools, as I recall Mr. Benton's testimony the primary focus here was on Smiley Junior High School? A. That is correct. Exhibit 8C shows the ten subject high schools estimated of ethnic and racial composition under Resolutions 1520 and 1524.

Q. What does it show then for Smiley Junior High School [100] under the resolutions? A. It shows Smiley to be 72 percent Anglo.

The Court: You're referring to 8C?

The Witness: 8C, yes, sir.

Q. At 72 percent Anglo and what percent Negro? A. Twenty-three percent Negro and five percent Hispano.

Q. Have you also prepared an exhibit Dr. Klite, that purports to project what the racial composition of Smiley Junior High School will be should these resolutions be rescinded? A. Exhibit 8D shows that without implementation of the Resolution 1520 and 24 as projected from the 1968 attendance, Smiley would be 24 percent Anglo and 72 percent Negro.

Q. So then the effect of the resolution in the recision would be just to completely reverse the racial composition that's at Smiley, is that correct? A. That's correct.

Q. Have you also prepared a bar chart, Doctor, that illustrates that change? A. Yes, Exhibit 8E, which again depicts the percent Negro and Hispano enrollment at the ten subject junior high schools. In red under implementation of Resolutions 1520 and 24 and in yellow without implementation of these resolutions. One can see that the declining order is the red bars. Cole [101] is affected in terms—essentially unaffected in terms of its percent Negro and Hispano by the resolutions. Smiley is the school with the most dramatic effect decreasing, as has been pointed out, the Negro population from 72 to approximately 25 percent. The other subject high schools—junior high schools of the city would increase their Negro and Hispano population under these resolutions by the busing from Smiley and Cole.

Q. Doctor, have you also prepared an exhibit that shows the changes in racial composition of the subject junior high schools over the years? A. Yes, Exhibit 8H for the ten subject junior high schools shows the percentage Anglo enrollment from 1963 to 1968. It shows that Smiley was 46 percent Anglo in 1963. By 1968 it was 24 percent Anglo.

Cole Junior High was ten percent Anglo in 1963 and four percent Anglo in 1968. The other junior high schools have shown quite stable percentage of Anglo over the period of six years from which data is available.

Q. Doctor, turning your attention next to the impact of Resolution 1531 upon the subject elementary schools, have you prepared any exhibits that depict the racial composition of those elementary schools under Resolution 1531? A. Exhibit 9D lists the number and percent Anglo and Negro and Hispano enrollment for the 17 subject junior high [102] schools. And it shows that under Resolution—

Q. Pardon me. Did you say junior high? A. —subject elementary schools. Excuse me. Under the Resolution 1531 each of these schools with the exception of Stedman would have between 70 and 85 percent Anglo enrollment. Stedman would have five percent Anglo enrollment. Stedman, you recall, is the school from which Negro schools were bused from—

Q. That's one-way busing for overcrowding? A. Yes.

Q. Doctor, as I recall Mr. Benton's testimony, it was the primary focus of 1531—that was up on Barrett. Could you tell us what the racial composition of Barrett would be under Resolution 1531? A. Barrett would be 73 percent Anglo, 24 percent Negro, and three percent Hispano.

Q. Now Mr. Benton also testified that there was to be some stabilization at two of the other elementary schools. Could you identify those for us? A. Park Hill and Stedman in turn under the resolutions—Park Hill would be 79 percent Anglo and Philips 70 percent Anglo.

Q. Doctor, you also prepared an exhibit which purports to depict the effect of the resolutions upon the racial composition of the subject elementary schools? [103] A. Yes, Exhibit 9E which shows that Barrett would

have zero percent Anglo and 97 percent Negro population; that Philips would have 55 percent Anglo enrollment instead of the 70 percent under the resolution; that Park Hill would have 71 percent Anglo instead of 79 as under the resolutions, and that the—among the other subject schools, there would be either ten or 11 that would have greater than 85 percent Anglo enrollment.

Q. Now, Doctor, have you also similarly prepared an exhibit depicting the differences before and after the resolutions at the subject schools? A. Yes, Exhibit 9F which shows the percent Negro and Hispano enrollment at the subject elementary schools under Resolution 1531 and after recision. Stedman not being appreciably affected by these facts, the major effect being at Barrett School which would change from a 70 percent Anglo school to a zero percent Anglo school and Philips which would change from a 30 percent Anglo school—correction—30 percent minority school to a 45 percent minority school. Park Hill would change from approximately 20 percent Negro and Hispano to a little more than 30 percent Negro and Hispano. The other schools averages are listed in the last column.

Q. Then finally, Doctor, calling your attention to Plaintiffs' Exhibits 97 and 98, have you also had occasion [104] to prepare a composite table showing certain data for all of the schools of the school district? A. Yes.

Q. Of what was the source of the data? A. Are you referring to these two exhibits?

Q. Yes. A. These are copies of the estimated ethnic distribution of pupils for all of the schools in the school system that has been issued each year by the school system since 1963.

Q. So these then are tables that have been prepared by the school district? A. That is correct.

Mr. Greiner: Do you have any objection?

Mr. Creighton: No objection.

The Court: What are the exhibit numbers?

Mr. Greiner: That's 97 and 98, Your Honor.

The Court: They will be received.

(Whereupon, Plaintiffs' Exhibits 97 and 98 were received in evidence.)

Q. And then, finally, Dr. Klite, have you also prepared a table that shows the change of the ethnic composition of the subject elementary schools over the years with respect to their racial composition? A. Exhibit 9I depicts the racial and ethnic composition [105] of the 17 subject elementary schools from 1963 to 1968. It shows that Barrett School was two percent Anglo in 1963 and in 1968 it was zero percent Anglo. Under Resolution 1531 it would be 73 percent Anglo. It also shows that Stedman was a predominantly Negro and Hispano school in 1963 and has remained so. It also shows that the Anglo population of Park Hill and Philips, which was 98 and 97 percent, respectively, in 1963, has decreased to 71 percent for Park Hill and 55 percent for Philips by 1968. The other schools are relatively stable on this chart.

Mr. Greiner: We have no further questions of the witness, Your Honor.

And for the record, we do offer each of these exhibits, which I understand have been received.

The Court: They are all received.

Mr. Creighton: I wonder, Mr. Greiner, if you could just list the exhibits you have just offered for the record and for my notes.

Mr. Greiner: Yes. The exhibits are the following: 7, 7A, C, D, E, and F; 8, 8A, B, C, D, E and H; 9, A, B, C, D, E, F and I; and 97 and 98.

(Whereupon, Plaintiffs' Exhibits 7, 7A, 7C, 7D, 7E, 7F, 8, 8A, 8B, 8C, 8D, 8E, 8H, 9, 9A, 9B, 9C, 9D, 9E, 9F, 9I, 97 and 98 were received in evidence.)

[106] *Cross-Examination by Mr. Creighton:*

Q. Dr. Klite, when you were testifying as to racial composition from time to time, were your statements based exclusively on school district figures? A. That's correct.

Q. And as of what date were these school district figures when you were speaking to the racial compositions in the various schools at the time 1520, 24 and 31 were passed? A. The source data for the 1520, 24 and 31 comes from the resolutions themselves and from the review volume, XLIX, of April 1969 and the review volume which is called XLX, I think it should be fifty, for May of 1969, and supplemented by a special report with Assistant Superintendent Armstrong.

[107] Q. Do you know when you received that verbal report? A. That report was given to Dr. George Bardwell by Dr. Armstrong sometime within the last month.

Q. And you got it from Dr. Bardwell? A. Correct.

Q. Have you made any inquiry as to the certainty of these figures, or to put it another way, as to whether these were estimates and if so within what ranges they were estimates? A. I have used the school administration's figures. I have not inquired at length as to how they obtained the estimates.

Q. Are there mileage scales on your map, Dr. Clyde? A. That map has a scale of 2.7 inches equals 1 mile.

Q. You're looking at 9-C, are you not? A. That's right.

Q. Do all of the larger maps have that same scale? A. The three maps that have been introduced as Exhibits 7, 8 and 9 do, yes.

Q. Have you measured off—It could be done by anyone with a little patience, I think—but have you measured off mileages or distances in terms of miles as between any of the schools where you're drawing arrows here? [108] A. No, I have not.

Q. But it would be possible with a measuring device and a scale given to determine that from that document, would it not? A. An estimate of it, yes.

Q. Dr. Clyde, not only in the three specific exhibits we discussed with reference to the post-rescission ethnic data in which you said you recall that, that really was synonymous with last year's ethnic data, not only with respect to those three exhibits; but is it fair to say, Doctor, that whenever you have spoken this afternoon of post-rescission racial and ethnic data you're speaking of last school year's figures? A. That is correct. The changes that might occur within a given school year from population changes reflect the 1969 attendance. We have no way of knowing—I have no way of knowing at the present time.

Q. Did you make any inquiry into the school district's methodology in making its projections and determinations of these ethnic figures? A. Well, we assumed, for example, if I may give you an example—

Q. All right. What did you assume, Doctor? A. That every student detached from the Smiley area was Negro and that every student brought to the Smiley area [109] was Anglo. By making that assumption we came to the

same percentage figure that the school administration had figured and published in the review.

Q. And referring to your high school exhibit, and I won't unveil it for this colloquy, but you understand, Dr. Clyde, that it's only in the case of the high school students in the Harrington Elementary district area that busing is provided? A. Well, the review of May 1969 lists 875 pupils will be transported at the Senior high level. Now, 875 turned out to be the total number moved among those boundary changes.

Q. East High School boundary changes? A. Yes, sir. High school boundary changes. And, they're listed in the official publication of the Denver Public Schools as being transported. I believe we have a copy of that.

Mr. Greiner: We do have Exhibits 10 and 11, which are what he is referring to.

Mr. Creighton: Yes, let's put them in at this point, Mr. Greiner.

The Court: All right. They are received.

(Whereupon, Plaintiffs' Exhibits 10 and 11 were recived in evidence.)

Q. I call your attention to the gate-fold, I suppose [110] it's called, in Exhibit 10, under Senior High. It speaks of 141 pupils from areas which I earlier called the Harrington area busing to South. Is there any other busing mentioned in that explanation? A. Not in that explanation, but in the following months' explanation all of the students were listed as being transported.

Q. What is your understanding, Mr. Clyde, of the amount of busing provided in connection with the East High School aspect of 1520? A. Well, there are these two figures and I don't know which one is correct.

Mr. Creighton: You may examine.

Mr. Greiner: Your Honor, at this time we would go ahead and offer Plaintiffs' Exhibits 10 and 11 which have been authenticated by the defendant.

The Court: Do you have any objection to 10 and 11?

Mr. Creighton: No, as I indicated before, they may be admitted.

The Court: They will be received.

Redirect Examination by Mr. Greiner:

Q. Did you state, Doctor, that under a projection by the School District as to what the expected racial [111] composition of Smiley would be? A. Yes, I did.

Q. And that was for what year? A. It's published in the review. I don't recall whether it was 1969 or '71 or both. If I could see a copy of that exhibit I could tell you. The estimate for 19—for September 1969 is 72 percent Anglo; 23 percent Negro; and 5 percent Hispano.

Q. Now, you have also I think referred to a projection by the School District with respect to East High School that is not reflected in these exhibits. A. Yes.

Q. What was the result of that projection? A. Their estimate for East in the Exhibit 10 is 68 percent Anglo in 1969 and 88 percent Anglo in 1971. This later figure was in error and is corrected in Plaintiffs' Exhibit 11 which shows the 1971 racial composition at East to be estimated at 73 percent Anglo.

Q. Now in reference to the question raised on cross-examination, Doctor, about the post-rescission figures, with respect to the trend in the racial compositions at these neighborhoods which have been reflected in the exhibits, what is the trend in these areas?

Mr. Creighton: Objection, Your Honor. There has been no trend reflected in the exhibits or other testimony.

[112] Mr. Greiner: I beg to differ. We have got three exhibits, Your Honor, that show from 1963 to 1968 exactly what that trend was.

The Court: Well, he may testify—

Mr. Creighton: That was in schools. I thought your question was residential.

Mr. Greiner: I'll change my question to schools.

Q. What is the trend in the schools, Doctor? A. The trend at East High School, Smiley Junior High School, Philips Elementary, Park Hill Elementary, has been towards increasing Negro population. Barrett Elementary is already a zero percent Anglo and can't get any lower.

Q. Now taking into consideration that trend, Doctor, was that trend reflected in the post-rescission figures that are reflected in these exhibits? A. No, they were not.

Q. And in fact we have gone back to September of 1968? A. That is correct.

Q. Considering the trend in those schools, Doctor, does the September 1968 data tend to understate the Negro compensation in these schools after rescission? A. It very well might.

[113] • • •

James D. Voorhees, Jr., a witness called by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

James D. Voorhees, Jr.—for Plaintiffs—Direct

Direct Examination by Mr. Barnes:

The Court: Give us your name and address.

The Witness: James D. Voorhees, Jr, 170 Downing Street, Denver, Colorado.

By Mr. Barnes:

Q. Mr. Voorhees, are you presently a member of the Board of Education and a defendant in this case? A. I am.

Q. When did you first come on the Board of Education? A. After the election in May of 1965.

Q. Prior to that time did you serve in any capacity for the Board of Education? A. I was on and for a time was chairman of a special study committee investigating quality of education opportunity in public schools.

Q. And that's the report of that special study [114] Committee—that's what has been identified as Plaintiffs' Exhibit 20 in this cause, I think. Is that this report? A. Yes, it is.

Q. Mr. Voorhees, have you had a change in position with regard to the question of equal education opportunity in segregated schools? A. Yes, I believe I have had such a change.

Q. And has this evolution occurred during the time you were on the Board? A. Yes, it has.

Q. Were you one of the members on the Board who voted in favor of the integration resolutions which are the subject of this discussion? A. I was.

Q. And does your position represent where you changed to in this evolution? Does your vote represent where you changed to in this evolution? A. Yes, I think that would be a fair statement.

Q. What is your position with regard to the availability of equal educational opportunity in segregated schools? A. I think that based upon what I have observed and found out the probabilities of equal opportunity are reduced and may be entirely eliminated in racially or ethnically segregated schools.

[115] Q. What were the factors that led to your coming to that conclusion? A. Well, at some point, and I couldn't pinpoint it exactly, it became apparent to me that something was wrong in the manner in which the educational establishment was treating, and the result that it was getting from this group of children that we are now talking about, and I would include as well the children who might be considered as the product of a subculture of poverty, as you know there is an incidence of, between poor and minority children.

At some point it became quite apparent to me that the results that were available in terms of achievement and pure education, I suppose, to these children were not the same results that were available to the children of the Anglo—primarily Anglo and middle class which makes up the great majority, of course, of the students in the school.

I suppose what crystallized this change more than anything was the release by the Superintendent sometime last fall, I believe, of some test scores—comparative test scores which indicated to me a direct correlation between concentration of poor children, minority children, and low achievement as compared to other schools where these conditions were not present.

Q. Mr. Voorhees, I hand to you Plaintiffs' Exhibit [116] 83, which I believe has already been stipulated to as to its authenticity and admitted, and ask you if that is a sample of the kind of compilation concerning achievement test scores to which you refer? A. It is.

Q. Mr. Voorhees, is the composition of the School Board the same today as it was at the time the integration resolutions were passed? A. No, it is not.

Q. What brought about that change? A. An election held on May 22nd of this year which resulted in two new members, Mr. Southworth and Mr. Perrill, being elected to the Board.

Q. Might that have been May 20? A. May 20. Excuse me.

Q. In your judgment what were the focal subjects at issue in the campaign?

The Court: Oh, brother.

Do you object to that question?

Mr. Craig: Yes, I do, Your Honor. I don't think this is a proper question to ask of a lay witness.

The Court: Sustained.

Q. Following the election, did the School Board hold conferences with regard to actions on these resolutions? A. It held at least one at which I was present and [117] I think it may have held another one in which I was present. My calendar shows two such conferences. And then there was a third conference which—at which I was not present.

Q. Was there any in-depth discussion of the educational benefits of these resolutions at the conferences you attended? A. No, there was not.

Q. Was there any in-depth discussion of the educational benefits that would accrue from the rescission of these resolutions? A. No, there was not.

Q. Did the Superintendent take a stand with regard to the rescission of these resolutions? A. It is my recollection that he indicated that he would not be in favor of

such rescission; that he did feel they were sound and educationally—that the resolution were sound and were educationally viable and were a step forward in solving some of the needs of this district.

Q. What was the reason that was given for the rescission of these resolution? A. As I remember, the then majority, the new majority of the Board indicated that they had received a mandate from the voters of the people of the City and County of the school district, to rescind. They also indicated that rescission was necessary in order to restore [118] the confidence of the people of Denver in the School Board so that the bond issue could be passed.

Q. Did the Board then meet on June 9, 1969, and take action with regard to the integration resolution? A. Yes, it did.

Q. What did it do? A. It rescinded the three resolutions, 1520, 1524 and 1531.

Q. Did it do that by motion or by resolution? A. It did that by motion and resolution on each separate resolution.

Q. Was a subsequent resolution then offered? A. Yes. I think there were several that won a substitute resolution identified as 1533 was offered. And then it seems to me there were two or three others having to do with voluntary programs and individual schools.

Q. I hand you what has been marked as Plaintiffs' Exhibit 6A and ask you if that is the Resolution 1533? A. It appears to be it.

Mr. Barnes: This has also been stipulated to as to its authenticity, Your Honor.

The Court: Very well.

(Whereupon, Plaintiffs' Exhibit 6A was received in evidence.)

Q. Were you one of the ones who voted against the [119] passage of Resolution 1533? A. Yes.

Q. What was the vote on that resolution? A. It was four in favor and three against.

Q. The Court has heard previous testimony concerning the passage of 1490, Mr. Voorhees, I think, before you were here. Are you familiar with that resolution? A. Yes.

Q. How did you vote on that resolution? A. I voted for that resolution.

Q. Does Resolution 1533 act, in your judgment, to accomplish the aducational objectives of Resolution 1490? A. I can't see how it does, no.

Q. Mr. Voorhees, have you filed an answer to this cause? A. Well, yes, Mrs. Noel and Dr. Amesse and I filed an answer today.

Q. For the purpose simply of identifying to the Court the position taken to that answer, can you state what your prayer is? A. Our prayer as to the first count is that the relief requested be granted. Our prayer as to the second count—

Q. Just as to the first count is all. That will do.

[120] Mr. Barnes: Your Honor, Plaintiffs' Exhibit 6 is on the—is the official publication of the Board and the minutes of the meeting of June 9, 1969, and it has been admitted as to its authenticity. We would like to offer it at this time.

The Court: Do you have any objection?

Mr. Craig: May I examine that exhibit?

The Court: Surely.

Mr. Craig: No objection, Your Honor.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 6 was received in evidence.)

Q. Mr. Voorhees, was the content of Resolution 1533 discussed in conferences prior to June 9, 1969? A. Not at any conference at which I was present.

Q. When was the first occasion that you saw Resolution 1533? A. It was at our places in the form in which it was enacted when the meeting opened.

Q. Were there subsequently public hearings to discuss the content of that resolution? A. No, except at Board meetings. It was a public meeting.

Q. Were there statements at the Board meeting concerning the resolution? [121] A. By Board members. I have a recollection which the minutes would perhaps confirm that a request was made that persons present be permitted to discuss it before it was voted on, and it's my recollection that that was not permitted.

Q. Approximately how many people testified at that time concerning this resolution? A. From the public? I don't believe any public presentation was made before the motion was called for a vote.

Mr. Barnes: No further question of this witness, Your Honor.

Mr. Craig: Your Honor, may I suggest we have about ten minutes' recess at this time to check our cross-examination?

The Court: Very well. Let me know when you're ready, Mr. Craig.

(Whereupon, the trial recessed at 3:10 p.m. and resumed at 3:27 p.m.)

Mr. Craig: Your Honor, we have no questions of the witness.

Mr. Barnes: I would like to direct one more question to the witness, if I may.

The Court: You may.

By Mr. Barnes:

Q. Mr. Voorhees, I believe you [122] testified earlier about your opinion as to the effectiveness of Resolution 1533 to achieve the intended results of Resolution 1490. Would you state, please, why you think Resolution 1533 is inadequate to achieve the goals of 1490? A. Well, basically because it is a voluntary proposal, and it seemed to me that the possibilities of achieving any kind of stabilization, particularly in a school that is as troubled as Smiley, for example, or maybe East, maybe Barrett, or maybe any of those resegregated elementary schools of Park Hill on a voluntary basis was nil. I thought of that resolution as a sort of a sop to the community and I didn't think it would be effective even in that category.

Mr. Barnes: Thank you. I have no further questions of this witness, Your Honor.

The Court: Well, the thrust of it was to seek voluntary exchanges all the way along the line?

The Witness: Yes, Your Honor, that's about what it says.

The Court: But it said aside all of these boundary changes that had been adopted.

The Witness: They had already been set aside. This 1533, as I remember it, was in lieu of the

specific provisions of the three resolutions that are here in question.

The Court: I take it that it would depend upon [123] the ability of the administration to persuade students in these other elementary and junior high schools to transfer the minority—to the so-called minority schools?

The Witness: Yes, Your Honor. It would depend on that, which I think is an absolute impossibility, and I don't think people are going to volunteer individually to transfer their children—Anglo parents—to a school that is not going to be an integrated school when their child arrives. It would also, of course, have required the making of room in those schools by the transfer of minority children out of those schools, which is equally different on a voluntary basis.

The Court: Very well.

Mr. Barnes: We have no further questions.

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[124] * * *

GEORGE E. BARDWELL, a witness called on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Barnes:

The Court: Please state your name and address so the reporter can hear it.

The Witness: George Bardwell, 2201 South Harrison, Denver, Colorado.

The Court: What is your occupation?

The Witness: I am a mathematician and statistician.

The Court: Where do you work?

The Witness: University of Denver, sir.

By Mr. Barnes:

Q. Dr. Bardwell, have you had [125] occasion to make a study of population movement and property values in the Park Hill area of Denver? A. Yes, I have.

Q. I show you what has been identified as Plaintiffs' Exhibit 38, and I don't think that's one of the ones to which the stipulation went.

Mr. Creighton: No, it was not. It was in your series submitted to us last night, but we have had a chance to look at this, Your Honor, and we have no objection to its going in.

The Court: May I see it, please.

This was prepared by the Community Relations Committee of the City and County of Denver?

The Witness: Yes, that's right, sir. I served as a consultant to the Commission on Community Relations.

The Court: You prepared it for that agency?

The Witness: I did.

The Court: And it's dated April 1966?

The Witness: That's right, sir.

Mr. Barnes: I am not going to ask him questions from this, Your Honor, but it indicates a study in the background—

The Court: You just want me to read it, is that right?

Mr. Barnes: It indicates a background knowledge [126] to which Dr. Bardwell will testify.

The Court: Maybe his testimony will spare me the burden of reading the whole thing, or, point up the highlights.

By Mr. Barnes:

Q. Dr. Bardwell, I hand you what has been identified as Plaintiffs' Exhibit 92 and ask you if you have had occasion to prepare a table which purports to show the assignment of probationary teachers and teachers with no previous Denver Public School experience, and teachers with ten or more years' Denver Public School experience as they relate to the subject elementary schools.

Mr. Creighton: What number was that, please?

Mr. Barnes: 92.

The Witness: Excuse me. It's of senior high schools.

The Court: This is the assignment of teachers with reference to their previous experience? Is that what you are talking about?

Mr. Barnes: Yes, Your Honor.

Q. What is the source of the information contained in this table? A. This table was compiled from a set of IBM printouts that were supplied to us by the Division of Personnel Services of the Denver Public Schools.

Q. What does the table purport to show? [127] A. Plaintiffs' Exhibit 92 shows the three senior high schools subject to Resolution 1520, East, George Washington, and South. It shows the percentage of the total teachers at those schools who have probationary status, no previous Denver Public Schools school experience, and the propor-

tion of teachers with ten or more years of Denver Public School experience.

* * * * *

[130] * * *

By Mr. Barnes:

Q. Dr. Bardwell, what does Exhibit 92 show with regard to the percent of probationary teachers at East High School, George Washington, and South? A. It shows in the year 1968 that the percentage of probationary teachers at East of 34 percent, which was double that at George Washington and also at South.

Q. Does it show with regard to the percent of those [131] teachers with no previous Denver Public Schools experience in those three schools? A. It shows a pattern very similar to that indicated for probationary teachers by which 17 percent of the 128 teachers at East had no previous Denver Public School experience, and that percentage is almost double that at George Washington and more than double that at South.

Q. Mr. Bardwell, I hand you what's been identified as Plaintiffs' Exhibit 93 and ask you what that purports to show. A. This exhibit is similar to the preceding exhibit showing probationary teachers as a percent of teachers with no previous Denver Public School experience—as a percent, and teachers with ten or more years' Denver Public School experience for the Junior High Schools under Resolutions 1520 and 1524.

Q. What is the source of the information of that data? A. The source for this is identical to that of the previous exhibit, a series of IBM tables, printouts, entitled, The Study of Years of Experience in Denver Public Schools, Contract Teachers, by School, Division of Personnel Services.

Mr. Barnes: I would like to offer Plaintiffs' Exhibit 93 into evidence.

Mr. Creighton: Same objection as to Number 92.

[132] The Court: The same ruling.

Q. Dr. Bardwell, what is the percent of probationary teachers that are at Cole Junior High School shown on your table? A. The percentage of probationary teachers is 66 percent.

Q. How does that compare with Hill Junior High School? A. Hill Junior High School has 34 percent probationary teachers. Therefore, by simple calculation, Cole has double the percentage of probationary teachers as does Hill.

Q. Nearly double? A. (No answer.)

Q. Turning your attention to Smiley Junior High School, what is the percent of probationary teachers shown there? A. Here, the figure is very similar to that at Cole in which 63 percent of the 98 teachers at Smiley are on probationary status, and that again is nearly double that at Hill.

Q. And are these disproportionate percentages consistent for those same schools for the columns you have listed for the previous teachers experience and teachers with ten years or more experience? [133] A. Yes, they are.

Q. For example, what does the table show with regard to the teachers of ten or more years experience at Hill and at Smiley Junior High School? A. Here, the comparison is even more dramatic. In the case of Smiley we have 7 percent of the teachers having 10 or more years of Denver Public School experience, while at Hill there are 36 percent. This means that there are about five times the percentage of experienced teachers at Hill than at Smiley.

Q. Dr. Bardwell, I hand you what has been identified as Plaintiffs' Exhibit 94 and ask you what that purports to show. A. This is a—is similar to the preceding two ex-

hibits, 92 and 93, showing the probationary teachers with no previous Denver Public School experience and teachers with ten or more years of Denver Public School experience; the experience expressed as a percent for those elementary schools that are affected by Resolution 1531 for 1968.

Q. What is the source of that exhibit? A. The source is identical to that of the preceding two exhibits, the IBM printouts which are a study of the years of experience of Denver Public School teachers.

Mr. Barnes: I offer Plaintiffs' Exhibit 94, Your Honor.

[134] Mr. Creighton: Same objection.

The Court: Overruled.

(Whereupon, Plaintiffs' Exhibits 92, 93 and 94 were received in evidence.)

Q. Dr. Bardwell, would you take that through the comparison by way of example of two schools on that table, Palmer and Philips, all the way through. A. Turning our attention first to Palmer, we have a total number of teachers of 16. The proportion or percentage of probationary teachers at Palmer is 13 percent. At Philips, we have 26 teachers. The proportion of probationary teachers at Philips is 58 percent. This means that at Palmer, compared to Philips, we have roughly four times the percentage of probationary teachers at Philips than we do at Palmer. For those teachers that have no previous Denver Public School experience, Palmer has 6 percent. Philips, on the other hand, has 27 percent, which means again that we have about 4 times the percentage of teachers at Philips that have no previous DPS experience as compared to that at Palmer.

Similarly, for those teachers who have ten or more years of experience at Palmer we have 75 percent of those teach-

ers in the so-called experienced group. On the other hand, at Philips we have 15 percent of those teachers of 10 or more years of Denver Public School experience. [135] Here, the comparison of the two percentages is 15 for Philips, and Palmer 75. Six times the percentage—excuse me, five times the percentage.

Q. Dr. Bardwell, I hand you what has been identified as Plaintiffs' Exhibit 96 and ask you what that purports to show. A. Exhibit 96 is a distribution by race and ethnicity of classroom teachers expressed as a percent for the elementary schools, junior high schools and senior high schools on September 23, 1968.

Q. What is the source of the information contained in that—what's the source of that table? A. The source of that table is a mimeographed handout given by the Division of Personnel Services of the Denver Public Schools.

* * * * *

[136] * * *

Q. Dr. Bardwell, turning your attention to the third page of Plaintiffs' Exhibit 96, what does that show with regard to the percent of Negro teachers in the school district in elementary schools? A. It shows that about 8.5 percent of elementary teachers are Negro.

Q. Turning your attention to Barrett School, what is the —what does the exhibit show to be the Negro percent of teachers in that school? A. At Barrett, 52.6 percent of the teachers are [137] Negro.

Q. As compared to an average distribution of 8.5 percent? A. As compared to an average distribution for all elementary schools in the district of 8.5 percent.

Q. What does the exhibit show with regard to Stedman School? A. With regard to Stedman, 21.1 percent of the teachers are Negro compared to 8.5 percent for the district as a whole.

Q. Dr. Bardwell, Plaintiffs' Exhibit No. 26 has already been offered and received, and I would like to show it to you, Dr. Bardwell. Will you look at it to refresh your memory as to what Plaintiffs' Exhibit 26 is. A. It's Denver Public Schools Policy, 1,617A, dealing with the change of assignment for employees. And the policies thereof.

Q. What does it show with regard to the control by the School District of Denver of teacher assignments? A. It shows here that a request for change of assignment cannot always be granted because the employee is not qualified for the existing vacancy nor the transfer from the present school or department would not serve the best interests of the program or district.

Q. What does it show with regard to the relevancy of [138] seniority in the assignment of teachers?

Mr. Creighton: Your Honor, if this witness is going to interpret policy, I will object. If he is going to read certain portions to highlight them, I suppose it is all right. Is this what you are doing?

Mr. Barnes: I'm not even going to ask him to read that; just state in general what the policy—

The Court: Well, he may answer.

Mr. Creighton: I object.

A. The policy of seniority with regard to this exhibit here is that seniority is a factor in transfer of a teacher and that that transfer should be taken—should take cognizance of the probationary status of a teacher in considering transfer.

Q. Dr. Bardwell, what does the policy 1617A show as to the possibility for changes in teacher assignment on the enrollment—when the enrollment of a school is changing? A. It permits a consideration of transfer of teachers, when

the enrollment — when there is a change of enrollment; where there may be a transition perhaps in the school itself.

Q. Dr. Bardwell, I direct your attention again to Plaintiffs' Exhibit 20 and ask you to look at page D13 and state what the finding reflected there is of the special [139] committee—what it was about, on the assignment of Negro teachers. A. The conclusion of the committee was that a large proportion of Negro teachers were assigned to schools that had a high proportion of Negro students.

Q. What did the study committee say with regard to the relevance of race in the assignment of teachers? A. They recommended to the Board of Education that—

Q. Before getting to the recommendation, Dr. Bardwell, if we could interrupt and direct your attention to page D13, next to the last paragraph, what was the finding concerning the relevance of race in the assignment of teachers?

Mr. Creighton: I'll object unless he reads the designated part.

The Court: All right.

Q. Would you read that paragraph? A. "As a result of its interviews the committee is convinced that race has been relevant in the assignment of teachers. It appears that the administration has been extremely reluctant to place Negro and Spanish American teachers in predominantly white schools because of concern with possible lack of acceptance on the part of a white neighborhood and a realistic assessment of the possible lack of support by some principals and faculties."

[140] Q. Dr. Bardwell, directing your attention to page D14—

The Court: I have received this material upon the theory that it supports your contention some-

what that the alleged segregated schools do not come up to standards and are inferior. We are not, I take it, in this suit concerned with the rights of teachers, are we?

Mr. Barnes: We are concerned with the acts of the School Board, Your Honor, which tend to—

The Court: We're not going to review every sin that they have committed, you know. I mean, we are concerned with a limited number of these alleged wrongs. That's all. And only as they pertain to your suit. I just don't think they should be used as an occasion to air every grievance that you have got. So, you are going to have to justify this teacher evidence somewhat, I think.

As I say, this is the question running through my mind, and—Is there some presumption or inference that standards of teachers are not up to standards, do you think? Do you maintain that?

Mr. Barnes: Not at all, Your Honor.

The Court: Why do you make such a point of that?

Mr. Barnes: It is our contention that the assignment of teachers is a conscious act taken by the School Board which in this case has resulted in concentration of teachers [141] by race and ethnicity which could not have been done accidentally and that this last exhibit that I have on this point—we can show that this condition existed.

The Court: Does it violate the rights of the plaintiff, you think?

Mr. Barnes: The intentional confirmation and solidifying of segregation in the schools, does, Your Honor.

The Court: That isn't what I asked you.

Mr. Barnes: If there is evidence that the School Board has acted and is acting to confirm the segregated character of a school by assigning Negro teachers to Negro schools, that is evidence of an intent which can give rise to an inference concerning their other action.

The Court: Very well.

Q. Dr. Bardwell, I hand you what has been identified as Plaintiffs' Exhibit 8G and ask you to state what that purports to show. A. This is a chart showing the concentration of Negro and Hispano teachers in the junior high schools subject to Resolution 1520 and 1524 in 1968.

Q. What is the source of the information contained in that table? A. The source of the information in this table is again the ethnic and racial distribution of classroom teachers from a handout by the Division of Personnel Services of the [142] Denver Public Schools.

Mr. Barnes: I offer the Exhibit 8G into evidence.

The Court: Do you have a copy of it?

Mr. Creighton: Yes, we were supplied copies last Saturday, and we spot checked these numbers and they appear to be in conformity with ours. I will have some comment on the form, but I have no objection to its admission.

The Court: The exhibit is received.

(Whereupon, Plaintiffs' Exhibit 8G was received in evidence.)

[143] Q. What does this table—what does this bar chart show with regard to the concentration of teachers at

Smiley Junior High School? A. It shows that in the case of Smiley and from reading the chart itself, it would appear that this is a bar of a height of 23 teachers while in the case of Cole there is 37 teachers. The remaining schools under the resolutions that are affected, Kepner, Kunsmiller, Hill, Grant, Merrill, Byers and Rishel, the corresponding numbers for these schools, Kepner, about 4; Kunsmiller, about 3; Hill, about 3; Grant, perhaps 2; Merrill, one; Byers, zero; Rishel, zero.

Q. What is the predominant racial concentration of Byers, Rishel, Merrill, Grant, Kunsmiller and Kepner? A. These are predominantly Anglo schools.

Mr. Barnes: Your Honor, I see that counsel for the defendants has a copy of Exhibit 8-G which was supplied to him on Saturday and which we found an error on. So I think he'd better see the original. It has a different figure with regard to the number of students in Smiley than the one we supplied him on Saturday.

Mr. Creighton: What is that figure?

Mr. Barnes: Dr. Bardwell testified it was about 23 teachers, I think.

The Witness: Yes, about 23.

Q. Dr. Bardwell, I hand you what's been identified as [144] Plaintiffs' Exhibit 8-F and ask you to state what that purports to show? A. This is a tabular distribution comparing the concentration of Negro and Hispano teachers in the junior high schools that are subject to Resolutions 1520 and 1524. It shows for each of the junior high schools, Byers, Cole, Grant, Hill and the rest, the percentage—the percent of Negro and Hispano students and simi-

larly the number of Negro and Hispano teachers. The percent of Negro and Hispano students is shown before and after the recission of Resolutions 1520 and 1524 and those figures are similar to the ones that were introduced in evidence before by Dr. Klite.

Q. What does it show with regard to the number of Negro and Hispano teachers in Smiley Junior High School? A. It shows that there are 23 of the total of 80 teachers for all these junior high schools are at Smiley, and 37—

Q. That's 80 Negro and Hispano teachers? A. Yes. Eighty Negro and Hispano teachers in these junior high schools that are subject to these resolutions. Twenty-three of these teachers are at Smiley. Thirty-seven at Cole. Which means that the proportion of Negro and Hispano teachers at Smiley and at Cole is about three-fourths or three out of four of the Negro and Hispano teachers in those ten junior high schools are located in Smith and Cole.

[145] Excuse me. Smiley and Cole. I'm sorry.

The Court: This is a total of how many?

The Witness: A total of Negro and Hispanos. A total of 80 Negro and Hispano teachers, and I might add to that, if I may, that—

The Court: Sixty of them are at these two schools? Right?

The Witness: Excuse me, sir?

The Court: Sixty of the 80 are at Smiley and Cole?

The Witness: That's right.

Mr. Barnes: I'd like to offer Plaintiffs' Exhibit 8-F into evidence.

Mr. Creighton: May I look at it?

The Court: That's what he has been testifying from?

Mr. Barnes: Your Honor, I forgot to offer it.

The Court: It becomes academic at this point.

Mr. Creighton: I want to record an objection to this exhibit and the explantion of it on the grounds of relevancy.

The Court: Where did these figures originate?

The Witness: Excuse me, sir?

The Court: Where did these figures originate?

The Witness: These originated from the Denver Public Schools, sir; from their published material from the Division of Personnel Services.

[146] The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 8-F was received in evidence.)

Q. Dr. Bardwell, I hand you Plaintiffs' Exhibit 94 and ask you to state what that purports to show?

The Court: Are you familiar with this one?

Mr. Creighton: I'm asking for it. This is one we were handed last night, probably.

The Witness: Excuse me, Mr. Barnes. It's 9-H.

Mr. Barnes: I beg your pardon. 9-H.

Mr. Creighton: We have had this one since Saturday. And, Your Honor, I want to make the same comment which we made as to the parallel one in the secondary schools—and my comment was that I recall it may be admitted.

The Court: Very well. It will be received.

(Whereupon, Plaintiffs' Exhibit 9-H was received in evidence.)

Q. Dr. Bardwell, what does this Exhibit 9-H show with regard to the concentration of Negro and Hispano teachers

in Stedman and Barrett Schools? A. This is a bar chart showing the concentration of Negro and Hispano teachers in the elementary schools subject to Resolution 1531 and for Stedman it shows by height on that particular bar of about 11 teachers at Stedman who are Negro and Hispano and about 10 teachers at Barrett who are Negro [147] and Hispano.

Q. What is the general racial composition of those two schools? A. These two schools are predominantly Negro.

Q. Dr. Bardwell, I offer you Plaintiffs' Exhibit 9-G and ask you to state what that purports to show? A. 9-G is a distribution—a tabular distribution of the number of Negro and Hispano teachers and students in the elementary schools that are affected by Resolution 1531. It shows a comparison of the number of Negro and Hispano teachers in each of those elementary schools as well as the percentage of Negro and Hispano students before and after the recision of Resolution 1531.

Q. What's the source of that information in that exhibit? A. Again, the source of the information for teachers is the estimated ethnic distribution of classroom teachers from the Division of Personnel Services in 1968.

Mr. Barnes: I offer Exhibit 9-G into evidence.

Mr. Creighton: Objection on the grounds of relevancy.

The Court: May I see it, please?

It will be received.

You are free to study it and cross-examine later, even, if you're not prepared. If you wish to attack these figures, I mean.

[148] Mr. Creighton: Thank you, Your Honor. I understand.

(Whereupon, Plaintiffs' Exhibit 9G was received in evidence.)

Q. Dr. Bardwell, what does this exhibit show with regard to the number of Negro and Hispano teachers in Barrett Elementary School? A. At Barrett there are 10 Negro and Hispano teachers.

Q. What does it show in regard to the Negro and Hispano teachers at Stedman Elementary School? A. In Stedman, there are 11.

Q. What is the total number of Negro and Hispano teachers in the subject schools? A. In the 16 subject schools, Montclair, and Montclair Annex have been combined in this table, there are 39 Negro and Hispano teachers. In Stedman and Barrett, 21 of these are concentrated, or over half of the Negro and Hispano teachers are located in the two schools, Stedman and Barrett, out of the total of 16 schools.

Q. What is the racial composition—what would be the racial composition of Barrett Elementary School if the recision were implemented? A. Barrett Elementary is 99.7 percent Negro and Hispano.

Q. What would it be under Resolution 1531? A. Twenty-seven percent.

[149] The Court: What kind of a grouping of elementary schools are you talking about here in Exhibit 9G?

The Witness: 9G?

The Court: Yes.

The Witness: Yes, in the case of Montclair and Montclair Annex, Montclair is a much larger school than the annex; around 660. In the case of Montclair Annex, it's about one hundred eighty.

The Court: But these are schools all of which are located in the northeast area or—

Mr. Barnes: They are the schools, Your Honor, which are affected by Resolution 1531.

The Court: They're all over town; southeast?

Mr. Barnes: That's correct.

The Court: And south central and north central? Very well.

Q. Dr. Bardwell, turning your attention now to Barrett Elementary School, when did that school open? A. Barrett Elementary School opened in 1960.

Q. Have you prepared a map which shows Barrett Elementary School? A. May I leave the stand?

Q. Yes. Would you leave the stand and show the Court the map? That is identified as Plaintiffs' Exhibit 40? A. Yes, this is Plaintiffs' Exhibit 40.

[150] Q. What is the source of the map? A. The source of the map is the 1960 boundary map of the elementary schools given to us by the Denver Public Schools.

Q. Now, have you drawn any extra lines on the map? A. Yes, we have. We have identified here two schools, the importance of which will come out in just a moment; Teller and Steck. This is City Park here. This is 26th Avenue. This is Colorado Boulevard in which there is a fairly heavy black line drawn through here.

Q. All of those lines are superimposed on the map, the source of which was what? A. The 1960 boundary map of the Denver Public Schools; elementary boundaries.

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[153] • • •

Q. Dr. Bardwell, where is the location of Barrett School on that map? A. Barrett School is located on the over-

lay which—in which this has been pasted to plastic and this is the location of Barrett School here. It abuts Colorado Boulevard. At least the playground abuts Colorado Boulevard, and this is 36th Avenue here.

Q. What is the boundary of Barrett School as shown? A. The Barrett School District?

The Court: The school was completed and opened in 1960?

The Witness: In 1960.

Mr. Barnes: The boundaries are shown on this—on this original map and we will have to offer that overlay in evidence.

[154] The Court: We will receive that, too.

Q. All right. You can use the overlay. You can take it out again.

What is the location of the school itself corresponding to the boundary drawn around the school as shown on that exhibit? A. The boundary of the school itself is indicated in red here. The boundary of the school district is indicated as the outline of the yellow portion and one will note here that the school's location reaches to the elementary boundaries themselves to the extreme eastern portion of that particular district. This being Colorado Boulevard right here.

Q. What is the underlying residential composition of that neighborhood as shown by the census tract information? A. In 1960, the year in which Barrett opened its doors to the children, the census tract, 36C, was shown to be 73 percent Negro. In census tract 36B, which contains the northern portion of Barrett Elementary School, the racial composition was 51 percent Negro. On the other

hand, across Colorado Boulevard, which is the dividing line here between these two portions, we see that, by taking the census material, the census statistics from the enumeration district, that the area shown in white was 6 percent Negro, just across from Colorado Boulevard. It might be worthwhile to point out here that Colorado Boulevard itself also extends [155] down through Teller and Steck. However, Colorado Boulevard goes down through the middle of Teller and it also goes down through —not quite the middle, but at least down through the middle portion of Steck itself.

Q. But Colorado Boulevard serves as a boundary between Barrett School and what other school located to the east? A. Stedman School would be located in this area here.

Q. And those are 1960 census tract figures? A. 1960 census tract figures. That's right, sir.

Mr. Barnes: This is Plaintiffs' Exhibit 40, Your Honor. If you want to look at it or I'll just give it to Mr. Kerr—

The Court: Very well.

Q. What was the capacity of Barrett School when it opened, Dr. Bardwell? A. The capacity of Barrett when it opened was 480, but this provided for two special education rooms of about 30 spaces. So this would make an effective capacity less special education of about 450.

Q. Is that a comparatively large or small school? A. It's a comparatively small school.

Q. What is the general size of land upon which the school—the school land upon which this school is built, if you know? A. I'd have to check out the size or the site for [156] this particular—

Q. Let me restate my question.

Does the smallness of site dictate the smallness of the school in this case? A. I wouldn't think so here because this site looks to be reasonably large.

Q. I'm talking about the actual site upon which the school is built; the playground site? A. Oh, the playground itself—I'm not certain whether or not this is compatible with the site size.

Q. Dr. Bardwell, turning your attention to Plaintiffs' Exhibit 42 which you have there and which we have another copy here, will you state what that purports to show? A. Yes. At the time that Barrett opened its doors in 1960, the percentage enrollment in Barrett was about 89.6 percent black or Negro. Stedman Elementary School, located on the eastern portion here of Colorado Boulevard in the white area, had a capacity of around 660 and it was over capacity by about 18 percent, having about 742 students in that year.

Q. Is that shown on the bar graph? A. And that information is depicted on the bar graph here in which we have indicated that Barrett School opened at 100 percent capacity. Stedman, however, was operating at about 118—120 percent over capacity.

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[158] * * *

Q. Do you have another comment, Dr. Bardwell? A. Yes, I would. I think it might be pointed out here, Your Honor, that in the case of Stedman School, which is located primarily in this area that is predominantly white, in comparison to the area over here which Barrett served, that Stedman in 1960 at the time Barrett opened its composition of enrollment was about 85 percent Anglo and

if one keeps in mind here that Barrett itself opened up at 90 percent or 89.6 percent black.

The Court: You already pointed that out, hadn't you?

Hasn't he already testified to this?

Mr. Barnes: We won't ask him to do it again, Your Honor.

The Court: Good.

By Mr. Barnes:

Q. Dr. Bardwell, turning your attention to Plaintiffs' Exhibit 50, I ask you to state what that purports to show? A. Yes, this exhibit has been prepared from the source maps of the Denver Public Schools representing this part of the City of Denver. This is the part of the so-called Park Hill section. This is Park Hill Elementary School boundary in 1961. This is Stedman Elementary School in 1961. This is Hallett. This is Smith. This is Ashley, Philips, Montclair and Montclair Annex, and Montclair being located [159] here. The annex is located over here. The shaded areas are optional areas as of 1961, and optional between Stedman and Park Hill. This shaded area here is located between Hallett and Philips—this was optional between Hallett and Philips, this shaded area here, which was an optional area between Montclair and the annex and—

Q. What is the source of that exhibit? A. The source of the exhibit except for the names which have been put on over here by ourselves is the 1961 boundary map of the Denver Public Schools.

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[162] * * *

Q. Mr. Bardwell, I direct your attention to Plaintiffs'

Exhibit 51, a bar graph, and ask you to state what that purports to show? A. This shows that for the schools, Stedman—and Stedman is located here—Smith, and Smith is located here, serving these boundaries; Hallett is here and corresponds to this right here; and Park Hill corresponds to this particular area. It shows that in 1961 Stedman was over capacity—or was over capacity by the following amount. Its capacity was 630 and the total enrollment at that time was 742 and computation shows that it was about 20 percent over capacity. Smith, on the other hand, in 1961 was under capacity. It had, for example, capacity of 960 with three special education units, and its enrollment however, was 909. In Hallett, it is almost at capacity. It has a capacity of 510 and an enrollment of 495, and this is about 99 percent capacity. On the other hand, in Park Hill we have here an enrollment of 709, a capacity of 660. It is in excess capacity of about 10 percent.

Q. What is the source of the information in that exhibit? A. The source of the information in this exhibit—[163] I'm sure I have it here—is the report, a study of pupil population, school boundaries, February 1962—excuse me—also pupil transportation, school buildings, Denver Public Schools, February, 1962.

Q. Published by— A. Published by the Denver Public Schools.

Mr. Barnes: I offer Plaintiffs' Exhibit 51 into evidence.

The Court: Do you object?

Mr. Creighton: That standing objection.

The Court: The objection will be overruled. It will be received.

(Whereupon, Plaintiffs' Exhibit 51 was received in evidence.)

George E. Bardwell—for Plaintiffs—Direct

Q. Dr. Bardwell, were there changes in boundaries proposed in 1961? A. Yes, there were. There were a number of boundary changes proposed in 1961 and this overlay—

Q. That is Plaintiffs' Exhibit 53? A. Plaintiffs' Exhibit 53. The boundary changes that were proposed by the Superintendent at that time and the source of the information that we have on this is the study report submitted to the Board at that time, indicated that the Superintendent proposed that this area here that is located just east of Park Hill Golf Course be removed from [164] Stedman and placed in Smith, that the area that is just west of Hallett shown here, which is now a part in 1961 of Stedman, be removed from Stedman and placed in Hallett. The optional area between Stedman and Park Hill, the Superintendent proposed that that be placed in Park Hill. The optional area between Hallett and Philips, it was suggested that that be placed in Philips.

The optional area here between Whiteman and Montclair was proposed—it was proposed that that be placed in Montclair. Similarly, the area just south of Park Hill which was in Park Hill at that time, it was proposed to put that into Palmer and the Albion School, which is a small school discontinued about 1962, it was proposed—that was phased out. But that that be attached to Park Hill.

Q. What's the source of that information? A. The source of that information comes about in two ways, the examination of the study report to the Board in 1962—

Q. Is that study report Plaintiffs' Exhibit 52? A. Yes, it is.

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[175] • • •

Mr. Barnes: We would like to recall to the stand Dr. George Bardwell.

George E. Bardwell—for Plaintiffs—Direct

DR. GEORGE BARDWELL, called as a witness by the plaintiffs, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination by Mr. Barnes:

Q. Dr. Bardwell, you are going to need to testify from the chart. Doctor, have you prepared Exhibits 52, 53, 54, 51 and 56 and 55, 57 and 58? A. Yes, I have.

Q. Would you identify those exhibits and state the source of the information on each? A. Exhibit 50 is a 1961 boundary map of the Denver Public Schools for the areas shown. Exhibit 53 are the proposed boundary changes, February, 1962. These boundary changes are shown in yellow. Exhibit 51 is a capacity utilization bar chart. Exhibit 54 is a boundary map in 1962.

[176] The Court: What was 51 again? What did you call 51?

Q. What did you call 51? A. 51 is a bar chart showing capacity utilization of the four schools, Stedman, Smith, Hallett and Park Hill.

The Court: Derived from what source, he asked you?

The Witness: Yes, this capacity utilization chart has been derived from the source indicated here, "Report—A Study of Pupil Population, School Boundaries, Pupil Transportation, School Buildings, Denver Public Schools, February, 1962."

The Court: Go ahead.

The Witness: All right, you have 53, sir?

The Court: Yes.

Q. Exhibit 54 is a boundary map? A. Exhibit 54 is a boundary map of the 1962 boundaries of the same schools shown in the preceding exhibit, showing the effect of the boundary changes in 1962. Exhibit 56 is a capacity utilization bar chart showing the effect of the boundary changes in 1962, and Exhibit 58 is a graph showing the estimated Anglo enrollment.

The Court: Hold up, just a minute. I have to identify these in my notes or they don't mean a thing to me, so just slow down a little bit.

The Witness: Right, sir.

[177] The Court: 56 is a capacity utilization chart, showing the effect of 1962 boundary changes, right?

The Witness: Yes.

The Court: Is that correct?

The Witness: That's right, sir.

The Court: All right, let's go to the next one.

The Witness: And the source on 56 is again the report and recommendations to the Board of Education, School District No. 1, Denver, Colorado, by a special study committee on equal educational opportunity, and this is dated—this is an appendix to that report. Exhibit 58 is the estimated Anglo enrollment, 1962. It is a graph.

Q. The source for that? A. Yes.

Q. What is the source? A. And the source of this is reports of racial and ethnic distribution of students for the years 1963, 64, 65, and division of personnel services, Denver Public Schools, information for 1960 derived from U.S. Bureau of Census.

Q. Do you have 55? Have you identified that? A. There is no 55. Excuse me, 55 shows an overlay of the boundaries not changed in September, 1962. Exhibit 57 shows the Negro population in the Stedman school district by enumeration district in 1960.

Q. And enumeration district is a category of the U.S. [178] Census information? A. Yes, enumeration district is a small geographical area that the Bureau of the Census uses to control the census enumeration.

Mr. Barnes: I would like to offer Exhibits 53, 54, 51, 56, 55 and 57 and 58 into evidence.

Mr. Creighton: I think the Court knows our objection. The basis is remoteness and irrelevancy to all of these.

The Court: I take it your purpose in offering these is to show that in 1962 there was presented to the Board of Education a plan which would have to some degree reversed the trends which have been going on and that this plan was rejected? Is this what you are saying?

Mr. Barnes: That is it in part, Your Honor. We intend to show that the only portions of that plan which were not accepted were those which would have transferred black children into predominantly white schools, and those with regard to the Stedman school district, which was at that time the black school in that area.

The Court: What's your overall object? That's what I asked you. I think I understand what the graphs were seeking to illustrate. In relationship to the issues that we are trying, just so the record will be clear, what's your goal in offering these?

[179] Mr. Barnes: Your Honor, we are interested in showing a pattern of historic acts which lends meaning and substance to the rescission itself which are consistent with it and which will go circumstantially to show two things: One, intent on the part of the Board in rescission, and second, a net effect over the years intensifying and isolating segregation of schools in this part of town.

The Court: Well, Exhibits 50 through 58, noting the objection, will nevertheless be received, and this may prolong the trial, and if you have to respond to this material, why, if you hadn't anticipated it, why, this is a risk we will have to take, I guess.

(Whereupon, Plaintiffs' Exhibits 50 through 58 were received in evidence.)

Q. Doctor, would you comment on what those exhibits show, beginning chronologically? A. Yes, Exhibit 50, showing the original boundaries of the school district in 1961, the hatched area showing the optional areas between Stedman and Park Hill, between Hallett and Philips, between Montclair Annex and Whiteman. In 1962, Superintendent Oberholtzer made certain proposals before the School Board, which I indicated in yellow. It is interest to note that in each case of the proposed boundary change, these areas tended to be detached and indicated the direction in which they would become detached, all of these changes going [180] south and west in this direction.

Q. East, I think. A. What?

Q. South and east? A. South and east. At the time, in 1961, Stedman was overcrowded to the extent of 18 percent. Smith was undercrowded. It was below capacity.

Hallett was slightly below capacity and Park Hill was slightly over capacity. The Board adopted each of those changes except two in number—three in number. Those three that were not adopted bounded the elementary school district of Stedman, which at the time we had estimated on the basis of Exhibit 58 was between 35 and 50 Anglo. The effect of the Board's actions in making those boundary changes with respect to capacity are shown in Plaintiffs' Exhibit 56, in which we note that Stedman was still at the same—to the same extent over capacity before and after the boundary changes. Smith declined somewhat in actual utilization of its capacity, considerably below capacity at that point. Hallett was brought up to capacity and Park Hill enrollment then exceeded the capacity of the school.

To illustrate the distribution of the Negro population in Stedman, which is the school on which attention is focused, we see that by enumeration district, this being Stedman Elementary School District here, that there was a tendency by these boundary changes, or the lack of making [181] these boundary changes to aggravate and intensify the containment of the Negro population in Stedman at that time.

Here, by enumeration district, we find that the Black area is between 16 and 20 percent Negro. The surrounding areas that are hatched are between four and five percent Negro. The remaining part of this exhibit, the remaining school districts being clear, were less than three percent Negro in 1960.

Q. And the boundary changes which were effected pertain to those areas which were less than three percent. A. Yes, they do, sir.

George E. Bardwell—for Plaintiffs—Direct

Q. I believe you related yesterday the number of Negro students in Stedman in 1961. A. There is an estimate here in Stedman in 1961, an estimate here of between, oh, around 60 percent Anglo, which would make it about 40 percent Negro.

Q. Doctor, I hand you—I guess we will point out on the board—we need another board. Doctor, have you prepared Exhibits 70, 71, 72, 73, 76, 75 and—well, stopping at 75. A. Yes, I have.

Q. Would you identify those exhibits and the sources from which they are taken? A. Yes, Exhibit 70 is a map of the Park Hill schools being considered in 1963. This is an official boundary map [182] of the Denver Public Schools.

The Court: The year 1963, you say?

The Witness: Yes, sir.

The Court: Very well.

A. (Continued) Exhibit 71 is an overlay showing the boundary changes for those schools in 1964. Exhibit 72—the source on that, sir, is the 1964 boundary map of the Denver Public Schools. Exhibit 72 is an official boundary map of the schools in 1964 of the Denver Public Schools.

The Court: Hold up. Any members of the press have to sit outside of the rail. We reserve this space in here for the lawyers and for the principal witnesses. I don't know whether there is anybody here or not, but if there is, why, I will have to ask you to retire. Go ahead.

A. (Continued) Exhibit 72 is a portion of the official boundary map of the Denver Public Schools in 1964.

Exhibit 73 is an overlay which portrays by school year date the location of mobile units in the elementary schools. Exhibit 75 is a graph showing the Anglo enrollment in 1963 and 1964 on a percentage basis for the seven schools being considered. Exhibit 76 is an illustration of the 1964 changes and the corresponding estimates of the percentage Negro in those boundary changes, as well as the percentage Negro population in the elementary school district.

Q. What is the source of the census information on [183] Exhibit 76? A. The source of the census information on 76 is the 1966 census study that I prepared and by subtracting from the 1966 census figure information on length of residency, between two years and under, the figures were derived in each of the yellow areas as so indicated.

Q. Is there any other information on any of these exhibits which was not issued by the Denver Public Schools? A. All of the remaining information are official records of the Denver Public Schools.

Q. Doctor, I hand you Exhibit 101 and ask you to identify that. A. Yes, this is a tabulation entitled "Mobile Classrooms Costs", which indicates the date of purchase and location of the mobile units located in the Denver Public School district.

Q. Where did you obtain that document? A. This document was obtained from Dr. Armstrong's files several days ago. I personally took this out of his files and had it duplicated.

Mr. Barnes: We would like to offer Plaintiffs' Exhibits 70, 71, 72, 73, 75, 76 and 101.

Mr. Creighton: We make the objections to all of these on the grounds of relevancy, Your Honor, and

in addition, as to Plaintiffs' Exhibit 76, we object on the grounds [184] there has been no foundation laid to show the admissibility of the estimates and figures shown thereon.

The Court: Well, what do you propose to illustrate with this?

Mr. Barnes: Your Honor, this evidence is offered to show the concentration of Negro students as they increased in 1964 and 65 in mobile units in Stedman and Smith, Hallett, and to a lesser degree in Park Hill and Philips, and offer to show that the boundary changes intensified the segregation in Hallett and schools which became segregated in that year.

It also tends to show the general movement of boundaries continuous from the last series to the south and east in advance of the inward movement of the Negro population.

The Court: Well, there are no boundary changes depicted here, are there, in these exhibits?

Mr. Barnes: Yes, Your Honor, these are a series of boundary changes which occurred in 1964.

The Court: Oh, 71 show that?

Mr. Barnes: That's correct.

The Court: When did you see these?

Mr. Creighton: Excuse me, Your Honor?

The Court: When did you see them?

Mr. Creighton: When did I see these exhibits? We finally got them the night before this hearing commenced, [185] about 9:30.

Mr. Barnes: I think these were supplied to counsel Saturday, Your Honor.

Mr. Creighton: I beg your pardon. These were supplied last Saturday, and these were part of the series it had been suggested might not be used, but the fact is we have had them during that time and we object to them as to whether they fairly relate to the figures the school district possesses, and on that ground these are properly based on our figures, except for 76.

The Court: Are they going to prejudice you in the defense of your case?

Mr. Creighton: Your Honor, it simply expands the scope of this hearing back to actions taken by other boards in 1964 and 65 in this instance. I think I've explained we feel the narrow issue is what this School Board did this spring. No, I don't think it is going to prejudice us. It just means we have got perhaps more to deal with in this hearing.

The Court: Very well, they will be received.

(Whereupon, Plaintiffs' Exhibits 70, 71, 72, 73, 75, 76 and 101 were received in evidence.)

The Court: I think, though, we ought to make an inquiry about where we are going here. Have you changed your plans? Have you now decided to throw everything but the [186] kitchen sink into this hearing, or including the sink?

Mr. Barnes: No, Your Honor, there are 116 schools in the district and this evidence relates only to those schools which were involved in these resolutions and in the rescission and which the resegregation of which will be accomplished if the rescission is implemented.

There are examples of optional transfers and boundary changes and examples also of schools which are far more segregated than these, which we intend to offer in the main hearing. There is a great deal more, but in a hearing of this kind, when we need to prove intent circumstantially, it seems to us to be relevant to offer all that relates to these schools.

The Court: Then, you will complete your presentation as to the Park Hill School in this hearing, really?

Mr. Barnes: That's correct, Your Honor. We do not anticipate any substantial more degree of evidence about Park Hill. We have investigated that as well as we can with the possible exception of optional transfers, discriminatory transfers, from the Park Hill area, the evidence of which we haven't got complete at this time.

The Court: Very well.

Mr. Barnes: There may also be, I am reminded by counsel, some curriculum differences, but we don't know of those at this time.

[187] Q. Doctor, will you explain what the exhibits that you have on the board show? A. Yes, a number of observations flow from these exhibits. Beginning with the 1963 boundaries as they exist, we notice—

Mr. Creighton: Excuse me, Your Honor, the witness was asked what they show and not to make observations, and I believe he ought to understand that.

The Court: Well, I don't know whether he is responding or not so far. I can't tell. We will just have to test him out. Go ahead.

A. (Continued) These exhibits show, beginning with Plaintiffs' Exhibit 70, the original 1963 boundaries of the school district. In 1964, these boundary changes were proposed. It is noted here that in each instance each boundary change have a general direction of being detached in a school in a more northern part, the more westerly part, so that the general direction of the detachment is in a southeasterly direction.

If one compares the percentage Negro in Stedman, Hallett, Philips and Park Hill, it is noted that in each of the instances of the detachment that the percentage Negro is smaller than the actual area to which the boundary change was originally states in 1963. This is true for Stedman, in which Stedman is 43 percent. The area detached to Hallett is five [188] percent. And Hallett, the area is 25 percent as an entire area. It is 20 percent in population, the area that is detached. Similarly, for the optional area of Stedman, four percent to two percent and the same pattern reveals itself when we examine the collection of the boundary changes that were suggested in 1964. This was in response to the very massive movement of the Negro population into the Park Hill area from the period 1960-1966. The net consequence of this was that in each instance, Stedman, Smith, Hallett, Philips, Park Hill actually, and Montclair, the percentage Anglo enrollment declined from 1963 to 1964, and in fact in the case of Hallett dropped from 65 percent Anglo enrollment to around 40 percent by 1964.

The response then for this movement into the Park Hill area was the building of a substantial number—in fact, 28 of the mobile units out of the 29 in the school district at that time, were located in the Park Hill area, as shown in Exhibit 73. Here, we find that twelve units were placed in Smith, four units in Hallett, four in Park Hill, in 1965. In

the preceding year, four units were placed in Philips and four units were placed in Stedman, suggesting that the response here was—the response to this Negro movement in population was the concentration of the school population, further concentrated by the use of mobile units.

Q. Dr. Bardwell, I hand you what have been identified [189] as Plaintiffs' Exhibits 7-G, 9-J and 8-I, and ask you to identify those. A. 7-G is the graph of a segregation index for the senior high schools from 1963 to 1968, showing the effect of the rescission of Resolution 1520 on those senior high schools. Attached to that exhibit is an explanation of a mathematical foundation for the construction of this index. Exhibit 8-I is a similar graph for the junior high schools subjected to Resolutions 1520 and 1524, and 9-J is a similar photograph applicable to the elementary schools subject to Resolution 1531.

Q. What is the source of the figures or the information that went into the making of those graphs? A. The basic statistical information has been derived from the distribution of students by race and ethnicity, from the division of personnel services, in 1963 to 1968.

Mr. Barnes: I would like to offer Plaintiffs' Exhibit 7-G, 8-I and 9-J.

Mr. Creighton: If I may voir dire, it is just possible we will want these admitted ourselves, Your Honor.

Voir Dire Examination by Mr. Creighton:

Q. Dr. Bardwell, your explanation of your methodology is a two-page explanation, is it not, in mathematical terminology? [190] A. It is.

George E. Bardwell—for Plaintiffs—Voir Dire

Q. As a non-mathematician I'm trying to understand this. Do I understand, Dr. Bardwell, what you have done here is show in a graphic form the extent to which a school population departs in its ethnic proportions from an ideal school, or I should say a hypothetical school, which represents the ethnic proportions of the school district as a whole? Is that what it does? A. That's right, sir.

Q. What are those ethnic proportions of the school district as a whole which you used? A. Abstractly, and these are at each end of the spectrum in which a totally segregated school then would have an index of 100, a totally desegregated school would have an index of zero.

Q. Yes, but my question was, what was the hypothetical sub-district that this compared? A. In the case of a subgroup of schools that would have a segregation index of 100, let's say, this would mean that all of the students that were Anglo would be confined to a certain set of schools and all of the students that were minority, namely Negro and Hispano, would be confined to another set of schools.

Q. Dr. Bardwell, do I understand that you—you have [191] got to know your methodology and decide about this—did you start off with a hypothetical city-wide sub-district which—I'm using figures from my recollection—which would be something on the order of eight or ten percent Negro, ten or twelve percent Hispano, and the balance Anglo? Is that what you started with? A. Well, no, if we start here then with a segregation index of zero—

Q. What would that kind of school have? A. Then, this would constitute that abstract situation in which in each of the schools in a sub-district there would be the same proportion in those schools as would be reflected in the district as a whole. I might add that this is much like a cost of living index, in which one establishes the base, let's say, 1957

to 1959 prices. This is equal to 100, and one would like to know what departure from that particular index—whether or not prices decreased or increased. You have an objective way of comparing a very large mass of data, bringing it down into a single index, which provides a very convenience and very meaningful way of analyzing a very complicated concept like segregation.

Q. This may prove to be that kind of approach, but it is just not clear to me, Doctor. You speak of sub-schools, and I will take Exhibit 7-G, the one first mentioned. By sub-schools, you mean which? Senior high schools? [192] A. We mean in this case East, George Washington and South.

Q. Now, you have lumped them all together. A. As a group.

Q. And compared it with the School District No. 1 as a whole. A. That's right, sir.

Q. Do I understand you to say that these three schools lumped together depart from what you called the abstract sub-district on the order of 40 to 50 during the period involved? A. I will trust your reading of the graph on that. I assume, yes, that's right.

Q. And if the three school districts, sub-districts, lumped together, had exactly mirrored the ethnic ratios of the city as a whole, it would have been zero? A. That's right.

The Court: I don't think you ought to go into the merits of these on a voir dire examination. You are ascertaining method or testing, I suppose, the accuracy of the exhibit.

Mr. Creighton: Well, if we understand—

The Court: I mean, I do not think it is proper to cross-examine him on them on whether they are—

Mr. Creighton: Well, these have been offered, Your Honor, and—

[193] The Court: —at this time. Eventually, I suppose you will have a full opportunity to cross-examine every aspect of them, but this is preliminary examination to determine whether they are authentic, sufficiently so to justify their being received.

Mr. Creighton: Well, I'm going to object to the office of the exhibit on the grounds that it is not relevant to the issues in this hearing.

The Court: You think that further questioning will have brought about the results that you more or less held out to us that you agreed to their being received if you have some opportunity to question?

Mr. Creighton: Well, Your Honor—

The Court: Were you disappointed in his answers? It seems to me you agreed with everything he said.

Mr. Creighton: Well, if I may go a little bit further?

The Court: I just don't know what you had in mind.

Mr. Creighton: Well, I hope I can discover that the methodology here is such that we can agree that it shows fairly what is in issue in this hearing, and I am still inquiring about his methodology in producing this exhibit.

The Court: Well, go ahead then.

Q. Now, this relates only to school populations? [194] A. That's right. Populations, that's right.

Q. And the terminal here on each of these exhibits is 1968? A. That's right.

Q. What school year do you mean by that? A. That would be the school year 1968-69.

Q. This past year? A. That's right, sir.

Q. And 67 would be the year before that? A. That's right.

Q. And the data— A. Now these are the only data, of course, that are available on the school district, as you know, that gives a breakdown by race and ethnicity. In fact, the only figures available from the school district extend from 1963 to 1968, in which the year shown at the bottom refers to the school year beginning in September of that year. Presumably, it begins in September.

Q. I think I have only one more question. You have shown one part of your diagram here, rescission of resolution—I think it refers to 1520 in the case of Exhibit 7-G for 1968, which you tell us is last school year—Have you again assumed that next fall is going to have last year's racial composition under rescission of the resolution? A. I'm making the assumption here from the School [195] Board figures and the review of the composition and our own calculations from that.

Q. Well, you understand, Dr. Bardwell, that the school district has not projected the effects of the new plans? A. And the racial composition of each of these schools, the assumption being made had that plan been in effect in 1968-69 school year, this could be the effect on the segregation index for those sub-schools.

Q. Oh, you— A. Otherwise, it wouldn't—

Q. If 1520 had been in effect during the last school year, it would have produced the Black line, is that what you are saying? A. That's right.

Q. But, that's not what the school district's figures say. A. These are derived from directly those—

Q. Don't the school district's figures say that implementation of 1520 would result next year in certain estimated ethnic patterns? A. That's right.

Q. And I am just trying to establish what rescission of resolution is based upon, what assumptions? A. The rescission of the resolution is based upon the [196] ethnic and racial distribution of those students of each of the subschools under the resolution and the Black line which departs and shows the index of around 25 would be based on the assumption that in order to have a means of comparison the year 1968 was shown, what the effect of that resolution would be upon pupil membership.

Q. For last year or next year? A. For 1968-69. In other words, had the resolution itself been in effect.

Q. Last year? A. That's right.

Q. It would have produced the Black line? A. That's right. In other words, if we are to have a meaningful comparison on a time basis, instead of projecting the racial composition under the rescission of the resolution, the information is much more accurately reflected if we use the racial composition had those racial compositions been in effect during 1968-69, and what we are attempting to show here by this graph is a depiction of the magnitude of the effect of the rescission on comparable periods of school populations at a single point in time.

Q. What I'm trying to get you to admit, I think, Dr. Bardwell, is that you have applied 1520 to last year's school year rather than next year. A. Absolutely.

[197] Q. And when you say rescission of resolution, that's your way of showing last year's figures. A. That's right, last year's figures.

Mr. Creighton: All right. We have no objection.

The Court: Well, they will be received, 7-G, 8-I and 9-J.

(Whereupon, Plaintiffs' Exhibits 7-G, 8-I and 9-J were received in evidence.)

Direct Examination by Mr. Barnes (Continued):

Q. Would you explain what graph 7-G shows? A. What graph 7-G shows is a segregation index for the senior high schools which is fairly flat over the period 1963 to 1967, lying between about 45 and 50 percent, and in 1967 where we make the comparison for the resolution before and after rescission, that we show that we—on the basis of 1968 enrollment figures that the segregation index would be about 50, that the effect of the resolution on the segregation index is to decrease that index to a value of around 28.

Q. What does the exhibit show with regard to the changes which occurred in the segregation index in the years 1963 and following? A. Would you repeat the question?

[198] Q. What changes occurred, if any, in the years 1963 and following in the segregation index up to the point of implementation of the integration resolution? A. I think it is clear from the graph, Mr. Barnes, that this index shows that the degree of segregation for these particular schools remains fairly constant for the period 1963 to 1967, between a value of about 45 to 50.

Q. Handing you Exhibit 8-I, what does that show? A. This is a corresponding graph of the segregation index for the junior high schools that are affected by these two resolutions, and again in 1963 an approximate value for this index is around 63, and again it remains between the

value of around 63 to 70 over the period 1963 to 1967. Based upon the 1968 school enrollment figures and the distribution by race and ethnicity, we would have then a segregation index on that basis of around 63 to 64. The effect of the resolution is to decrease that index on the basis of that same year comparison to a value of around 35, so the degree of segregation compared to what we would have under the rescission of the resolutions around 65 would be decreased to about 35 under the resolution.

Q. Handing you Exhibit 9-J, what does that show? A. 9-J is a similar graph for the elementary schools, in which there have been, starting in 1963, a gradual trend from about 82 down to about 65 in 1967 of the segregation [199] index. In 1968, comparing the two values for the elementary schools under the resolutions, we would find that the 1968 enrollment would show an index of around 60. The effect of the resolutions would decrease this index to a value of about 43, so there have been a decline in that sense of about 17 percentage points in the segregation index under the resolutions, and this would give an approximate effect of desegregating, the desegregating effect of the resolutions for the elementary schools.

Q. Referring back to Exhibit 7-G, 8-I and 9-J together, do they reflect any other substantial desegregation of the impact equivalent to that achieved under the resolutions? A. No, they do not.

Q. Do these Exhibits 7-G, 8-I and 9-J pertain simply to the sub-schools under the resolutions? A. They do.

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[200] * * *

Cross-Examination by Mr. Creighton:

Q. Dr. Bardwell, I plan to go through several exhibits that you introduced more or less in the order that you introduced them. I would like first to discuss Exhibit 8-F with you. I hand you the exhibit. This shows, does it not, and I might cite for the Court's benefit this exhibit is labeled as showing relationship between ethnic compositions of certain junior high schools and the number of Negro and Hispano teachers in those schools—Dr. Bardwell, the first column after the school name shows what the school district projects as the percentage of Negro and Hispano students in those schools next fall if 1520 and 1524 have been implemented. A. Yes, sir.

Q. And the next column which you call "After Rescission" is in fact what those schools have in the way of ethnic proportions last school year, according to the school district's figures? A. That is correct.

Q. And, finally, in the third column, you have put not a percentage but the absolute number of teachers, have [201] you not? A. That is right.

Q. Taking Smiley, for example, you have noted that there are 23 Negro and Hispano teachers there, according to school district figures last year. A. That's right.

Q. Do you know what that would be as the percentage of total number of teachers there? A. I have that in another exhibit. This amounts to—I will have to—

Q. Do you know at the moment? A. No, I do not.

Q. If I suggested to you that the same information you have been using shows that last year there were 96 teachers at Smiley, would you accept that as probably the figure? A. If I am not held to it.

Q. And as a mathematician, it would be about what percent? A. It would look to be about 25 percent.

Q. As a matter of fact, isn't it at best a misnomer to label this "concentration of Negro and Hispano teachers"? Wouldn't a percentage have shown that better? A. Well, not necessarily, sir, because what we are talking about here, and I think this is a fair depiction of the information, we are talking about the number of Negro [202] and Hispano teachers located in those subject schools. Now, since there are 80 of these teachers altogether, then it seems to be a fair representation of the information to show in which schools those particular teachers are in fact concentrated, and I can't think of a better word for it. This would mean that 37—

Q. By concentration, then you are not talking about concentration at a particular school, but these particular schools? A. Yes, that's all we are comparing in this exhibit are the subject schools under the two resolutions.

Q. All right, I'm going to hand you next Exhibit 8-G, which again shows as you have labeled it "concentration" and here again you have used and these are in the same junior high schools, are they not? In fact, Dr. Bardwell, isn't what you have done in 8-G is simply make a bar graph out of those absolute numbers on the right hand column? A. That's exactly what was done, that's right.

Q. You are calling it there again concentration of teachers? A. That's right.

Q. Do you happen to know the total number of teachers, say, at Kunsmiller or Hill? A. I have those in my records and I—if you would like me to—

[203] Q. Well, from your present knowledge of all of these figures, Dr. Bardwell, would it be fair to say if this bar graph were shown as percentages rather than absolute

numbers, the percentage of Negro and Hispano teachers at, say, Kunsmiller and Hill would be higher relatively to Smiley and Cole than here shown? A. If we take the number of teachers, and they tend to be fairly uniform among the subject junior high schools, then whether one uses numbers or percentages it's really immaterial, but it is true, as I recall the figures generally, that Cole and Smiley do have more teachers generally than some of the other junior high schools shown here, so the percentages would decrease these bars somewhat. The extent to which this decrease occurs, I am not willing or able to testify.

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[204] • • •

Q. Let's start with 40, the base exhibit, where you have shown percentages which you say are taken from census tract data for 1960. A. I might say here—

Q. No, let me frame a question, please. Did you further refine the two census tracts to the west of Colorado Boulevard by enumeration districts? A. This information here—

Q. Did you or did you not, please. [205] A. No, I do not believe we did.

Q. How many enumeration districts are in those areas marked 51 percent and 73 percent? A. In this case, if my recollection is correct, there are two enumeration districts from the census tract 36-C and there are—

Q. Let me interrupt. 36-C is the one shown as 73 percent? A. As 73 percent.

Q. And the one marked 51-C is census tract number what? A. And census tract 36-B is 51 percent.

Q. Now, those census tracts are broken down into enumeration tracts, aren't they? A. That's right.

Q. And you are telling me there are how many in each of those? A. It is my recollection, so I can't be held to that.

Q. Yes. A. It is my recollection that there are two here.

Q. You are indicating 36-C? A. 36-C. I think there are two here, and there are two here, but I can't—

Q. You are indicating for that answer 36-B, are you not? [206] A. Yes, that's right.

Q. Do you recall what the enumeration tract showed as far as percentage? A. I will have to go back to my notes. I don't know that I have them here. They are in large bound books that are just simply too bulky to carry around, but I would be more than happy to furnish the information.

Q. Were these two enumeration tracts studied intensively in the preparation of your report on Park Hill? A. No. Well, yes, the information that was extracted from the census reports of the 1960 census tract of Park Hill is the 36-C and 36-B. This is the so-called Clayton Park area of the city, in which there was a large area of movement of Negroes toward Colorado Boulevard.

Q. You considered these two in your Park Hill survey? A. No, I considered more than that.

Q. But you did consider these? A. That's right.

Q. Isn't it possible, Dr. Bardwell, that if you had broken these two census tracts down by enumeration district you would have found differing percentages in the several enumeration districts? A. Oh, this is quite true.

Q. And isn't it possible basing this question really on your report that the westward, the westerly enumeration [207] tracts, in each of these, would have higher Negro percentages than the easterly? [208] A. I think this is generally true, but I caution you when you deal with a smaller area, smaller subjects, on enumeration districts, like this, that one can be fooled in the sense that certain of these enumeration districts will show, for instance, a higher percentage of Negro than census tract as a whole

and not necessarily in the path of the migration of the Negro families during that period.

This is particularly true in the northern part of this area.

Q. But, there would be differences? A. Oh, yes, there would be differences.

Q. Dr. Bardwell, I don't mean to keep you on your feet any longer than necessary, but I must move to your next series which involves some displays. May we have the 50 series?

Let me call your attention, Dr. Dardwell, to Exhibit 57, which is an overlay, is it not? Here, you did use enumeration districts, did you not? Here, you did use enumeration districts, did you not? A. Yes, we—

Q. That's all, that was my question. Do I understand that the green portion of the Stedman—the two green portions, the dog leg and the rectangle, in the Stedman district — A. These three here, this one and this one and this one?

[209] Q. Well, they are—the one on the south is contiguous, is it not? A. Yes.

Q. Those two green portions, overly, do they not, largely areas in which there is generally speaking a low percentage of Negro population by enumeration district in 1960? A. That's true, only part of the—

Q. Then, Dr. Bardwell—

Mr. Greiner: Your Honor, might the witness be allowed to finish his answer?

The Court: Yes.

A. I might point out, Mr. Creighton, that unfortunately enumeration district population in 1960 is the smallest subunit of population we could possibly get and, there-

fore, to apply that population directly to the green areas we have used those enumeration districts which were our most appropriate, most applicable, because those are the enumeration districts that are coextensive, as best we can, with the green areas that we have; that's right.

Q. But if I heard the first part of your response, you agreed that the green areas overlie largely white areas. A. That's right.

Q. And, therefore, to have moved them to Smith and Hallett would have been to take substantial largely white [210] pupils according to your methodology out of Hallett or out of Stedman and into Smith and Hallett? A. I am not certain I can say that. At least, it would be part of this area here. You see, I do not know exactly what blocks are assigned to this particular green area. What this is is a general depiction showing that the entire Park Hill area, the area that was coextensive with Stedman, was by far more or higher percentage Negro than any other part of Park Hill. What would have happened in particular with these particular green areas going out into Smith or from Stedman to Hallett from here to Park Hill is largely an unknown factor. One would have to estimate this in some way. It could well be, and in fact from my census I can assert that the area in which many of the Negro families moved first into Park Hill in the early stages or early parts of 1960 was precisely in this area here with respect to the green area right here.

Q. You are indicating the northerly green area in the Stedman district? A. Yes, but, nevertheless, in terms of time this area here was essentially the first area in which Negro concentration became higher than other parts of Park Hill.

Q. Dr. Bardwell, I am not sure I understand to what

extent you are willing to interpret this, but I will ask this question once more. Isn't it true from that exhibit that [211] if the green areas had in fact been moved from Smith and Hallett it would have subtracted largely white circles from the Stedman school? A. I cannot say that. I cannot say that, no.

Q. Would you admit that is a possibility, one of the possibilities? A. Obviously, yes.

Q. Now, Dr. Bardwell, let me direct your attention to your Exhibit 58. I believe you told us that the point on the upward axis—what's that called? A. This is called the ordinate, "Y" axis.

Q. "Y" axis? The points on the "Y" axis for 1960 are taken from the census? A. Yes.

Q. And the points on that axis for 1963, '64 and '65 are taken from school district data? A. That's right.

Q. What you are trying to show here, as I understand, is what might have been the case in 1962, for which you don't have that kind of data. A. Yes.

Q. And you put some rectangles there opposite the "Y" axis for the several schools? How did you determine those rectangles? A. From a mathematician's point of view, a [212] mathematician would simply draw one single line through the points.

Q. That would be called interpolation? A. Yes. Here, we wanted to give our analysis the widest latitude that we possibly could, and, here, for example, in the case of Stedman, even though Stedman at that particular time in 1962, according to our estimates, was between 30 and 45 percent Anglo, that the analysis still stands. In other words, the analysis itself is firm enough, even allowing a wide latitude of error in the estimates of the Anglo population for each of those schools.

Q. You have determined for yourself the latitude of error that you want to admit to by the rectangular bars? A. Well, some common good sense goes into this, from my knowledge of population movements.

Q. And this in turn is based on your study of Park Hill? A. Well, a number of other studies, as well, that there is something inherent in the fundamental nature of sociological populations that one does not have when you have evidence as compelling as this to have the intermediate years between '63 and '60 to go all over the chart. Things just don't happen that way. They don't happen in natural sciences or sociology, either.

Q. Even assuming the lower limits of your margin [213] of error, is it fair to say that the decline in Anglo enrollment peaked out in 1962, and that thereafter the decline rate modified consistently? A. Well, I am not quite sure I know what you mean by peaked out.

Q. Bottomed out, I should have said. A. Well, it is still, of course, declining.

Q. Yes, but at a lesser degree. A. It would have to, sir, because you can't have less than zero percent Anglo.

Q. I suppose not. A. No. In other words, you would be going off the graph here, of course, if you were to have a continuing series of—if the interpolation were extended in a straight-line manner as you are perhaps implying, then you would go below zero percent Anglo, and that, of course, is impossible.

Q. Now, you do not have to extrapolate after '63 because you have data. A. That's right.

Q. May we have your 70 series? And where is 76, Dr. Bardwell? A. Right here.

Q. In the lower left of that display? A. Lower left.

Q. Now, the arrows, will you tell us again, the [214] arrows represent what? A. Want me to illustrate? The arrow here, for example?

Q. You are referring to Hallett and Phillips. A. Referring to Hallett school district and the boundary change in the southeast part of Hallett, in which the figure on it is 20 percent.

Q. Yes, what does that mean? A. This 20 percent means that our estimate here of the proportion of the Negroes in that particular area—

Q. That's your professional estimate? A. That's right.

Q. Excuse me, go ahead. A. That the proportion of Negroes that were transferred out of Hallett because of that boundary change into Philips was 20 percent.

Q. 20 of the previous Hallett percentage? A. No. No, sir. 20 percent Negro.

Q. You mean of those moves, 20 percent was Negro? A. That's right, sir.

Q. What is the largest figure in the Hallett subdistrict, 25 percent? A. 25 percent refers again to estimates as best we can determine.

Q. From what, Dr. Bardwell? [215] A. Well—

Q. From what dates? A. Well, this 25 percent again is from the 1966 census, or, I mean census of Park Hill.

Q. That is your census? A. That's right.

Q. Your census indicates to you that Hallett subdistrict had 25 percent Negro in 1964? A. That's right.

Q. After the move or before? A. No, this was before the change. In other words, the entire district, subdistrict of Hallett, before this boundary change was actually made, is 25 percent.

Q. All right. A. Similarly, for the other subdistricts as well.

Q. All right, then, taking your example, the Hallett to Philips arrow, you figure that 20 percent of those moved were Negro? A. That's right, sir.

Q. Doesn't your '66 report show that there are higher concentrations of Negro residential patterns in the northern part of the Hallett district at that time than in the southern part? A. In this part up in here, yes, that's true, as far as the area is concerned, that's right. It may not [216] extend over to this area here. It is only in this part in here that we are talking about, but in general the northern tier of the areas that were in that 1966 study do show a higher proportion of the Negro residents.

Q. So, if something off the southern tier of Hallett would be moved to Philips, it would I suppose on that data involve a lesser percentage of black children than the district as a whole? A. Well, we are depicting in this information as accurately as is conceivable from the only possible source I know, and that is from my 1966 census, and those data indicate with the smallest subdistrict that I have in that information that this is the 20 percent out and this is 25 percent corresponding to the entire district.

Now, in terms of the precise location, we could go back to the individual blocks and determine that precisely, but this is an enormous task.

Q. Doesn't your 1966 data indicate, for example, the south and east part of Philips district was almost totally white at that time residentially? A. That's right.

Q. Therefore, movements to the contiguous areas of Montclair and Ashley would necessarily on that methodology move only white children? A. You mean actually here?

[217] Q. From Philips to Ashley. A. Yes, that's right.

Q. Moving from that part of the Philips district? A. That's right.

Q. And no other part of the Philips district was contiguous to Ashley, was it? A. Well, yes, this part in here, northerly, the northern part of the boundary changes.

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[218] * * *

By Mr. Creighton:

Q. Dr. Bardwell, still with reference to the 70 series and particularly to Exhibit 71, that shows changes in the school district in fact made in the elementary schools for the school year 1964 and 1965, does it not? A. Yes, sir.

Q. And that was after the receipt by that Board of the March 1st, 1964, special study committee report, was it not? A. That's right.

[219] Q. Are you familiar with that report? A. I am.

Q. Would it be fair to say that that report says, with respect to mobile units—

The Court: By the way, what's the exhibit number?

Mr. Creighton: This is Exhibit 20, Your Honor.

Q. —that the committee approves the use of mobile units temporarily to relieve overcrowding. However, care should be taken that these facilities should not become permanent. Is that your recollection of the recommendation? A. Something to that effect. I don't know the exact wording and perhaps I ought to see it.

Q. Certainly. I'm showing the witness Page B10 of Exhibit 20.

Is that a satisfactory statement of the study committee's recommendation? A. Yes.

Q. And in your 1966 study, Dr. Bardwell, and that for the Court's reference is Exhibit 38, wasn't one of your observations from your data that there had been, during the period you substituted up to 1966, and particularly in the years immediately preceding 1966, in the area we're talking about, there had been a rapid immigration particularly to the northern part of this area of Negro families; that these Negro families had on the average more school children per [220] family than the white families they apparently replaced? A. (Nods affirmatively.)

Q. And this happened very rapidly? A. Yes, this points up the variation in the percentages here shown in population statements here of 43 percent while, for example, 43 percent of the population in 1964 was Negro at Stedman, yet, on the other hand, the proportion of Negro students at Stedman was 85 percent and the difference in that percentage reflects that.

Q. That rapid change? A. The difference between percentage of Negro families and the percentage of students.

Q. There was a rapid change not only of racial composition but of family size? A. There was.

Q. Do you think the use of mobile units—

The Court: Was this a trend that was apparently at some earlier times?

A. A trend?

The Court: Yes.

The Witness: The trend had been manifested starting in 1960, in which one finds—and we're talking about Park Hill as a whole—that the population may remain stable for that entire period of time,

the same number of people in Park Hill over the six-year period, but the number of Negro [221] persons increased from 520 to 12,200 in the span of six years.

Q. Do you have any knowledge as to the deployment of mobile units in the elementary schools involved in this 70 series today? A. Yes.

Q. Are there mobile units at Ashley, for example? A. Yes. I have forgotten how many units at Ashley, and if my recollection is correct there are two. But at Smith we still have and even after this long period of time, after 1964, which is a period of over five years, we still have mobile units at Smith, four at Stedman, and four at Hallett. Park Hill only within the past few months—only in the past few months have the mobile units been removed from Park Hill. Still, the same four mobile units at Philips and so, since the 1964 report indicated the mobile units ought to be temporary in nature, here we have the same mobile units extending still today.

Q. Have there been any permanent facilities built in this area during this period; this time? A. The most recent one is the—yes, there have been some additions at Park Hill. This is as Mr. Armstrong informs me in the past year, the Park Hill addition has been made of around 300.

Q. Three hundred what? [222] A. Three hundred spaces; so, increased capacity.

Q. Do you know whether those are classrooms? A. Yes, classrooms.

Q. Finally, Dr. Bardwell, referring to your segregation indices, which are Exhibits 7G, 9I and 8I, I believe you can resume the witness stand—let me take the one that pertains to the most schools first, and that is Exhibit 9J.

Would you like to have it in front of you? A. Yes, please.

Mr. Creighton: Perhaps, Your Honor, those three exhibits I just mentioned, if I could have them.

Q. I hand you, Dr. Bardwell, Exhibit 9J. On voir dire I didn't discuss this with you, Dr. Bardwell, so I must ask you what pool of schools, what group of schools did you use to construct this exhibit? That is to say, what segregation index as shown for what schools? A. These are the 17 elementary schools that we have used as coming under the effect of the Resolution 1531. They include such schools, for example, as Stedman, Ashley, and the numbers of schools we have indicated in previous exhibits. I could list you—give you a precise list of those, if you like.

Q. Well, it's 17 elementary schools? A. That's right.

Q. And I suppose, if you narrowed your focus to one [223] school at a time, an all-white school would have a segregation index of 100, would it not? A. That's right.

Q. And an all-black school would have a segregation index of 100? A. That's right.

Q. So that when you start lumping schools together, all-white schools tend to raise the average, and all-black schools tend to raise your index? A. That's right. If the index is applied, for example, to a school like Stedman, then it's a segregation index.

Q. Just to Stedman. Let's apply the index to Stedman. A. If the resolution itself were rescinded, then the segregation index for Stedman would climb to 100. That means from the current status of Stedman, assuming the resolutions are in effect, would be a segregation index applied to Stedman very close to zero. Yet, if the resolutions were rescinded, then this segregation index for Stedman would be, I think, fairly close to 100.

Q. It would remain 100. When you say rescinded, you mean remain the same as last year? A. If you want to put it that way, sir.

Q. But with respect to 17 schools as a whole, is it fair to say that this shows a steady—that 9J shows a steady [224] decline in the segregation index during the years you have shown, even— A. That's right, except for the period 1966 to 1967.

Q. That would be the school years of what? A. This would be the school year 1966 to 1967; 1967 to 1968; and 1968 to 1969; the school year beginning in September indicated by the year at the bottom of the chart.

Q. I see. A. But—

The Court: Did you finish your answer?

The Witness: No, sir.

The Court: Go right ahead.

A. I was about to indicate that while there was a substantial decline in the segregation index from 1963 to 1965, that that segregation index is leveled out appreciably so that for the period 1966 to '68, it has remained almost constant.

Q. A little bit down, is it not? A. Well, that is random variation.

Q. Your exhibit shows a little bit down. A. It's random variations for the most part.

Mr. Creighton: I believe that's all I have, Dr. Bardwell. Thank you.

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[228] • • •

GILBERT CRUTER, a witness called by and on behalf of defendants, having first been duly sworn, was examined and testified as follows:

[229] *Direct Examination by Mr. Quinn:*

The Court: Give us your name and address and occupation.

The Witness: My name is Gilbert Cruter. I'm a teacher—I mean, an administrator with the Denver Public Schools, and my address is 2875 Monaco Parkway.

Q. Mr. Cruter, can you give your job title with the Denver Public Schools currently? A. Executive Director for School Community Relations.

Q. Could you explain to the Court briefly the function of that office? A. Basically, my particular responsibility is directly to the Superintendent and I advise the Superintendent on human relations and integration issues and help to design and implement programs to meet school system requirements.

Q. How long have you held your present position, Mr. Cruter? A. Since 1964.

Q. When was that particular office created? A. The office was created in 1964 as a result of a recommendation from the study committee that was set up in 1962 and did a two-year study on recommendations of the Board which was the creation of this advisory committee and the office was set up as a result of their recommendations.

[230] Q. Do other school districts in Colorado currently have similar offices within their administrative structure?

A. To my knowledge, there is only one and that is the Littleton School District, which has an office or a person who serves in a capacity similar to mine but doesn't necessarily function the same way.

Q. Could you briefly relate to the Court your personal background, particularly your professional background, Mr. Cruter? A. Well, academically, I have a Master's degree in education. I have been associated with the Department of State as a cultural affairs officer from 1961 to 1963. I have taught at Southern University in Baton Rouge, Louisiana, as directer of health and education, and I have served as congressional liaison officer for the agency for international development in Washington, D.C. And I have worked with the public schools since 1946 with a brief two-year leave of absence—well, actually, I have had three leaves of absence from the Denver Public Schools, to work in foreign service.

Q. Is one of your formal duties—does it have to do with teacher recruitment? A. Yes.

Q. Would you explain that to the Court? A. Well, as I indicated before, it's my responsibility to advise the Superintendent on these particular matters [231] because we were trying to secure some Negro teachers and I took it upon myself, with the advisement of the Personnel Director at that time, who was Howard Johnson, who is now the Deputy Superintendent, to visit Negro colleges which I had had some familiarity with in view of the fact that I had taught at Southern University and so, starting two or three years ago, this is the third year, I recruited at approximately 17 schools which were primarily Negro colleges throughout the South.

This is the reason—the reason we did this is because this was a fertile field for educators that had been un-

tapped by the Denver schools. Now, we do recruit from white institutions and we pick up what Negro recruits in education we can from those particular areas, as well.

Q. How do you conduct this recruitment, just briefly? What is your method of recruiting? A. Well, many of the people who have currently been working in the departments I either knew or have known previously. And so many of my contacts have been made directly with them. I also work primarily through the placement department, but also have side contacts, too. And then they tend to provide me with the names of individuals whom they think would fit into the Denver school system.

As you know, there is a great deal of recruitment of Negro graduates at the present time because of—well, [232] recruitment, I should say, by industry, business and government and so on, and so, consequently, the students you get is rather small because, consequently, you can't compete on the salary level that—with that of business and industry.

Q. Have your efforts, however, been successful to some degree? A. Yes, they have been. The first year was a primary—primarily a year of contact in which we were trying to lay the groundwork, so I think we probably got—I would estimate around 15 teachers that particular year. The second year I went down—and I was more or less more knowledgeable about the recruiting thing—the first year, incidentally, we didn't take any contracts with us; merely a letter of commitment. The second year I took the contracts with me. I issued 50 contracts and we wound up with, I think, around 39 or 40 teachers. This last year we again took out contracts with us as well as letters of intent for those who couldn't make up their mind, and

I had them sign the contracts that particular time, and I think we have, according to the latest information I have from Personnel Department, roughly 36 teachers out of some 40 that I had given contracts to.

Q. Those would be teachers who would be beginning employment in the fall of this year? A. That's right.

Q. Do other school districts carry on this type of [233] recruitment? A. This I couldn't say except that we have worked closely with Jefferson County and we have had one person who accompanied me this year to recruit teachers for the Jefferson County school system.

Q. Mr. Cruter, are you familiar with the plan which has been referred to as the Hallett Plan or sometimes the Hallett Demonstration Integrated School Plan? A. Yes.

Q. Could you explain to the Court what that is and what its origin was? A. Basically, the origin of the Hallett Plan was that a group of people from University Park School wanted to give their children an integrated experience and they selected Hallett as a school that had comparable socioeconomic levels with their particular school. So, as a result, there were some 45—50 youngsters who volunteered to go into Hallett and some 45 youngsters left Hallett in order to go into University Park and other schools.

Q. Is that a continuing program? A. Yes. It has top priority right now in view of the recent action of the Board and we are concentrating all our efforts in this area in order to try to—

The Court: Would you keep your voice up a little bit more.

[234] A. We're concentrating all our efforts in this area at the present time to provide an integrated experience for the people who work to avail themselves of the Hallett program, both from the Hallett area and also from—some 35 schools that are located within the south, southeast and southwest area of the city.

Q. Could you explain some of the means that have been utilized to implement this plan? A. Yes. We have met with the principals of the 35 schools involved. They, in turn, have sent out letters to parents, indicating that the volunteer open enrollment was available for the Hallett School. They have, for the purpose of efficiency, I guess—well, I won't say I guess—but I will say for the purpose of efficiency we have divided the 35 schools into clusters based upon geographic proximity to one another and have set up recruitment committees within those particular clusters. We have done the same thing in the Hallett area in which we have divided the area into blocks with the map indicating the number of youngsters in each block and have set up block committees made up primarily of people or parents whose children were bused out the first part of January at the time that the University Park and Hallett projects were started.

Q. Have there been any other means of publicizing this plan? [235] A. Yes, we are putting out another publication which will be out the 21st which is called the Volunteer Open Enrollment Dialogue, which is a summary or summation of all of the things that have taken place since the closing of school. We also had some radio announcements about the volunteer education. Mr. Lyons' office in Public Education is designing some advertisements to go into newspapers at a later date to try and see if we

can't get more people interested in volunteer enrollment.

Q. Can you identify Mr. Lyons? A. Mr. Lyons is the director of the office of public information for the schools.

Q. Mr. Cruter, I hand you a document which has been marked Defendants' Exhibit C and plaintiffs' counsel has been furnished a copy of that. Can you identify that document? A. Yes, this is a copy of the material which will go into the first publication sheet which is at the printers at the present time.

Q. When will that be sent? A. It will be mailed out Monday.

Q. And to whom will that be sent? A. This will go to the parents involved and currently involved in open enrollment programs as well as interested [236] parents within the seven clusters that we have set up.

Mr. Quinn: I'd like to offer Defendants' Exhibit C in evidence.

Mr. Greiner: May we have a brief voir dire examination, Your Honor?

The Court: Yes.

Voir Dire Examination by Mr. Greiner:

Q. Mr. Cruter, did you personally prepare Defendants' Exhibit C? A. The staff and myself, yes.

Q. What about the statistics that are reflected in Defendants' Exhibit C? Where did this come from? A. These are the latest publications on at least—our latest insofar as up to date, July 15, of the request to Hallett by the people in the seven clusters, that is, by the parents in the seven clusters that we have set up and also, the request to leave Hallett and it gives you

those who were involved prior to the close of schools, that is, those who were involved in January to June project, and the additional ones that we have acquired since that time.

Q. Approximately when was Defendants' Exhibit C prepared, Mr. Cruter? A. That has been in preparation for the last week.

Mr. Greiner: We have no objections, Your Honor.

[237] The Court: It will be received.

(Whereupon, Defendants' Exhibit C was received in evidence.)

The Witness: May I finish?

This has been in preparation since the last week but it has been an accumulation of information that we have prepared ever since the close of school.

Direct Examination by Mr. Quinn (Continued):

Q. Mr. Cruter, I now—

The Court: When did you start planning to send out such a document?

The Witness: Beg pardon, sir?

The Court: When did you start your planning to send out such a document? When did you decide that such a document would be—

The Witness: At the time that the Superintendent directed us as a result of Board action since Hallett was given top priority then we started our planning in this particular respect to see about trying to enlist as many volunteers as possible to

make this a pilot demonstration of an integrated school.

The Court: When did you first decide to send out a communication?

The Witness: This was done just before the close [238] of school. This is part of the planning process.

The Court: But the preparation was not completed or not started until a week ago?

The Witness: No, the final documentation was not done until a week ago.

The Court: Very well. Go ahead.

By Mr. Quinn:

Q. Mr. Cruter, I hand you another document which has been marked Defendants' Exhibit B and ask you if you can identify that document? A. This is a letter that was sent by Mr. Berge, President of the Board, to the Ellis parents to request—to solicit their participation involved in open enrollment plan.

Q. Do you know to whom that letter was sent? A. This went to all the parents in the Ellis School District—subdistrict.

Q. Can you give the location of the Ellis School, approximately? A. This is a—I can't give you the exact address but is a school in the southeast area of the city.

Q. And was this letter a part of the Hallett Plan which is being implemented through your office? A. Yes, because the Ellis parents, as well as the other parents in the cluster, wanted a statement from the Board President indicating what their particular response [239] would be

for this particular plan. So this was the reason for the letter.

Mr. Greiner: I don't mean to interrupt but we have no objection to the introduction of that exhibit.

The Court: It will be received.

(Whereupon, Defendants' Exhibit B was received in evidence.)

Mr. Quinn: I have no further questions of this witness, Your Honor.

Cross-Examination by Mr. Greiner:

Q. Since 1964, Mr. Cruter, you have served in the capacity of Director of Community Relations for the school district? A. No.

Q. Since what date? A. 1966.

Q. This position was created in 1964, is that correct? A. That's right.

Q. Now, is it fair to say, Mr. Cruter, that certainly one of the functions of your job is to communicate with the Negro community? A. No, my job is to represent the entire school district and this just happens to be one element of it.

Q. Let me put it another way. In the course of your [240] job, do you in fact communicate with the Negro community? A. Yes, I do.

Q. Now, does that communication include listening as well as talking? A. That's right.

Q. Well, since you have been Director since 1966, can you tell me whether or not there has been a growing concern in the Negro community over the continuance of segregated schools for Negroes? A. Yes, there has been.

Q. Now, as I understand your efforts with respect to the Hallett program, it is to—what is the ultimate objective at Hallett? It is to change a black school into a white school, is it not, predominantly? A. No, it's not to change a black school into a white school. It's to provide an integrated school setting in which you would have approximately a fifty-fifty ratio.

Q. Are you familiar with Resolution 1533, Mr. Cruter? A. Yes, I am.

Q. 1533 has some figures in it, does it not, as to what the hope is at Hallett? A. Yes.

The Court: What's the exhibit number, please?
Mr. Greiner: Plaintiffs' Exhibit 6A, Your Honor.

Q. Mr. Cruter, doesn't Plaintiffs' Exhibit 6A indicate [241] that the ultimate objective at Hallett is an exchange of some 500 students? A. Yes.

Q. Now, as I understand the statistics on Defendants' Exhibit B, to date you have received 158 essentially Anglo requests to go into Hallett and 100 Negro requests to leave Hallett, is that correct? A. That's right.

Q. So you are a little short on the objectives set out in 1533? A. That's right.

Q. I notice that—do you, by the way, have Defendants' Exhibit B in front of you, Mr. Cruter? A. No.

Mr. Greiner: I meant C. Pardon me.

Q. At the bottom of Page 2 of Exhibit C, it states that there are 33 Anglos who were going to continue in the program at Hallett. Did you speak personally with each of those Anglos, Mr. Cruter? A. No, I haven't.

Q. How did you arrive at this conclusion? A. Well, they had indicated—there were cards that were sent out prior to the close of school for those who wanted to—requesting those who had been attending Hallett whether they wanted to continue.

[242] Q. Mr. Cruter, exactly when were those cards sent out? A. Well, I couldn't give you the exact date on it.

Q. When did school close, Mr. Cruter? A. The 6th of June.

Q. 6th of June? A. Yes.

Q. So that those cards then were sent out before the Board rescinded these resolutions, is that correct? A. Well, I can't say that because I had nothing to do with the sending out of the cards.

Q. But you do know that the cards were sent out before school closed? A. Yes.

Q. Now, what is the fact with respect to your statistics showing the Negroes who are to continue in a program at Hallett? A. This was the same process.

Q. So, in other words, based on data that took place before the Board rescinded these resolutions you are continuing to assume a continuing 46 participation at Hallett? A. So far as we know, this will be the status of those who want to continue to go.

Q. Now, Mr. Cruter, are you generally familiar with what I will describe as the two basic purposes of the resolutions which were rescinded? Would you agree that the [243] first purpose was the stabilization of schools in transition such as Phillips, Park Hill, and East High School?

Mr. Quinn: Your Honor, I think we're getting

outside the scope of direct examination.

The Court: True.

Mr. Greiner: Well, I think what Mr. Cruter's testimony relates to, Your Honor, is essentially the issue of whether the substitution—of the effect of the substitution of 1533, and I don't think we can properly judge the effectiveness of 1533 unless we consider what was going to be done under the rescinded resolutions.

The Court: To my mind he was called only to testify concerning this one program, as their witness. But when you get beyond that, I think you're calling him as your witness.

Do you wish to do that?

Mr. Greiner: I have no objection to doing it, Your Honor. I might say, though, that Hallett was just one of the voluntary programs under 1533 and I would like to inquire to see whether Hallett is not in fact the one that has so far demonstrated the most, in quotes, "success."

The Court: All right. Go ahead.

Q. Now, there is also a voluntary aspect under 1533, is there not, Mr. Cruter, with respect to voluntary open enrollment at some of these other Park Hill elementary schools? [244] Yes, there is.

Q. Such as Stedman, Smith, Park Hill, Hill, Phillips and so forth? A. Yes, sir.

Q. What's been the response for voluntary open enrollment from the Anglo community, Mr. Cruter, in a school such as Phillips, for example? A. This I couldn't answer because the person who has that information is Dave McWilliams who has that particular responsibility. So

I couldn't give you any information as to what the response has been from those particular schools.

Q. You have been working solely on the Hallett program? A. That's correct.

Q. Now, you mentioned a recruitment, Mr. Cruter, of Negro teachers, did you not? A. Yes.

Q. And I understand that at least your involvement in that program of recruitment began some three years ago? A. That's correct.

Q. So that the figures for Negro teachers in the school district for 1968-1969—that would reflect how many of the three years of that recruitment? A. Would you restate that question? When you say reflect, are you talking about the number of people I have interviewed or are you talking about the number of people who [245] were employed.

Q. Who were employed. A. I would say roughly about 18 percent of the total number employed at both secondary and elementary level. In other words, this averages out about 39—36 to 39 per year.

Q. I think I can ask the question more directly Mr. Cruter. Plaintiffs' Exhibit 95 shows, for example, a total of 191½ Negro teachers in the elementary schools in Denver, does it not? A. Yes, that's right.

Q. And that's for the school year 1968? A. That's right.

Q. Now, that's 191½ out of 2,260 total for the elementary schools? A. (Nods affirmatively.)

Q. Now, out of that 191½, Mr. Cruter, how many of those were some of your new recruits you described? A. I don't have that breakdown. I couldn't give you that. The only thing I can say is that I know how many were employed each year that I went out to on the recruiting. The

year of 1968-1969, there were 39 employed, according to the information I received from the personnel office. And of the 1969-1970, there were 36 employed.

Q. I am sorry. I misspoke. When I said Exhibit 95—[246] it is in fact Plaintiff' Exhibit 97. If you will just examine that. Is Plaintiffs' Exhibit 97—does that indicate that there are still some Anglo schools that have no Negro teachers? A. That's right.

Q. Now, how many Negro teachers are you trying to recruit, Mr. Cruter? A. Well, I think you put me in a situation where I can't answer because I'm really not directly associated with personnel. We're just trying to recruit teachers.

Q. Well, I take it from your description that your function is to recruit Negro teachers, is it not? A. No, I took it upon my—I felt that one of the functions of my particular office was to at least try and bring back some integration so this is how I happened to get involved in recruiting teachers. I'm not a person who works in personnel.

Q. Now I believe you indicated that part of your job was to talk with and listen to Negroes in the community, is that correct? A. That's right.

Q. Can you report to us on the basis of your recruitment experience in the Hallett program, Mr. Cruter, how the Negro community reacted to the rescission of these resolutions? A. I'd like to put it on a much broader basis than that if I may.

[247] Q. That's fine. A. Because I think that the impact in the communities that we have had to deal with or have been dealing with has been one of defeat, rejection, insofar as the volunteer open enrollment plan is

concerned. We have just started our process of trying to go block by block to recruit people out of the Hallett area and we have mixed reactions on this.

Q. Now, that intense recruiting as I understand it—have you been participating in that? A. Part of it, yes.

Q. I take it since you're going to Africa next week that you will not be participating any further? A. We have a staff that will still continue that.

Q. When is that recruitment program going to end? A. We hope to have a pretty good report on it by the 15th of August.

Q. Now, last year in Hallett, under the exchange program there which was voluntary, there was a mutual exchange of approximately 50 students? A. Yes.

Q. Now, did the Black students in your opinion, Mr. Cruter, who remained at Hallett—did they receive the benefits of an integrated education there at Hallett? A. That is something I can't answer because I haven't been that closely connected with the school. I would say that [248] there were those who feel—I think we have in the community those who feel that a predominantly integrated school is beneficial and those who still feel a segregated school is beneficial. I think you've got two factions you have to consider.

Q. Now, Mr. Cruter, let me ask the question another way. Under the voluntary program last year, did Hallett become an integrated school? A. It depends on how you define integration.

Q. Let me ask you—before the program began, Mr. Cruter, approximately what was the percentage of Negro composition at Hallett? A. I would say it was about 85 percent.

Q. And at the height of the voluntary open enrollment program last year, Mr. Cruter, approximately what was the Negro percentage at Hallett? A. Well, it was reduced. The reduction was very small. So, if you're going to base it on a 50/50 or a racial balance, I would say it was not an integrated school.

Q. Well, would you say it went from about 85 percent Negro to say 80 percent Negro? A. Something like that, yes.

Q. In your communications with Anglo parents, Mr. Cruter, with regard to the Hallett program, have any Anglo parents indicated to you that they might be willing to send their children to Hallett if it was going to be a predominantly Anglo [249] school, but that they would not be willing to send their children to Hallett if it remained under this program a predominantly Negro school? A. No, I haven't heard that.

Q. Have you in fact talked with some Anglo parents? A. Yes.

Q. And you have not run into that kind of a condition? A. No.

Q. Do you recall whether or not that kind of a condition existed with respect to the voluntary open enrollment program in the second semester of 1969? A. It's hard for me to even answer that because at this particular time I was not as deeply involved in that process as I am at the present time.

Q. Mr. Cruter, I hand you what's been marked for identification Plaintiffs' Exhibits 37-A through G and ask you if you can identify those. A. Yes, I have seen these before.

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[250] * * *

Q. With respect to 37-B, which is the second page, Mr. Cruter, of that series of exhibits, is that not a request for voluntary open enrollment at Hallett school? A. Right.

Q. Is there not a condition stated there with respect to that participation? A. That's right.

Q. What is the condition, Mr. Cruter? A. Provided that Hallett becomes 60 to 65 percent Anglo as of 1/27/69, and that insofar as possible minority race children replace charges of University Park. We further do not believe volunteer open enrollment to be a realistic solution. Open enrollment is merely a farce. I might add this information does not come to my office.

The Court: What document is this?

[251] Mr. Greiner: 37-B.

The Witness: This goes to Mr. McWilliam's office and therefore I would not be aware of or be apprized of that particular statement.

Mr. Greiner: Your Honor, we would offer that series of exhibits at this time.

Mr. Quinn: We would object to the offer insofar as it relates to comments that are based on these—without some indication of who put them there or what the purpose was. This is purely hearsay. If there's to be any question of those comments themselves—

The Court: I don't believe Mr. Cruter has testified to the source of these documents.

Q. Mr. Cruter, do you know whether or not these exhibits come from the files of the school district? A. Yes, they come from the files of the school district.

The Court: And these are responses to this effort?

The Witness: Yes.

Mr. Greiner: This was the earlier efforts.

The Witness: This is prior to the close of school.

The Court: Are you offering them on some kind of a testimonial basis; that is, for the truth of the statements that are contained in them?

Mr. Greiner: No, Your Honor, I'm offering them only to show that certain parents did place certain conditions of [252] racial composition upon their willingness to participate in voluntary open enrollment. I'm not offering for example 37-B for the truth of the proposition that open enrollment is merely a farce.

Mr. Quinn: Your Honor, I don't see the materiality of them on that basis; somebody's personal opinion.

The Court: I suppose we can receive them circumstantially to show that there has been reaction to this effort.

Mr. Quinn: In a very indirect way.

The Court: But I don't believe that we can accept these statements on any testimonial basis; but that they are purely hearsay. Is that all right?

Mr. Greiner: Thank you, Your Honor.

Q. Mr. Cruter, with respect to the Hallett school do you have any information or opinion how the Negro community views such a segregated school? A. The Hallett area as well—and I think we need to say that this is about the Black area in general, the Negro area in general; they wanted integrated education and they wanted quality education.

Q. Pardon me, Mr. Cruter, but do they tend to equate those two things? A. I think they do. And the idea is that they don't want to be placed in a situation in which they're not going to be received by the particular community in which their child [253] will be or in other words there is a feeling of comfortableness and security that any parent feels for his school, just as a white parent feels about his child going into a Black community, the Black community feels the same thing about his child going into a white community. There are those who feel that there are certain benefits that will occur because of the opportunities to be associated with other children; to be able to live in a multi-racial society. I have had remarks made on both the black side as well as the white side indicating the necessity for a racial mixing. And because they recognize the fact that with the world getting smaller and with our recent exploits with the moon, that our youngsters are going to have to learn to live in a multi-racial society. There are also those who I think we have to look at it on the other side too—there are those who feel also that probably their child is getting a good education in a segregated school simply because their previous experience has been one of a segregated school so therefore they feel that they got something out of it and that he wants to continue it.

Q. You're talking about the parent's education? A. I'm talking about the parent's education. So I think this has some bearing on it too. But, by and large, children I think tend to profit from the experiences that they gain from their peers, and if they are in a racially mixed situation I think they materially profit from it both academically [254] as well as socially.

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Robert D. Gilberts—for Plaintiffs—Direct

[263] ROBERT D. GILBERTS, called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

The Court: For the record, give us your name and address and occupation.

The Witness: My name is Robert D. Gilberts. I live at 6495 Happy Canyon Road.

Direct Examination by Mr. Greiner:

Q. Dr. Gilberts, you are one of the defendants in this action? A. Yes.

Q. And you are the Superintendent of Schools of School District Number 1? A. Yes.

Q. You have been such, serving as Superintendent in this district, since approximately August 1, 1967? A. Yes.

Q. Dr. Gilberts, I would like to take you back in time to the passage of the Noel resolution. Do you recall when this was passed? A. This is Resolution 1490?

Q. That's correct. A. May 1968.

Q. So you were here then when that was passed? [264] A. Yes.

Q. Upon the passage of the Noel resolution, were you directed by the Board to prepare a comprehensive plan for the integration of the Denver schools? A. Yes.

Q. And you did prepare such a plan, did you not? A. Yes, I did.

Q. Does that plan have a title that we might use conveniently for reference? A. We have a copy of it here, "Planning Quality Education, Proposal for Integrating the Denver Public Schools."

Q. How many months was that plan under development? A. We had approximately sixty days, working days.

Q. And you, as I understand it, obtained the services of outside consultants to help you? A. Yes, we did.

Q. And that was Jack Dempsey and Associates? A. Together with a firm from California, that's Davis, McConnell and Rosson, who worked with him.

Q. I understand that during this development period you and your administration made a determined effort or definite effort to get inputs of ideas from various sources throughout the community, did you not? A. Yes, in that limitation of time we did the best [265] we could.

Q. And are some of those inputs reflected in the final product? A. Yes, they are.

Q. Now, that plan, "Planning Quality Education," that was introduced to the electorate here in Denver approximately when, Dr. Gilberts? A. First part of May—or, excuse me—first part of October of last fall.

Q. Was that the televised presentation that you have reference to? A. Yes, it was.

Q. Now, shortly after your televised presentation, you received a further direction from the School Board with respect to implementation.

Q. Well, the plan which we presented in October was a conceptural approach to dealing with the problem. It outlined in fairly broad terms various approaches we thought could be used to approach these problems here in Denver. It was not the kind of plan that would give the finite details of solutions in each of these areas. Therefore, it was necessary for us to begin planning in terms of specific elements of this book. The element that we began planning on initially was the one which related to the stabilization of schools in Northeast Denver.

[266] Now, that was a normal part of the planning process. I don't recall that there was any specific direction or that there may have been an identification on the Board's part that this was the first area they wanted to work in.

Q. Did that identification then take place sometime in November of 1968, to your recollection? A. Yes, I would estimate that would be about the time.

Q. Dr. Gilberts, so there is no confusion, as I understant it, you used the general term "stabilization" to include both the program of improving the percentage composition of such schools as Philips, Park Hill, and East, you include that act as well as the complete reversal of the racial compositions at Barrett and Smiley Junior High Schools? A. Yes, in this peripheral area around the Park Hill area, those two were included.

Q. Now, then, did you then during the course of the development of this plan for stabilization receive more inputs, so to speak? A. Yes.

Q. And you met with the School Board on this point? A. We began having a series of conferences working out the elements of this plan shortly after this presentation. I can't say exactly when, but within a week or two, [267] I believe. In addition to that, we had some public hearings where people had a chance to comment. We also set up some idea centers around the city where people had a chance to visit with us about the proposals and make additional suggestions.

Q. As I recall a statement in your deposition, it was that you considered some fourteen different alternatives during this process. A. Actually, there were 14 plans sufficiently finite so that they could be presented as options. I am sure there were many more ideas.

Q. All right, then, as I understand it, the first finite recommendation to the School Board which you and your staff presented was reflected in Resolution 1520, is that correct? A. Yes.

Q. And that pertained primarily, did it not, to a senior high school and a junior high school, namely East and Smiley? A. Yes.

Q. Now, there is a feeder relationship, is there not, from Smiley into East? A. Yes.

Q. Was this why those two schools were selected? A. Yes.

[268] Q. They were all—at least, with respect to East High School, this had been identified as a school in transition? A. Yes.

Q. And by that you meant that there had been over the years a gradual decline in its Anglo population, is that correct? A. That's true.

Q. Now, Smiley, as I understand it, at this point in time was already approximately 75 percent Negro, is that correct? A. I recall that as being approximately true.

Q. So you felt that you had to do something about the racial composition at Smiley if the improvement of the racial composition at East was going to have any longevity, is that correct? A. This was one of the factors, yes, sir.

Q. So that the first proposal then was 1520. Do you recall approximately when 1520 was formally presented to the Board of Education? A. January, I believe, 1969. I am sorry, I can't recall the precise date on it.

Q. Well, the Board didn't pass 1520 at the meeting at which it was first presented; is that correct? A. That's right.

[269] Q. What happened then, Doctor? A. There was a

public hearing on the presentation and it was acted upon at the subsequent board meeting.

Q. And approximately how long did that take? A. I can't be absolutely certain, but it seems to me it was in the vicinity of a two-week period.

Q. Plaintiffs' Exhibit 3, Dr. Gilberts, would indicate that 1520 was passed on January 30; is that correct? A. Yes.

Q. All right, now, after the passage of 1520, Dr. Gilberts, was some further detail necessary in order to implement the general proposal reflected in 1520? A. Yes, it was.

Q. And did that then lead to the development of Resolution No. 1524? A. Yes.

Q. And that's Plaintiffs' Exhibit 4? A. Right.

Q. Now, how long was it then between the passage of 1520 and the presentation to the Board of 1524, do you recall? A. Again, I can't be absolutely certain, but I would estimate within about a two-week period, the presentation of this, because this, too, is presented at one meeting and acted upon at another, I believe.

[270] Q. And there was also a public hearing which was with respect to 1524, was there not? A. Yes, I believe there was.

Q. Now, in general, 1520 and 1524 treated the secondary schools which have been focused upon, is that correct? A. That's correct.

Q. Now, was it also necessary because of the feeder relationship between these schools to do something about the elementary schools, in your judgment? A. That was our judgment.

Q. Now, in order to effect that objective, did that lead then to the development of Resolution 1531? A. Yes.

Q. And that's Plaintiffs' Exhibit 5? A. Yes.

Q. Now, how long—just a moment. I take it that in the

development of your overall plan, "Planning Quality Education", that you considered the elementary schools as well as the junior high schools and senior high schools, did you not? A. In terms of this element of that plan?

Q. Yes. A. Well, in the basic document we merely indicated that certain steps would be necessary in order to attempt to [271] stabilize those schools in Northeast Denver. It was not spelled out in detail. We did not have the time to qualify what kind of steps we thought would be necessary at the time the plan was presented.

Q. But I take it your plan did look at one of the alternate types of action which might be taken, and one of the items was the stabilization of schools, was it not? A. Yes.

Q. Now, Doctor, was 1531 passed by the Board when it was on the day of its first formal presentation to the Board? A. No, it was not.

Q. Again, was there a special public meeting with respect to 1531? A. Yes, there was.

Q. Now, with respect to these public meetings, I take it that one of the purposes of those meetings, Doctor, was to accept, to receive, rather, the comments of the community with respect to these proposals, was it not? A. Yes, the hearings were primarily to receive from members of the community their feeling about the plan as it had been presented before.

Q. And you attended each one of those hearings or meetings? A. Yes, I did.

[272] Q. I take it there must have been some people that spoke out against each of these resolutions in the meetings? A. There were.

Q. And were also proponents of these resolutions? A. Yes.

Q. Did you make any judgment in your mind as to what the balance of the "fors" and "againsts" were?

Mr. Jackson: Objection, it calls for a conclusion in an area I don't think is truly relevant in this particular area, Your Honor.

The Court: I am inclined to agree with it. I don't see where that makes any difference.

Mr. Greiner: Well, let me approach it another way.

Q. Dr. Gilberts, with respect to the statements by members of the community that took place—I am focusing now only on these three public meetings—did you feel from participating in those meetings that the community was against these resolutions?

Mr. Jackson: I make the same objection, Your Honor.

The Court: What's the purpose of this?

Mr. Greiner: I think I can show it in another way, Your Honor.

[273] Q. Did they level out—

The Court: Well, if I knew what you were trying to establish, I would be in a better position to rule.

Mr. Greiner: I am just trying to find out from the witness, Your Honor, what he felt the level of community acceptance was for these plans.

The Court: For what purpose?

Mr. Geiner: My next inquiry is going to be—

The Court: Where is it germane to anything we

are hearing here? Let's suppose he formed an opinion one way or the other.

Mr. Greiner: My next question, Your Honor, would be whether it made any difference to him as to whether or not there was a level of community acceptance for these plans.

The Court: Are you seeking to show something in the nature of bias of the witness?

Mr. Greiner: Not a bit; not at all.

The Court: Well, then, I don't see where it would affect us at all.

Mr. Greiner: Well, I think, Your Honor, that the witness will agree with us that the matter of community acceptance—

The Court: Are you trying to show that his viewpoint was wholly unbiased and even so, why is that [274] important, unless it would affect his credibility as a witness?

Mr. Greiner: Your Honor, what I am trying to show from this witness is that community acceptance was one of the facts which he felt was relevant and material in the development of these plans. That's all.

The Court: Well, you can ask him that.

Q. Is that right, Dr. Gilberts? A. Certainly, general community acceptance was a major factor in our considering what we would recommend. I would hesitate to say that we drew those conclusions completely from any one source of communications, hearings being only one of those.

Q. I recall that one of the resolutions has a statement, does it not, something about the level of community acceptance? Perhaps I am wrong. I guess I am wrong. I am sorry.

Then, Dr. Gilberts, I take it that after these public meetings that the Board went ahead and passed each of these three resolutions; is that correct? A. That's correct.

Q. The passage of those resolutions was not unanimous by the Board? A. That's correct.

Q. Keeping in mind the various inputs that went into [275] the development of these plans, Dr. Gilberts, is it fair to say that you supported each one of these resolutions? A. Yes, I did.

Q. As a matter of professional judgment, you felt that they would achieve their intended purposes? A. We had hoped so. They were our best judgment as to how we might approach the solution to attempting to stabilize the enrollment in these schools.

Q. I take it that there were the—that you must have concluded as a matter of professional judgment that the stabilization of these schools was important? A. Yes, we did.

Q. Now, that was from an educational viewpoint? A. I think it was very heavily from the point of view of the communities themselves and the kind of composition of population within those communities. We had hoped as a side benefit to this kind of stabilization we would provide ourselves with a broader base upon which we could test some of the hypotheses that are related to the question of whether or not an integrated education in effect does provide a better level of education for children.

Q. Now, I take it, Dr. Gilberts, that you recognized that there may be some relationship between the fact that a school which is segregated predominantly minority, some relationship between that fact and the quality of education [276] at that school, in terms of, for example, achievement? A. I would be a great deal more sure about the relationship

of socioeconomic cloth and academic level at a school rather than the racial relationship to that factor.

Q. Of course, in Denver, there is a closer relationship between race and socioeconomic levels? A. I don't believe I have data that would allow me to accept that.

Q. You don't accept that as a proposition? A. I don't believe I could state that with absolute knowledge it is true or to what degree it is true.

Q. After these resolutions were passed, did you and your staff take further measures looking toward the implementation of the steps? A. Yes, immediately.

Q. Could you relate some of the things that were done? A. Well, at the senior high school level it became necessary for us to identify youngsters who were going to be affected by changes in boundary and by transportation to provide preparing for them in the new schools they would be attending. This involved a registration of these youngsters for classes next year and the building of a program to accommodate those elections. That, of course, related to the need of differing numbers of staff members with different [277] kinds of academic qualifications or specialties in these schools, so it was necessary to reassign teachers, because we did affect numbers of pupils in these schools as well as just changing pupils.

It was also necessary for us to begin planning in the general area of a program the kind of changes in educational programs that we might implement in the schools to hopefully increase the quality of education within all of them.

Transportation began to be examined, although the details in this obviously could not be done until later in the summer, because this would be a part of the overall program which included voluntary open enrollment, with trans-

portation provided as well, and there is a possibility of interrelating these transportation systems, and until that was done we could not get into that in great detail.

We began talking about what we could do in terms of school-community relations, perhaps as a result of this to improve the climate in the communities of receiving schools, preparation of pupils and so forth. At the elementary level, the problem was not as complex because of the self-contained nature of the classroom. There it was pretty much a matter of identifying the number of pupils to be moved, notifying them of the movement, the school to [278] which they would be moved, and looking at the teacher requirements.

Q. Dr. Gilberts, Plaintiffs' Exhibit 18, I believe it is, is here before you. It is in evidence. Plaintiffs' Exhibit 18 reflects some of the teacher assignments in the secondary schools, does it not? A. It appears to.

Q. Now, was there not also in connection with 1520 and 1524—for implementation, was it not also necessary to purchase some additional school buses for the district? A. It was.

Q. And Plaintiffs' Exhibit 12 is a reflection of that bus purchase contract? A. Yes.

Q. Now, I take it that after the recision of these three resolutions that the administration then began taking steps for the implementation of 1533, is that correct? A. Well, a good portion of Resolution 1533 was embodied in the other resolutions, and, therefore, some of the planning which was related to those elements just continued. We didn't change Hallett School, as an example of the one you discussed this morning. It was a plan which began under the original resolution and was a continuing part of this one, so they continued. There was a need, obviously, to

reschedule the youngsters in the schools to [279] which they would be assigned in the fall and to reexamine the teacher staffing in these schools.

Q. Now, for example, around Barrett School, the attendance area for Barrett School had been redrawn, had it not, under 1531? A. We had identified some elements in the Barrett School area which would be reassigned to other schools in the district.

Q. So that was a matter of geographic carving up of the attendance area? A. It was a geographical identification by block.

Q. What happened upon the recision of 1531? A. Those youngsters that had been scheduled for assignment to other schools were reassigned to the Barrett School.

Q. And the place of their residence once more became a part of the Barrett attendance area, is that correct? A. Correct.

Q. Now, I understand, Dr. Gilberts, that there is a relationship between transportation of the pupils affected and the ability of some of these receiving schools to receive the students, is that correct, who were detached from these other schools? A. Will you state that question again? I'm not sure I understand it.

Q. I take it, for example, that in order to get a [280] child that had been in the Barrett area down to Steele, as is indicated here—this happens to be Stedman—from Stedman to Steele, that's quite a distance, is it not? Some sort of transportation had to be provided? A. Yes.

Q. Now, did that corollary between transportation and the implementation of 1531 exist in every instance? A. 1531?

Q. That's the elementary school. A. No, there were

some boundary changes that affected the school of residence as well. They were fairly minor.

Q. Now, can you give us an example of what you have reference to? A. Well, as I recall, in the Park Hill area, there were several little pieces reassigned there. I again will have to look at—I guess I have a map here.

Q. You have reference to Exhibit 11? A. I'm looking at Exhibit 11, yes. This indicates some boundary changes around the Philips School, Hallett School and the Park Hill School.

Q. Was there then through those boundary changes an exchange or reassignment of the children in those schools between those schools? A. Well, they were assigned from, say, the Park Hill District to another district, yes.

[281] Q. Now, in order to implement that reassignment, was it necessary to bus the child? A. No, it was not.

Q. And yet, even that aspect of 1531 got rescinded, is that correct? A. The entire resolution was rescinded; in the sense that those were changed, yes.

Q. Now, you will recall, I am sure, Dr. Gilberts, that there was a School Board election in May of this year. A. Yes.

Q. Did the question of these resolutions—was it one of the issues in this School Board election?

Mr. Jackson: I am going to object to that, Your Honor. I don't think this witness has been qualified to testify as to issues in the election and I fail to see how it has any relevancy to the hearing on the preliminary injunction.

The Court: Well, if it does, we can take judicial notice of it.

Q. My only point was, Dr. Gilberts, that shortly after the results of that election were known, did you then learn

that the Board was going to consider the recision of 1520, 1524 and 1531? A. After the new board had been installed there were several sessions during which time we discussed these [282] resolutions and looked at several alternatives that might be used.

Q. I take it the answer to my question is yes? A. Yes, after the new Board was installed.

Q. And was the educational value of the then existing resolutions discussed during those sessions? A. Yes, I believe it was.

Q. Was the educational value of what might happen if there was a recision discussed? A. Yes, I believe that was discussed.

Q. During the course of these discussions, Dr. Gilberts, was the actual language of 1533 before the group? A. No, it was not.

The elements that eventually appeared in this resolution I believe were discussed from time to time within these conferences.

Q. To the best of your recollection, Dr. Gilberts, when was the first time that there was a document which we can say was 1533? A. At the first regular meeting of the new Board of Education.

Q. That would be on June 9, 1969? A. The date of the passage of that resolution. I am sorry, I can't recall the date just exactly.

Q. I think that I can assure you that it was June 9th, [283] 1969. Now, so that was the first time that the Board had before it the actual language of 1533, is that correct? A. In that form, yes.

Q. Now, the school election took place on approximately May 20th? A. Yes.

Q. And the Board meeting at which recision took place

was on June 9, is that correct? A. You indicated the date. I accept this, if you have the date there.

Q. So, there was about a three-week period, is that correct? A. Approximately, yes.

Q. How many meetings were held at which you attended during this three-week period? A. I believe that we had three Board conferences.

Q. Do you recall the duration of each of those conferences? A. I would say they ranged from an hour and a half to two and a half hours.

Q. Do you recall whether each of those conferences was attended by all seven members of the Board? A. No, there were some members missing at these meetings.

Q. Now, is it a fair characterization of our position [284] in these conferences, Dr. Gilberts, that you were opposed to the recision of these resolutions? A. I felt the recommendations that had been made were ones that I could recommend, and, therefore, I maintained my position.

Q. Dr. Gilberts, are you familiar with the concept of the common school? A. The which?

Q. The common school? A. Well, I can think of several characterizations of a common school.

Q. Is it fair to say that when public education was being formulated in this country that the common school was the basic concept of our public education? A. Yes, that was at least the theoretical concept of what the school was or was supposed to have been.

Q. School was a mixing pot? A. This is what the literature describes as being the philosophical objective of it. I'm not sure the evidence will sustain that particular position.

Q. Now, as the concept of the common school was applied to growing metropolitan areas, it no longer became possible, did it, to have just one school for a community? A. Well,

that was a problem initially in many of the urban centers, such as New York, and some of the larger eastern [285] cities. There was never one school in those cities.

Q. But perhaps there might have been one high school, for example—in not New York City? A. Yes, this, of course, was a highly selected educational institution at that time which very few people attended.

Q. Do you see any relationship, Dr. Gilberts, between what I believe the school district refers to as the neighborhood school policy and the concept of the common school? A. Well, I think that there is similarity between many of the schools at that point in history which was—were at that time classified as common schools and some of the same problems we have presently in the large cities of the nation. There have always been socioeconomic stratifications within the large cities and schools that were established within those cities did not reflect the total spectrum of socioeconomic class. Therefore, I suppose from their point of view schools in large cities today are probably more similar than dissimilar.

Q. I take it, Dr. Gilberts, if I understand your testimony correctly, that you felt that the stabilizing measures inherent in these three resolutions were important in order to improve communications between the various racial and ethnic groups of this city? A. That certainly was one of the aspects that I felt [286] was important and is important.

Q. And I take it that you felt that you had to begin somewhere in improving these communications, is that correct? A. Well, the reason for selecting the northeast area of the city was because it was quite apparent that it was an area in transition and that there was possibility that by taking these steps that we recommended that we

may have been able to contribute in some way to the continuing resegregation in that area. Now, there is a body of research available that indicates that once a school reaches a certain point in composition—one figure that's used is 30 percent—there tends to be a rapidly increasing curve of segregation. There is a question of whether or not that is cause or effect, of course, whether it merely reflects the occurrence of change within the communities or whether or not it causes or interrelates, both causing and reflecting.

Q. You were in court this morning when we were discussing the racial composition of Stedman School, were you not, in connection with the 1964 boundary changes? A. Yes.

Q. You will recall that the neighborhood of the Stedman District was represented to be some 45 percent Negro, is that right? A. At that point in time, I believe this is the figure [287] they used.

Q. And yet the school population of Stedman School was about 85 percent Negro, is that right? A. These were the figures I believe presented, but I have no personal knowledge of them.

Mr. Jackson: I am going to object, if the Court please, to this line of questioning. The witness testified he came to this city in 1967. Counsel is attempting to inquire as to matters in 1964. If he is attempting to go through the testimony of the previous witness, I believe the exhibits are in and we can look at those.

The Court: Overruled.

Q. Dr. Gilberts, that's merely an example of statistics I just cited to you. That's merely an example of how the

neighborhood changes when it is within transition. Let me— A. Be specific, will you, please?

Q. Let me be more specific. As Negroes move into the neighborhood, is it not true, Dr. Gilberts, that the first Anglos to leave generally are those with school-age children?

Mr. Jackson: Objection. It calls for a conclusion.

The Court: If he knows, he can answer. Overruled.

A. I'm not sure I do know. I don't believe I know as a matter of fact that this is true.

Q. You would also know then that the last Anglos to leave are the older whites with no children in school? [288] A. This would follow if the first assumption is correct.

Q. Might that not explain why the racial composition of the school would run ahead of the racial composition of the neighborhood? A. Could very well.

Q. You will recall, Dr. Gilberts, a discussion we had during your deposition concerning certain characteristics of these segregated schools, certain objective indicia which they seem to share in common? A. I recall in general.

Q. Did we discuss such things as a higher dropout rate generally in a segregated school? A. Yes, and I believe I kept inserting into that testimony this is true of lower socioeconomic areas and whether we do identify it as strictly a racial characteristic or socioeconomic characteristic is questionable.

Q. There also tended to be lower teacher experience at the segregated school? A. I indicated I thought there might be exceptions to that but that generally that was true.

Q. That there generally tended to be more new teachers at the segregated schools?

The Court: Are you asking him what he said before? Or what his testimony is now?

[289] Mr. Greiner: What his testimony is now.

The Court: If you know.

A. I thought he was making a statement. I am sorry.

Q. The question is, does there tend to be more new teachers, Dr. Gilberts, at these segregated schools?

The Court: You mean in Denver?

Mr. Greiner: Yes, sir, these segregated schools, Stedman, Smith, Hallett, Barrett.

The Court: Well, you heard the testimony.

A. There are. However, I have some question about those data. They include the years of experience in Denver and we do hire a good many teachers with experience outside of the school system and they are placed, many of them, in those areas. I'm not sure just to what degree, counting total experience, there are more beginning teachers in that area with lesser experience than other parts of the city.

Q. I take it from your earlier comments, Dr. Gilberts, that you do not feel that there is a direct relationship between the integration of the school population and improvement of the achievement of the minority group in that integrated environment, is that correct? A. What kind of improvement in the minority group? Academic improvement, is that what you are talking about?

Q. Yes, sir. A. I have seen no evidence that would lead

me to believe [290] there is an absolute relationship between the two.

The Court: You are familiar with it? Are you thinking of standards, achievement standards are equal in the segregated schools?

The Witness: No, what I am saying, Your Honor, is that in the research that I have read where they have tried to control on one hand for socioeconomic class and then to make comparisons for achievement and do the same thing based on race, there is no correlation that is of any substantial nature where race is related to achievement. There is some substantial determination in terms of the socioeconomic class in terms of achievement.

Q. Have you read a publication—

The Court: You don't think then that segregation per se produces a lower level or standard?

The Witness: Well, sir, I believe that there are—

The Court: Or that integration makes a contribution to—

The Witness: I believe integration is important, but I believe it is important from the point of view of opening and breaking down some of the barriers of communication we have in our society. I think that can be reasonably well established. When one begins talking about the relationships between that process and the academic achievement, we have an extremely difficult area in which to research and the [291] materials that I have read over the years and recently reviewed show clear indication that

there is such a relationship. I would hope that there is and one of the reasons why we have increased the base of integration through plans that we have proposed would be to give us a broader base upon which to continue to test that hypothesis.

Q. Dr. Gilberts, does part of the literature which you have read in this area include a report of the United States Commission on Civil Rights issued in 1967? A. Yes.

Q. Entitled "Racial Isolation in the Public Schools"? A. Yes.

Q. Now, Dr. Gilberts, isn't there rather conclusive proof that segregation in fact retards the learning processes of the minority child?

Mr. Jackson: Your Honor, I don't know if they have intended to call this witness as an expert witness, but, certainly, we are getting into a field that appears to call for expert testimony and I don't see that it is particularly relevant in this fashion at this particular hearing from this witness.

The Court: Overruled. As I understand it, he is seeking to refresh his recollection or discredit him, I'm not sure which, but he is referring to some official report, I take it, and asking him if he is familiar with it [292] and if it states a particular thing.

Are you able to answer the question?

The Witness: Only in a general way, Your Honor. I would have to look at the document to be sure, but my recollection is—I don't think I can look at 300 pages or whatever it is in a short period

of time here—that in this document there was an assertion that there was—

The Court: Mr. Greiner is always giving somebody a book to read during the course of the trial.

Mr. Greiner: Part of the educational process, Your Honor.

The Witness: I am afraid it is not possible for me—would you identify the place for me in there?

The Court: You want him to search it out, too?

The Witness: I believe that the document indicates that, or, asserts that there is definitely a relationship between the segregation and lower achievement or lower achievement in the schools, but I don't recall that it specifically sorted out all of the other independent variables that could have a part of this and then establish racial isolation in and of itself as an absolute factor in the lack of achievement.

Q. One of the other items referred to in this report was the psychological damage imposed on the minority child in the segregated school.

[293] Is your opinion of that conclusion of the report similar? A. I don't consider myself a sufficient expert to judge that absolutely. I do have a feeling that certainly this may be an extremely important factor in terms of the youngster's own concept of himself and his feelings of importance and his ability to be motivated and to succeed. I think it is a factor, yes.

Q. Now, you are aware, I know, Dr. Gilberts, that in Browne against Board of Education, the United States Supreme Court recognized that psychological damage, did it not?

Mr. Jackson: I'm going to object to the counsel asking the witness what the Supreme Court has said on a case.

The Court: There is no assurance that it is gospel. Overruled, that particular facet. In other words, supposing he has read that? Are you aware of it?

The Witness: Yes, sir, I am.

Mr. Greiner: What I am getting at—

The Court: Well, we take judicial notice, though, of what the Supreme Court has said.

Mr. Greiner: What I am trying to get, Your Honor, is superintendent notice of it.

Q. Now, that finding of the Supreme Court was in a [294] so-called de jurie case, is that correct? A. That's correct.

Q. That's where the state had by law maintained a dual school system, one for whites and one for blacks? A. Yes.

Q. Is there something that you read, Dr. Gilberts, that indicates to you that the psychological damage is different in the two situations, de jurie on the one hand, de facto on the other? A. I can't say there is anything that I have read that might lead me to believe that, but I might add to that the court has refused to draw the same conclusion in the case of de facto.

Q. I won't take you into the area of the law, Dr. Gilberts. I will leave you there. I take it from your comments that you have no particular training in sociology or psychology, is that correct? A. I have a minor in social psychology for my Ph.D.

Q. When did you receive that? A. '61.

Q. Now, under 1533, Dr. Gilberts, I believe there is, as you mentioned, to be a continuation of certain of the programs that were included in, for example, Resolution 1531, is that correct? A. Yes, sir.

[295] Q. Isn't the essential difference between the rescinded resolutions and 1533—can't you state those to fall into about three areas? The rescinded resolutions made the transportation aspect mandatory, isn't that correct? A. In 1533?

Q. In 1531. A. Yes.

Q. Now, there were also some voluntary programs under 1531, for example, as I recall, Hallett School? A. This was one of them, together with voluntary open enrollment and the idea of grouping some of the schools in North Central Denver and Northeast Denver with schools in Southeast and Southwest and so on.

Q. But that's a point in common between the two? A. Yes.

Q. And what we are focusing on now are the differences. A. I'm sorry.

Q. So mandatory transportation is one of the differences, is that correct? A. Yes, sir.

Q. And another difference is in the actual attendance areas for particular schools, is that not also correct? A. Yes.

Q. Are there any other major differences in your opinion? [296] A. I believe those cover the major differences.

Q. What about the difference of the effectiveness, Dr. Gilberts, with respect to the objective of stabilization here in Northeast Denver? Is 1533 in your opinion going to be as effective as 1520, 1524 and 1531? A. Well, I suppose that's a matter that might be debated. One can look at short term and long term—

Q. Well— A. —accomplishment.

Q. Let's start looking at, first, short term. September 2, 1969, Dr. Gilberts— A. I don't believe that we will be able to accomplish everything that we have indicated in that short a term under the new resolution.

Q. The school district has had a program, has it not, of voluntary open enrollment? A. Yes, as a matter of totally free choice on the part of the parents.

Q. Has voluntary open enrollment in Denver ever integrated a school? A. I don't believe it has ever had a good chance and, since it has been promoted and designed, had programs that would attract people into it. It has only been in operation actually since last January, and, therefore, I don't believe the test is adequate yet.

[297] Q. Our objective at Hallett, as I recall, is to get 500 children involved in the exchange program. A. This was in the original resolution, I believe. Five hundred—yes, you had that document out this morning. I think you verified that.

Q. Yes, it was Exhibit 5A. It was your report to the Board on implementation of 1531. A. Yes.

Q. Now, has the target at Hallett changed? Is it no longer a mutual exchange of 500 children? Is that what you indicated? A. We would certainly like to achieve that, if possible.

Q. Mr. Cruter indicated that you had between 100 and 150 at this point, is that right? A. Yes, after one week of the campaign that we have just initiated.

Q. Didn't the initiation of that program start on July 7, Dr. Gilberts? A. Yes, it did.

Mr. Greiner: No further questions.

Cross-Examination by Mr. Jackson:

Q. Dr. Gilberts, the goal of 500 in the exchange on the Hallett program is composed, is it not, of 250 Negroes [298] moving out of the school and 250 whites coming into the school? A. Yes, I believe that's true.

Q. So, we are not talking about a wholesale shift of 500 students out of the school and 500 back into the school? A. I don't believe so.

Q. And under the present status report as Mr. Cruter advised us this morning, we are somewhere over the 200 figure then? A. In both directions, yes.

Q. Dr. Gilberts, much mention was made of the public hearings which were held following the introduction of Resolution 1520, Resolution 1524 and Resolution 1531, and the question was asked as to whether they were discussed at these public meetings.

Were they the only matters that were discussed at these meetings in terms of their specifics? A. Well, the discussion was not controlled absolutely. There were a number of other items that were brought into it, but these were the primary items.

Q. The programming and the steps taken by the school district to implement the Resolutions 1520, 24 and 31, you testified as to certain of the work that had been done in that area. Is there any carryover value to other programs [299] of the work which has already been done in this area? A. Yes, in those areas that were consistent between the two resolutions, certainly, there is a lot of carryover value.

Q. And there were—oh, excuse me. A. And there are

some other programs which will be implementing it. I think there will be some carryover, too.

Q. And there was a great deal in common between the 1520, 24 and 31 programs and the program under 1533? A. Yes, other than those items we mentioned were eliminated.

Q. You were asked on direct examination whether or not the boundary changes had been approved by the Board in the Northeast Denver area, the ones which did not involve any great distance of travel on the part of students that involved going into Phillips and from Phillips out to—or from the Stedman area into Ashley and around in that area. That boundary change had been agreed upon, is that correct, by the Board in their resolutions? A. Yes.

Q. Had these children actually changed their schools? Had they actually gone to the new schools? A. No, sir.

Q. There had been no movement at all? [300] A. No, sir.

Q. There was just a planning move which had taken place at that time? A. Yes.

Q. Now, referring to the teachers that might on occasion be found in schools where there is some concentration of minority children and the fact that on occasion there are teachers present who have less experience than others and are classified as beginning teachers, I didn't understand your testimony to be that the beginning teachers were any less qualified than other teachers?

Mr. Greiner: Your Honor, could we establish which of us can lead this witness? I object.

The Court: He may.

Mr. Greiner: Pardon?

The Court: The rules are clear.

Mr. Jackson: The rules are clear—excuse me?

The Court: Yes, just keep your remarks this way. I think he can ask him any questions, cross-examination, really, even though it may be a friendly witness.

Mr. Greiner: Thank you, Your Honor.

The Court: Go ahead.

A. There is no total relationship, I do not believe between the experience and ability of the teachers, although certainly, experience is a factor.

[301] Q. But it doesn't necessarily follow that a beginning teacher would have to be then less qualified? A. Not necessarily, no.

Q. Dr. Gilberts, I believe you testified that Resolution 1533 in its present form first appeared at the Board meeting on June 9, 1969, is that correct? Assuming that's the date the resolution was passed? A. Yes, assuming that, yes.

Q. But the programs contained in 1533 have in fact been before the Board on a number of other previous occasions had they not? A. Yes, they were a part of the other resolutions.

Mr. Jackson: I have no further questions, Your Honor.

The Court: Do you have anything further?

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Robert D. Gilberts—for Plaintiffs—Redirect

[301] • • •

Redirect Examination by Mr. Greiner:

Q. Dr. Gilberts, I am handing you what is in evidence as Defendants' Exhibit C. The second page thereof depicts the total number of students who have volunteered for the Hallett program. A. Yes.

Q. What's the total? A. 258.

Q. And that's how many are going to Hallett? [302] A. 158 are indicated here.

Q. How many are coming from Hallett? A. 100 are indicated here.

Q. Well, is that possible, Dr. Gilberts? A. Well, this is not the point at which this will be applied and this is merely a progress report and there is no indication of whether or not these are the figures that will be used finally.

Q. But I think you would agree, would you not, that until 50 more children transfer out of Hallett there is only going to be 100 Anglo children going in, would you not? A. I'm not sure that I could agree to that. There may be some additional space at Hallett that could provide for a few additional whites. I am not sure.

Q. Dr. Gilberts, would you agree with the general concept that I have just stated? A. In general, yes.

Q. Now, so that there is no confusion, Plaintiffs' Exhibit 5A, that was prepared by you or your staff? A. This is one of those that we had at the deposition?

Q. Yes. A. It appears to be, yes.

Q. On Page 10 of Exhibit 5A, there is described the Hallett program on 1531, is that correct? A. Yes.

[303] Q. And does it not provide for 500 Anglos going in and 500 Negroes going out? A. You are right.

Q. Now, has that goal changed? A. As I indicated before, we hope to attain that.

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Howard L. Johnson—for Defendants—Direct

[360] • • •

HOWARD L. JOHNSON, a witness called by and on behalf of defendants, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Creighton:

The Court: Give us your full name and address and occupation, please.

The Witness: Howard L. Johnson, 1130 South Franklin Street, Denver, Colorado. Deputy Superintendent of Schools.

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[361] • • •

Q. (By Mr. Creighton) Mr. Johnson, what is your present employment? A. I am Deputy Superintendent of the Denver Public Schools.

Q. How long have you been employed by Denver Public Schools? A. I have been employed for the Denver Public Schools since September 1930.

Q. And is that a common name for School District Number 1, the City and County of Denver? A. Yes, sir.

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[365] • • •

Q. And under these noninstructional, nonbusiness administrative duties, what are some of the duties you had there? A. They are pretty largely in the form of certain directives having to do with the schools, maybe in regard to certain bulletins, approval of certain noninstructional activities within the schools, the general interpretation of policies established by the Board of Education and the administrative staff.

Q. Did these noninstructional administrative duties include matters relating to the transfer of pupils? A. Yes, this part came under the pupil personnel services.

Q. And did those noninstructional administrative [366] duties include matters pertaining to school subdistrict boundaries? A. Yes, until such time as the planning and engineering services were establishes, and roughly it was included in my responsibility until approximately two and a half to three years ago, at which time there was a cooperative effort as this duty became more of planning and engineering.

However, I had the responsibility during the period from approximately 1960 until, I would say, 1965, 1966.

Q. And during your ocupancy of that office from 1965 or '66, as you have testified, until you left that particular office last year in '68, school subdistrict boundary matters were handled largely by whom again? A. Largely by me, and even during that period of time until our recent reorganization of a year ago I worked very closely with that office in regard to certain aspects.

Q. With what office? A. With the office of the assistant superintendent for planning and engineering.

* * * * *

[367] * * *

Q. Has there been, then, a difference in the function of the deputy superintendent under the new organization as compared with the organization that obtained between 1960 and '68? A. Yes. The difference is pretty largely this: the deputy superintendent position prior to 1968 was identified as one of the assistant superintendents who assumed the authority of the Superintendent during his [368] absence and then assumed certain top level adminis-

trative authority as delegated by the Superintendent; whereas, under this arrangement there is a specific job description in regard to the responsibilities of the deputy in coordinating the activities day to day in these six departments or divisions.

Q. And when in this time span we have been covering did the present superintendent, Dr. Gilberts, take up his duties? A. Dr. Gilberts assumed his duties on August 1, 1967.

Q. Mr. Johnson, you indicated that prior to last year when you were superintendent of personnel services, among your duties were those relating to the recruitment of teachers, is that right? A. That is correct.

Q. In this connection, are you familiar with the policies, if any, of the school district relating to teachers? A. Yes, I am acquainted with it.

[368A] Q. Mr. Johnson, there is in evidence in this case an exhibit, Plaintiffs' Exhibit 26, which is Policy 1617A. Would you tell us the effective date of that policy? A. This policy became effective in April 1, 1963.

Q. Now, since the effective date of that policy, has there been any change in the policy or its equivalent as it affects teachers? A. Yes, there has been this change, in this respect; that this policy on the basis of classified personnel—

Q. Now, you might explain to the Court what you mean by classified personnel. A. Classified personnel would be the so-called non-teaching or non-certificated personnel. It would include such as bus drivers, custodians, lunchroom workers, clerical help, those individuals who are not licensed by the school as certificated teachers.

Now, as a result of an agreement that was signed between the School District No. 1 or through its Board of

Education and the Denver Classroom Teachers Association who had gained recognition of the city as the official representative of teachers, on April 8th, 1967, this agreement was put into effect and adopted by the Board of Education and it includes this policy.

Q. Excuse me, Mr. Johnson. I have handed you Exhibit—an exhibit marked Defendants' Exhibit E. Is that the [369] agreement you are referring to, that you're speaking of? A. That is the agreement.

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[370] * * *

Mr. Greiner: We have no objection, Your Honor.

The Court: It will be received. What's the number of that?

Mr. Creighton: Defendants' Exhibit E.

(Whereupon, Defendants' Exhibit E was received in evidence.)

Direct Examination by Mr. Creighton (Continued):

Q. Now, Mr. Johnson, you said that nonclassified teachers were not affected by Exhibit E. A. Non-certificated, or as we call them, classified employees. They are termed non-certificated. We use the classified, and the other group of certificated people being called certificated personnel.

Q. But the teachers' agreement, did it affect the previously existing policy, 1617A? A. Yes, it had this effect, that there were some items in this agreement which, of course, supersede Policy 1617A that probably are a little bit—probably clarified to a greater degree in teachers' rights in cases of transfer, assignments and so forth, and consequently I would say it is [371] defined more clearly as it relates to employee relationships.

Q. Are you familiar with this agreement? A. Yes, sir.

Q. Can you direct our attention to the section of it having to do with teacher transfers? A. Yes, on Page 25 of the agreement, Article 14, and under the heading of "Transfer," would include the matters as it relates to teachers—to transfers of teachers in this case, not all certificated personnel, only classroom teachers; those individuals of this—that this group would represent in negotiations with the Board of Education.

Q. Are there any portion of Policy 1617A which now control the teacher transfer arrangement? A. No, on the basis of the signed agreement between the Board of Education and Denver Classroom Teachers Association, any articles in this agreement supersede those of policies stated elsewhere.

Q. Now, Mr. Johnson, do transfers apply to teachers presently hired—presently employed by the district? A. Yes, it is.

Q. Now, do they apply—does this transfer policy then apply to teachers who have not yet commenced employment with this district? A. No, the agreement such as it relates to transfer—this relates only to the teachers presently hired—presently employed by the district? A. Yes, it is.

Q. Now, do they apply—does this transfer policy then apply to teachers who have not yet commenced employment with this district? A. No, the agreement such as it relates to transfer—this relates only to the teachers presently employed. As of [372] September 1, 1969, at the beginning of the work for teachers, a contract year, this agreement will apply to them immediately as of that date.

Q. Could you outline for the Court the way in which the present transfer policy under the Exhibit E operates? A. Yes, if you are referring to Article 14 on the basis of transfer, I think there are about four or five items that need particular attention and one is the principal criterion for consideration of a request for transfer—is whether or not the request will result in the best educational program for the school district. A request for transfer will not be granted if a teacher does not qualify for the existing vacancy. That is one section.

Another section is 14-2-2, that the best educational program results from the selection of a school faculty which is well balanced in terms of teachers' experience, general background, and competency, and careful consideration will be given to each of the above when filling vacancies.

Q. Now, Mr. Johnson, are those general principles incorporated in the previous policy, 1617A? A. That is correct, and this would be the general criteria on principle we work under on this particular basis with the understanding that we would discuss with personnel regarding that important part.

Q. And what is the next important factor that you [373] have identified under transfer policy? A. There are about three important factors as we think of transfer: a request by a teacher for transfer, and it is outlined here, but rather than reading from here I can define it a little bit more clearly.

Mr. Greiner: Your Honor, we would object to the witness interpreting the exhibit. I think the exhibit states what the policy is.

The Court: Very well, Let him read it.

A. And in reading from Article 14, "That not later than April 20 of each school year . . ." Now, these are transfers requested by the teacher. "Not later than April 20 of each school year, the superintendent shall have posted in the office of each school a list of the known vacancies which will occur during the following school year.

"14-3-2, Teachers who desire a transfer to another building shall file a request on the appropriate form with the superintendent not later than May 1 of each year. Requests on file prior to the posting of vacancies will also be considered. If a transfer is to be made the teacher and the administrators concerned will be notified in writing of the new assignment. Except in unusual cases teachers who are to be transferred will be notified before May 20.

"14-3-3, Not later than May 20 of each school year the superintendent shall have posted in the office of each [374] school a supplemental list of known vacancies which will occur during the following school year.

"14-3-4, Not later than June 1 of each school year teachers may file applications for transfers to positions listed on the supplemental list of vacancies. Requests on file previous to the posting of vacancies will also be considered. If transfer is to be made the teacher and the administrators concerned will be notified in writing of the new assignment. Except in unusual cases, teachers who are to be transferred will be notified in writing before the close of the school year.

"14-3-5, No assignments of new teachers in the school system shall be made until all pending requests for transfers have been processed. If a teacher does not wish to be considered for vacancies which occur in the summer, the teacher must cancel his request for transfer in writing.

"14-3-6, In considering a request for transfer the convenience and wishes of the individual teacher will be honored to the extent they do not conflict with the instructional requirements and best interests of the school district.

"14-3-7, If more than one teacher has applied for the same position, the teacher best qualified for that position shall be appointed. Qualifications being substantially equal, seniority in the school district shall control.

[375] A. (Continued) "14-3-8. All requests for transfer on call in the Superintendent's office shall be destroyed on October 31 of each year. All renewals or new requests for transfer must be filed on or after November 1 of each school year.

"14-3-9. Nothing in this article shall prevent a teacher from requesting a transfer at any time.

"14-3-10. On or about June 15, the Superintendent shall make available to the Association a system-wide schedule showing names of all persons who have been transferred and the nature of such transfers. A supplemental listing of transfers and their nature shall be made available to the Association by the end of August."

Q. Now, Mr. Johnson, you have covered the part of this agreement relating to transfers requested by teachers, have you not? A. That is correct.

Q. Now, then, isn't there a section covering transfers that the administration wishes to effect? A. Yes, sir, and this refers to Article 14, Section 4, following immediately after that, my previous statement, and this is, "Transfer Requested by Administration."

The Court: I think I will let him summarize this.

[376] Mr. Greiner: I don't think I would even object to that, Your Honor.

Q. If you would, then, please summarize how administration-initiated transfers work. A. Yes, we have some situations where the administration may request a transfer. A good example of this would be that the enrollment or the membership in a school should be less than our anticipated membership for that school and it is necessary to transfer from a school to another school because we have overstaffed a particular school. There may be other reasons, but this is the one that is most common, and in this respect, if this is to be for the following school year, then this should be done prior to June 1st. However, a provision is given that if we find the emergency situation in September we still reserve the right to request transfer of the teacher. Then the transfer will be made only after a meeting between the teacher involved and the Superintendent's designee, and at this time the teacher must be notified regarding the reason that we requested his transfer.

In the event that the teacher objects to the transfer, then he can immediately notify the Association, and then the Superintendent or his designee will then meet with the teacher and the Association's representative to discuss this matter, and, of course, this discussion is [377] necessary or it could become a grievance filed by the teacher and the Association.

Now, at the time then, after it is discussed with the teacher, if it is agreeable, then a list of all open positions at that time must be available to the teacher, and then the teacher may indicate in the order of his preference the school that he wishes to be transferred to. So, really, it provides that this teacher cannot be taken from one school and said that the teacher is now in School A. He is convinced that there is a legitimate reason for his trans-

fer. So, he acknowledges that. But we cannot take him from School A and move him directely to School B without giving him the other possible schools where we have vacancies for which he is qualified.

If there are three schools requesting the same qualifications, there are three vacancies, we must give him the opportunity to go to School B, C or D, as the case may be, and he then is entitled to make his choice.

Q. Turning back to the transfers initiated by the teacher himself or herself, does that impose any limitations or qualifications on the administration's ability to make a determination of where the teacher goes? A. You will note in the wording that it indicates the qualifications of a teacher. You will also recall that [378] earlier I stated for the best interests of the school district. To the extent that we do give a feasible answer to that teacher regarding the transferring of one teacher over another and explain that we think it is for the best interests of the program, we do have or are empowered to do this, but not without answering to the teacher or if necessary to the Association, if they object that we are dealing with the teacher unfairly, but it does give us the privilege of transferring —of indicating to the teacher to go to a certain school.

Now, of course, if the request is made by the teacher, then, of course, that first section does not apply, because this is only where the teacher requests.

Then, of course, he requests for a specific position.

Q. Then, are teacher preferences a factor in determining who gets transferred where? A. It is a very important factor.

Q. Is teacher seniority a factor? A. Yes, that is written in the agreement, that seniority shall prevail, assuming that all other qualifications are similar.

Q. Was that seniority feature in the previous policy, 1617-A? A. It referred to it, but it is not as direct in [379] the statement. It is referred to that seniority shall prevail, and that has been the practice and procedure for years.

Q. Now, Mr. Johnson, when you finish up this transfer process, the dates you have indicated it happens, is there a time during the school year when there are unfilled openings that need to be filled with teacher personnel? A. Yes, if you will note that we attempt to fill these vacancies upon request of teachers prior to June 1st, so there is a period, really, that extends from June 1st to about September 1st, and in unfortunate years may even extend to the first day of school. But we have been fortunate in this respect, and during this period of time we had these vacancies that are a result of retirement and resignations and some unusual situations where we may have vacancies during the summer, and, then, of course, these are the vacancies that have not been requested for filling by the staff who were there during the previous year.

Q. Are projected enrollment changes a factor? A. It is not only overall projected enrollment changes, it could be projected enrollment changes in each of our 116 schools, because very often the mobility of population can affect a school as much as 50 to 60 pupils [380] just through the movement and the transiency even within the city.

Q. Now, how do you go about filling these vacancies? A. These vacancies must be filled by new applicants and teachers who are hired. Some of them are hired in the spring of the year because we anticipate from year to year so many vacancies. Some of them must be hired during the summer months, if we have failed to fill these positions or the estimated positions.

Q. During the last several years, Mr. Johnson, what has been the size of this new teacher assignment matter? How many teachers? A. It is necessary for us to hire from 500 to 700 new teachers each year. We have roughly a turnover in our staff for an average of from 12 to 14 percent a year, which is quite consistent with other large cities in the United States.

Q. Do you know anything about the extent of experience of these new teachers you must bring into the system each year? A. Yes.

Q. All right. A. As far as experience is concerned, and I will have to give the approximate number, although I am within [381] one or two percent, on the basis of our elementary teachers. Approximately 42 percent of those teachers have had previous teaching experience, one or more years. In the secondary schools, we find that the experience—we do have a higher percentage that runs approximately 39 percent of our new teachers have had previous teaching experience.

Q. Would these be classified in some of your classifications as teachers without previous Denver Public School experience? A. That is correct. As far as listing these teachers on the basis of experience, we usually list them as having previous Denver Public School experience. The experience gained outside, we do not count this in our normal format of indicating experienced or inexperienced teachers, and these individuals are given benefit on the salary schedule for a portion of their outside experience, but they are not listed as experienced Denver Public School teachers.

Q. Do you know anything about the extent of the non-Denver experience of these 39 to 43 percent that come to you having had experience? A. I personally do not have,

but in the personnel services staff there is a very close examination of this previous experience in regard to recommendations made by [382] previous administrators as well as the subject matter area, extracurricular activities, sponsorship, and all of this type of evidence does come to members of the personnel services staff.

Q. In regard to these new teachers, what is the School District looking for in the way of new teachers today? A. We are looking primarily for individuals who are sympathetic with children, understanding of children's problems, their ability to be able to discipline with reason, have the necessary control over the individual, be able to work within the community and to work—and their ability to work with parents. And, then, of course, in addition to this, and we have to recognize the necessity of the most modern teaching methods and also their knowledge of subject matter in a particular area.

At this particular time, however, we have come to the conclusion that probably the knowledge of subject matter and this type of skill is important, but it is not as important as the sensitivity of a teacher in working with children.

Q. How do you seek out teachers with sensitivity or training in sensitivity? A. Well, of course, we have quite an extensive recruiting program, starting about the first of December of [383] the previous year, in hiring teachers for September, and this continues with a great deal of vigor and force until about the first of May, and very often we are able to hire the bulk of these people by April or May, and, of course, in attempting to gain these, these are all personal interviews.

Contrary to what is done in some areas of employment, we do not consider a teacher an applicant until such time as he has been personally interviewed by a member of our

staff, has submitted even prior to that interview his transcript of record, his recommendations from his previous employer, and all of the data submitted to our office.

Then the personal interview takes place and at that time he is considered an applicant, and then it is pretty largely a comparative matter of determining upon the basis of the personal interview as well as the materials—it is a comparative matter of selecting these roughly five to six hundred teachers—it may vary from year to year—out of somewhere in the neighborhood of about 3,000 of these formal applicants.

[384] Q. Has the school district done anything through the source of these newly-trained teachers, the teaching colleges, to improve what you're seeking? A. Yes. In fact, this, I think—I think this is brought pretty definitely to our attention on the basis that there are certain things we are looking for in teachers today that were not requirements for an education degree.

Many of us who have been in education over a period of years, we receive quite a heavy dose of methodology, should we say, and subject matter. And I think the institutions of higher learning went on for years overlooking some of the important things, sociology and many of these things. And we made it a point a few years ago to contact 55 institutions of higher learning with whom we had had our greatest contact requesting certain types of courses to be put into colleges. We also requested that we needed to do more from the standpoint of practice teaching or student teaching in having these individuals work with a lower socioeconomic group, the culturally deprived. And I am happy to say that—and we haven't gotten 100 percent on this—but we have found very close cooperation. For instance, the student assigned by the Denver Public School

System by institutions of higher learning in this state—the majority of them are now doing their student teaching in so-called target area schools.

* * * * *

[391] Q. Specifically in the area that we have just been discussing of teachers Mr. Johnson, I refer you to Page D8 of this Exhibit 20, at the top of the page. Would you read that—or let me ask you, is the recommendation there, No. 2, one that fell within your responsibility? A. That's D8, No. 2. "A minority background should be considered as an asset in the recruitment of teachers in the Denver Public School System in that larger number of well-qualified teachers of Negro, Spanish-American and Asian backgrounds; standards of training, personalities, and abilities shall never be lowered or raised because of a minority background."

Now, Mr. Johnson, has the school district and specifically your office responded to that recommendation? A. Yes. We have responded to this recommendation. I think it is evident in this respect. The increase in the number of minority teachers that we now have in the Denver Public Schools. Number two, the emphasis that is placed upon recruitment of teachers in minority background and this particularly is making certain that we have a very close coverage of those institutions in the United States which have a large Hispano group in the college or university.

Number three, we moved further than just making contacts with the institutions of higher learning where we knew there were a large percentage of Negro and Hispano [392] students. But we moved deliberately into about 12 of the large Negro universities and colleges in the South. And then, also, utilized members of our own staff—our staff who were Negro or Hispano to make these contacts.

Q. Was Mr. Cruter involved in this? A. Yes, Mr. Cruter was primarily involved in recruiting with the southern universities and colleges.

Q. When did this response commence with respect to the 1964 recommendation? A. It really commenced in 1965 for the September recruiting because, as we went through these 155 recommendations, we put—we began implementing immediately those that we felt could be handled in this respect and we substituted in our recruiting plans, we substituted other people to make these recruiting trips. We also substituted other—certain other schools and eliminated some that we had not been quite as well successful with in our recruitment in order to achieve all of these 155 recommendations.

Q. Since 1965, do you have any evidence or measure of results in that regard? A. Yes. We have evidence in this respect, that at the present time we have in the Denver Public Schools approximately 400 certificated employees, that is, teachers who are of the Negro group. We have approximately 100 who are of the Hispano group. Roughly 50 to 75 orientals, and [393] so this would total altogether somewhere in the neighborhood of 575 to 600 individuals of these ethnic groups.

Q. That's as of now? A. As of this last September.

Q. How does that compare historically since 1965? A. In 1965 we had approximately 275 to 300 Negroes. The Hispano group was approximately 50, and oriental group was about the same. So I would say there has been an appreciable increase in those numbers.

Q. Mr. Johnson, would you read the next recommendation on Page D8? It's No. 3. [394] A. Accredited colleges and universities throughout the country, not merely those close to Colorado, should be objects of a more aggressive recruitment effort.

Q. Is your previous testimony a fair description of what you did to respond to that? A. Let us say in this respect it was fair, that we did try to move in the areas, thinking of the recruitment of the minority group. We did extend our boundaries for recruitments slightly, but not extensively. We extended slightly in the East going into Indiana, Ohio, Illinois, and then we did move in the direction of making more contacts with eastern universities and colleges, and this was tied in with professional meetings of our group.

Then as far as the South is concerned, I have explained that. We have previously recruited in the Midwest to a great degree, and we did go into New Mexico, Arizona and Utah and recruited there. We have studied very closely the matter of recruitment in California, Oregon, Washington, and also the far East. This matter—

Q. By that, you mean the eastern states? A. Eastern states, yes, sir. Now, in this particular business, this school business is very similar to private industry. It is a law of supply and demand, and I think we must be careful that we are not wasting a great deal of recruiting money going into places where we know we may be [395] outbid already on the basis of a thousand to two thousand dollars on the beginning salary. However, as the reports will show, we do hire many teachers, quite a number of teachers, from California. We do hire some from New York State, and so on, but we have been concentrating upon more in the Midwest, the Rocky Mountain area, and the South and our Central states.

Q. Do you have any other data or indication that this recruitment has produced a more geographical diversity in your input? A. Yes, it has that, and I think part of it is due to the recruitment. However, I think a great deal

is due to the fact that we send out a great amount of literature. Every institution in the United States gets our literature, even though our recruiters aren't there. Last year, as I recall, in the teachers we recruited last year they gave us their home addresses, that is their place of residence, and we recognized some of this may have been the parents and they moved on to teach for the year, but 46 states were represented and Canada was represented; so we have teachers who indicate that their homes are in 46 out of the 50 states.

Q. Mr. Johnson, would you read the next recommendation of the study committees, number 4? A. Yes. "The administration group in charge of recruiting teachers should include representatives of minority [396] groups in Denver," and this—

Q. Let me ask you a question, Mr. Johnson. You have mentioned, of course, Mr. Cruter alluded to his activities. In addition to that, has the administration taken steps in '65 to respond to that? A. Yes. we have, by using both Negro and Hispano recruiters.

Q. And in terms of comparative numbers between now and '65, has there been a change in the numbers of minority persons involved? A. In recruiting?

Q. What? A. You mean in recruiting?

Q. In recruiting, yes. A. Well, it has increased definitely on the basis of total number. Unfortunately, we have not used—we have not used the minority group prior to that particular time. There were one or two reasons for it, and pretty largely that we didn't have the manpower and we hesitated a great deal in using individuals who were assigned to the other jobs. We were using specifically the personnel people.

Q. Have minority recruiting personnel proved effective? A. Yes, I think they are effective. I don't think [397] that we need to look at it particularly from the standpoint of numerical value on the basis of numbers as much as it is the fact that I think the image is going out that we are interested in top-flight minority group teachers, and I think that this is paying dividends. I think that as Mr. Cruter told me he found that his trips into the South are more valuable—

Q. That would be hearsay. A. That would be hearsay.

The Court: Well, he told us that.

The Witness: That's right.

Q. Would you turn to page D-10 of Exhibit 20 and read the recommendation that appears at the bottom of that page. A. "The Board of Education and administration should work actively in concert with other school systems throughout the country to impress upon teacher training colleges the importance of preparing teachers to teach all children, including children of different ethnic and racial background, and the type of child we are characterizing here as disadvantaged culturally. It should be made clear that such training should be a plus factor in selection in the Denver system."

Q. Was this recommendation part of your responsibilities? A. Part of it. A dual responsibility along with [398] the Assistant Superintendent for Instructional Services, Dr. Hinderman.

Q. Do you know what response the administration of the district made to this? A. Yes, in this respect, that Dr. Hinderman and his associates contacted these institutions of higher learning and discussed the background in regard

to the offerings of colleges and universities for prospective teachers. We likewise, as we sent our people on recruiting trips, met with deans of colleges as well as the placement directors to discuss this matter of the necessary training of teachers to be better fitted to work with the culturally deprived.

Q. Do you see any evidence of results of this program? A. Yes, I see evidence. Again, you may indicate this as hearsay, because this is difficult to measure from the standpoint of any valid tests or measurements, except this, that we do get the report from our principals and we also are receiving from the community generally, parents and others, the quality and understanding of many of new teachers—

Mr. Greiner: Pardon me, Your Honor, I think I will object to this question on the basis of hearsay, what reports he has received from other people.

[399] The Court: Overruled.

Q. You may proceed. A. I think I have advanced my point, and that is on that basis.

The Court: Reports have been good. Go ahead.

Q. Mr. Johnson, you indicated that your—or, let me ask you this, have your duties involved any responsibilities with respect to the use of mobile units in the school district? A. In this respect. that is, the department of personnel services has the responsibility of working with budgetary services on increasing enrollment and so forth. To that degree, why, we did have the responsibility of recommending to the Superintendent the need for some means of al-

leviating the crowded conditions in certain schools and there to that extent. However, the bulk of the responsibility of purchasing and so on is in the division of planning and engineering, and in these cases the result of a recommendation of the Superintendent and the other staff members regarding the needs.

Q. Do you know when the district first started using mobile units? A. I would say about 1962, as I recall, the first year of the mobile unit. '62 or right about that time. I am inclined to believe—I would say '64, because I think [400] that Dr. Armstrong had a part in the purchase of those, so I think it was later, and he took office in '62.

Q. Mr. Johnson, I will hand you Plaintiff's Exhibit 101, which has been received in evidence. A. That's right.

Q. Do you happen to be familiar with that display? A. Yes, I am, and I note that my date was correct, 1962. Yes, I am acquainted with this.

Q. Are you familiar with the study committee's recommendation with respect to mobile units, which came two years later, obviously? A. Yes.

Q. What was the recommendation? A. Their recommendation largely was that they indicated that mobile units were a possibility and that we should—we should move in the direction of utilizing any means to relieve what they considered to be crowded situations in certain schools.

Q. Now, this Exhibit 101 indicates that mobile units were in the first year of employment sent where? A. The first year they were sent to the following elementary schools: Doull, Wyatt, Wyman, and Greenlee.

Q. That was 1962? A. That was in 1962.

Q. What was the next year they were installed? [401] A. Then in 1964 then there was a movement of some of

these because they were not necsseary, and there was also a purchase of some additional units, and sent to Philips, '64, and in 1965 to Smith School, and then also in late '65 to Park Hill School, and also Hallett School.

Then, we found that the decrease in enrollment in certain areas made it possible to move some of these. For instance, Doull School that had received the first mobile unit, we were able to move that to Eagleton to offset an increase there, and also in 1967 it was possible because of a lower membership at Hallett Elementary School to move two of those units to Ashley Elementary School.

Q. Has the use of mobile units given you any additional flexibility? A. Well, yes, it does. I think probably taking the first school on the page, Doull School was a very good example, and we had a heavy membership at Doull School. It was predicted that Doull School membership would be reduced, and our predictions proved to be correct, and so consequently on this particular basis we did not go to the expense of an extra classroom and so on, and we were able to utilize that mobile unit in other schools, and so there is this flexibility, and it may not only be on the basis of membership. It could be on a special program flexibility.

The Court: These units are single classrooms?

[402] The Witness: Pardon, sir?

The Court: Are these units single classrooms?

The Witness: Yes, they are single classrooms.

The Court: What are they, prefabricated?

The Witness: Yes, prefabricated.

The Court: They can be disassembled and moved somewhere else?

The Witness: Yes. It is not quite as simple as that because there is the matter of electricity, the

various utilities, and so on. So it is not quite as mobile as we normally think of a house trailer.

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[403] * * *

By Mr. Creighton:

Q. Mr. Johnson, as a matter of fact, I was about to ask you about these mobile units and to describe them. Are these classroom facilities? A. They are classroom facilities built purposely for this particular use.

Q. Do you know how satisfactory they are for this purpose of classroom units? A. We are in the impression that they serve very satisfactorily; at least, the reports that we get from teachers that use them, that generally they are well satisfied with them.

The Court: I take it that they are an interim facility that you utilize until your plans materialize to build new schools; is that right? Until the population becomes set in an area so that you know what your needs are going to be?

The Witness: That's correct, Your Honor. They are a temporary facility and for flexibility purposes.

Q. Do in fact these units have any advantages over other types of classrooms? A. I think probably teachers and pupils that wish to be isolated from the run of the regular school, the hallways and so on, that this would be an advantage.

[404] Q. Do they impose any limitation in class size? A. Only to this extent: that they are set for the normal class size, and normally the pupils—the number of pupils in these particular facilities usually number 25 to 30 pupils

and they handle that particular number very well. They do have air conditioning. They have the necessary public utilities that are necessary in close proximity.

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[408] * * *

Q. Please refer to Exhibit 20 at page D-14, Dog-14. Please read Recommendation 1 that appears on that page. A. "The Board of Education should establish and enforce a policy that qualified teachers of minority backgrounds will be assigned throughout the system."

Q. Now, was that recommendation assigned to you? A. That would have been assigned to me as Assistant Superintendent for Personnel Services.

Q. Do you know what the School District has done [409] since '64 to respond to that recommendation? A. The Superintendent, the previous Superintendent as well as the present Superintendent, has indicated that we should move in this particular direction, and we have to the best of our ability, assigning teachers of minority backgrounds throughout the system, and as of last fall we had a minority teacher in every secondary school and minority teacher in 77 out of the 91 elementary schools.

Q. So the interaction of your policy and the teachers' agreement impose any limitations on what you would otherwise do here? A. It would impose this limitation on an individual basis, but I don't think that it would impose it from the standpoint of the overall mass movement of any type. It can be realized that the agreement does indicate that if the administration requests the transfer of a teacher, the teacher is in position to question the transfer, so it places that limitation on it.

Q. Since 1964, has there been measurable—

The Court: Well, other than this, you just assign them without regard to whether they are minority people or not in the various parts of the town?

The Witness: Yes, we do. However, in the case of transfers it is necessary that the teacher request the transfer. That is, unless we go to the teacher and—

[410] The Court: Well, I think we ought to focus on the evidence. We have evidence here that these people are unduly concentrated in some of the Northeast Denver elementary schools particularly.

The Witness: Your Honor—

The Court: I mean, we had a good deal of evidence here the other day. I don't know if you were here or not. Is there a tendency of this kind?

The Witness: Yes, Your Honor, this is correct in this respect, that there are many of these Northeast Denver schools that have a greater number of Negro teachers in these schools than we do elsewhere in the city, and then as far as the distribution of these teachers, as I spoke, in 77 of 91, this is a matter of one or two teachers being in those situations.

Now, the point I am making is that we are stressing a greater distribution of these teachers throughout the city, but it is necessary that any teacher who wishes to be transferred to any other part of the city, of course, must do this pretty largely on the basis of this agreement and request such transfers. We had not had a large number of requests in this direction.

The Court: Well, my question is, why, if you pay no attention to whether these teachers are mi-

nority, they end up concentrated in Barrett and Stedman and these [411] other Northeast Denver schools?

The Witness: I think part of this is due to we have a greater turnover of teachers in those particular areas, and then as far as the reassignment of teachers are concerned we do discuss with teachers regarding assignments and we find that sometimes there is a reluctance on the part of the Negro teachers to want to go into other schools. However, we are having a better success in this respect than formerly.

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Q. Please read Recommendation No. 4 on page 214.

[413] • • •

Q. Please read the next recommendation, No. 5 on that page. A. "After a transitional period, during which the other recommendations of this committee are implemented, particularly with respect to training in human relations, no teacher, probationary or permanent, should be assigned to teach in a school containing substantial numbers of culturally-disadvantaged children unless his preparation, experience and/or personal qualifications demonstrate the probability that he will be successful in teaching culturally-disadvantaged children."

Q. Do you know what the district has done in response [414] to that since 1964? A. I would say that the district has attempted to meet this. Although, again, I think it's—the statement is so worded that no teacher should be assigned to teach in a school containing substantial numbers of culturally-disadvantaged children, I think it would stand to reason that I would have to indicate that on the

basis of assignment, there may have been some misassignments or—remember, that we have so many new teachers, and consequently it may be that when we make a statement that the individual, his preparation, experience and personal qualifications—now, it's entirely possible that his personal qualifications would thus demonstrate this but on the basis of preparation, experience and so on that this teacher may have had—

Q. When you speak of assignment, you're speaking of this input each year? A. That's correct. So, as I say, I don't think you could say that all teachers assigned here have all three of these qualities anymore than they would have in assignment in other parts of the city. I would say that it's the attempt to look very closely at these pepole who are assigned in a culturally-disadvantaged area or in any other area of the city.

Q. Do you make this same effort of screening, I suppose in the case of transfers—in negotiating and discussing [415] transfers? A. I would say a greater effort is made at the time of the placement of the teacher when he is new than on the basis of transfer. But an attempt is made in both cases.

Q. Would you please read No. 6 on D15? A. "A systematic program should be established by the administration to encourage teachers in schools attended by culturally-disadvantaged children and to emphasize affirmatively the personal rewards and satisfactions gained by teachers who work in such schools."

Do you know if any response has been made by the district to that recommendation? A. I would say that a response has been made but a great deal more needs to be made. I think the greatest response in answer to that

recommendation has been made through our workshops and school community relation programs of various types and where contacts have been made with some four or five hundred teachers during the year through our school community—our Department of School Community Relations. I frankly think this must be a concerted job of all teachers as well as administrators. We did meet with teachers in this particular area, the city, a matter of two years ago, working with Mr. Cruter in school community relations to see what we could do to build up the advantages in working with these children.

[416] Q. Please read the next one. A. No. 7, "In policy statements adopted by the Board and by the administration, it would be made clear that teacher preference as to assignment is subordinate to other criteria and that each qualified teacher in the system is expected to be able to teach and to be prepared to teach in any school where the administration thinks he can be most effective."

Now, Mr. Johnson, that speaks of the word assignment, which I believe in your context means the new teacher to the district. A. That is right.

Q. Where you don't have a transfer situation and teacher preference involved. A. Uh-huh.

Q. Were new teachers who are strictly speaking assigned —has the district responded to this suggestion? A. Responded in this manner. That probably the assignment of teachers is probably more a personal matter working with the individual teachers and discussing their assignment as they move than it is to just bluntly assign them in a particular area. For instance, at the time that we recruit teachers we do not give the teacher any indication of a specific assignment. We are assuming that we are recruiting teachers—

[417] The Court: I think what was asked is whether the Board has abided by this recommendation, that is, in respect to laying down policy. Isn't that all the question is?

Mr. Creighton: Yes.

Q. Has this been made a part of a policy—a formal policy? A. There is no formal policy in this respect, as we speak of a formal policy. But it is a practice, and the Board of course is very interested in this type of assignment as is the administration.

Q. Please read No. 8. A. "Teachers should be assigned or transferred to the elementary or secondary schools with major consideration given to their qualifications for teaching at a certain level."

Q. Now, did this require any change in practice? A. I think that it required a change in this respect; that there was a closer examination—probably on major and minor subjects. It is very interesting—we have some cross-overs between elementary schools and particularly on the basis of homemaking teachers who have had a major particularly in childhood education and so on. And I think it has made the Personnel Services watch more closely the qualifications and credentials of these people. When [418] teachers apply, they do this very often—they realize that there is a greater turnover in elementary education. The teacher may be primarily qualified in a subject area in secondary schools but may make known, where we ask the question in what particular level do you wish to teach, they make the statement, elementary. Then I think there was a tendency, that as we looked at the credentials, we found out they were qualified for elementary, that greater care should have been given in this respect, and I think the fact that this was

brought to our attention, I think this—I think there has been a closer scrutiny from the standpoint of those credentials of individuals who may have had some background who were qualified in elementary but had not necessarily taken their undergraduate work in this respect.

Q. Please read No. 9. A. "So that it will not be used as an excuse for careless placement or perpetuation of assignment, contrary to these recommendations, the residence of a teacher should have nothing to do with assignment except in unusual cases."

Q. Has there been any response to that recommendation? A. I think, so far as assignment of teachers are concerned in the Denver Public Schools, that is, the original assignment of teachers, I don't think there was too much violation of this and probably when teachers had indicated a preference, and where they seemed well qualified, I think [419] the teacher was given a little bit the benefit of the doubt. However, there have been very few instances. However, there have been some unusual cases where a teacher may be assigned close to a home situation. But this is not our practice. In fact, if this comes up as a reason for a request for transfer, it is usually not granted.

Q. The next recommendation deals with teacher aids. Had you been using teacher aids prior to the recommendation? A. Very few teacher aids were used prior to this recommendation. This is partly due to two things, one was—it was pretty largely a matter of finance, and I don't think at that particular time that we were sophisticated enough to use teacher aids. However, I do think that as a result of the inroads that were made by the use of federal funds, in which we were able to get certain types of aids in working with the teachers themselves in community work, we did set up certain criteria for the use of teacher

aids. So, whereas, about 1964, we had practically no teacher aids, we have right in the neighborhood of 400 now. These are used in direct aids to the individual teachers, are used in the playgrounds, lunchrooms, hall duties various types of assignments; audiovisual aids. So in this respect this is being implemented and we believe that it needs greater study because not only— We are utilizing teacher aids to the best of our ability through no fault of the [420] teachers or the principals—but I do think it does need additional work. But the administration and the Board both concur that this is a direction we should move. But it is comparatively new, not only in Denver but in many school districts in the cities—or, the United States. Excuse me.

Q. Please turn to Page D18. Please read the first recommendation there. A. These are your recommendations to principals?

Q. Yes. A. "Principals should become familiar with the community resources, cultural background and socioeconomic conditions of the community in which their schools are located."

Q. Has the district taken any steps to respond to that recommendation? A. Yes, they have taken steps and I think this has been the move in the right direction. It was formerly assumed that principals of course would become familiar, but I think now the basis of again much of the work that has been done in our workshops for principals and others, that we are making strides forward in this respect, particularly in community visitation and so on. But there was one that not only appears here but appears elsewhere in this report, but this is one that—that we are striving very [421] diligently to make the principal recognize that this is an important responsibility for him.

Q. Please read the next recommendation. A. "In addition to human relations training, principals as a prerequisite to assignment should have demonstrated a capacity to respect, to understand and to communicate with children and parents in more than one type of neighborhood."

Q. Now, what did that mean and what, if anything, did the district do? A. I think that probably what is meant on this,—as you know of the committee report, it was pretty largely this, that very often principals were assigned to a greater degree on the seniority basis, and I don't think they were as concerned about the children and the parents in any more than one type of community. I think there was a tendency prior to the assignment of principals of various ethnic groups, that is, a greater number of them that here were principals who had served primarily in a white community, with administrators, but were assigned to communities where other ethnic groups were the major groups, and they didn't prove to be successful. And this is an emphasis upon that very thing; that they should have this background and that we should take particular care in respect to these assignments, and we have attempted to do that, and it's been done in a number of ways. We have a greater number of minority group [422] principals, administrators and so on, who do understand these problems much better and likewise I think, as a result of the answer to the previous statement in the service training workshops and so on, I think we are developing a greater supply of people. But, this was a very emphatic thing on the part of the study committee and we are certainly looking at this.

Q. Please read recommendation No. 3 at the bottom of that page. A. "The job responsibility of principals in elementary schools particularly in schools where substan-

tial numbers of culturally-disadvantaged children attend, should be analyzed and assistant principals with qualifications similar to those recommended for principals should be assigned in order to permit the principals to give ample supervision and assistance to teachers."

Q. Did the district implement that recommendation? A. Implemented it in this respect; that the job descriptions for all administrative personnel was received after this particular report and it is not only a matter of review and job descriptions at that time, but upon the advent of a new superintendent a matter of two years ago, it has been reemphasized that this entire matter of job descriptions, the entire responsibility of staffing the individual school now is being looked at again.

[423] Q. Please turn to D21 and read Recommendation 2 and then please tell us briefly, because I think you have touched on it before, what the district is doing there. A. "As rapidly as possible all administrative personnel should participate in training in human relations. Such training should be an important consideration in all future appointments to administrative positions."

And, as you indicated, I did touch upon this before. And it has really been given very serious consideration as we appoint new administrators in the Denver Public Schools.

Q. What techniques or devices do you use for this? A. You are speaking now of the evaluation or are you speaking of the training?

Q. Of the training. A. The training is handled pretty largely through the Department of School Community Relations, working with a committee of teachers who are very interested in this area and we are requiring that principals and administrators attend such types of programs. In fact—and this is not only at the administrative

level of the principal; this is from the superintendent on down. The superintendent and his immediate staff participated in such type of workshops last—this last school year.

Q. What was that workshop called? [424] A. Mr. Cruter now prefers to call it more in the field of human relations, although it originally had the name of Sensitivity Training.

Q. Would you turn to Page E12 and note Recommendation No. 3. Was that under your responsibility? A. "Teacher should be encouraged to make more home visits with time allowed in order to work more effectively with parents and in motivating pupil learning."

So far as this specific recommendation is concerned, this really came through the Division of the Instructional Services because it pertained to the involvement of programs right within the school. But I do know that at least this was investigated a great deal.

[425] Q. And has it been stressed since 1964? A. It is constantly being stressed. In fact, this is a very important factor.

Q. This discussion of community involvement reminds me, Mr. Johnson, I neglected to ask you in connection with the mobile units, in determining whether to use mobile units did the administration consult with the parents in the area affected? A. In most instances, in fact, let us say this, the mobile unit was usually the means that was used to relieve overcrowding in a particular school and it usually resulted after a series of meetings with the school administrators, teachers and parents within a community, because the mobile unit became very closely related to the change in boundary lines, transportation or mobile unit or double sessions.

That is, it usually originated on that particular basis with the result that the mobile unit began to gain favor.

Q. Among whom? A. Among parents, administrators and others, in order to eliminate the double sessions particularly. That is, they did not wish the double sessions. And, of course, we were in position from the standpoint of the financing—this appeared to take care of some unusual situations. Some parents were aware of this and in nearly all instances [426] the mobile unit was then decided to be the most feasible, but usually with this one provision, we don't want them forever and be sure they are mobile and not permanent.

Q. Do you recall the limitation in the guideline that you read from the board motion guideline you mentioned? Do you recall a suggestion there about transportation? Was the use of mobile units considered as an alternative to transportation? A. Yes, normally these were lumped together. Very often it was transportation or double sessions, recognizing the mobile units are—that is, they are costly, and so, consequently, this extra class in this respect in the early days of the mobile unit, it finally came into the picture where it became another matter, and with the result that we found that the mobile unit in most instances appeared to be a better solution, that is at least in the eyes of the parents, than transferring the pupils from the school or going on the double sessions, so the mobile units I think became the lesser of what they considered to be certain evils.

Q. In your office, do you have occasion to know about individual school or building capacities and the ratings thereof? A. Let me say that in my office, in my office as assistant superintendent, I was acquainted with them, and as [427] deputy superintendent I also am acquainted.

This normally is handled through the planning and engineering, but I am generally acquainted with some features of this. But we must recognize that when we speak of building capacities we are going into detail other than just to say that a building is "X"—will handle "X" number of students.

Q. Well, do you know whether the district had rating capacities for its buildings? A. Yes.

Q. Do you know how these are arrived at? A. Yes.

Q. How? A. The rating capacities—and this is characteristic over the country in trying to establish a formula that is used, and that is on the basis of 30 pupils per classroom, and this is a formula that is used as a beginning to determine this, and as we use the so-called rated capacities, a building is listed on this particular basis, and normally arrived at on the 30-pupils-per-classroom basis.

Q. You mean that a building's capacity is as simple as this, that you count—its rated capacity— A. That's right.

Q. And you count the number of classrooms and multiply by 30? [428] A. Yes. We want to recognize here we are talking about two things. You are talking about normal capacity, in which you arrive at 30 pupils per classroom, and when I made the statement I was acquainted with it, this is the case. I am acquainted with it.

Now, whenever you determine the capacity of any building in this city, there are many other things to be taken into consideration, and, consequently, these are taken into consideration knowing that no school building will probably ever have the exact normal capacity; however, it is something to start with on the basis of indicating this is the normal capacity when we speak of a building generally.

Q. Let me ask you this, Mr. Johnson. The data that is available about our buildings as to capacity, is that the

rated capacity? A. That's what we call the normal capacity or rated capacity.

Q. That's the multiple— A. This is the figure 30 times the number of classrooms.

Q. It is nothing more than that? A. It is nothing more than that, because from that particular point it means that planning and engineering, the division of education, and others have to look very [429] closely at this building. It stands to reason that a building that was built in 1912 has certain peculiarities to that particular age than the building built in 1968. There are many things to be taken into consideration, and these are taken into consideration, and, consequently, we have the normal stated capacity which is very important for all of us to know, the formula type; but we must look very closely at this and it is possible that a building may have a stated normal capacity and, frankly, because of certain conditions and not only the conditions of the facility but the conditions of the educational program, that building cannot handle its normal capacity.

Q. Its rated capacity? A. That's right, and there are other buildings because of the type of programs and because of the structure of the building it is entirely possible that that building can handle quite favorably 8 to 10 percent more than that.

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Q. Mr. Johnson, I am going to get before you again Exhibits 33 and 34, which are subdistrict boundaries policies and pupil assignment policies, respectively, that have been introduced in evidence by the plaintiffs, and which bear on the general matter of subdistrict boundaries, and then I would like to have you pick up that '64 committee report, Exhibit 20.

Let me ask you preliminarily, to clarify this, did your office as assistant superintendent of personnel matters from 1960 until the revamping last year include matters relating to those two resolutions which I just handed you and the general matters of subdistrict boundaries? A. Generally, this Policy 1222-C relating to school district boundaries, we have looked at the various things we mentioned in the type, size and facility of this school, the pupil capacity of the school, school-age groups, [431] and so on. This policy emphasizes to a greater extent and brought in there at this particular time the ethnic and racial characteristics of the school population, making to the extent possible a heterogeneous school community. And then there is more stress upon the mobility and levels of educational attainment.

Q. More in respect to when? A. That is, this policy emphasizes this to a much greater degree.

Q. Why I asked— A. Than just the working guidelines we had formerly before this policy was adopted. However, the type and size of facilities at the building, the pupil population, natural features and the urban features and so on, were taken into consideration when we designed boundary lines in order to establish the membership within a given school to as great a degree as possible. However, it wasn't always possible to follow exactly on this and as a result sometimes we would have to forego some of the criteria in this respect.

Q. Well, Mr. Johnson, you have mentioned 1222-C. A. Yes.

Q. Now, as to 1226-B, when did that become effective? A. Policy 1226-B was effective on February 3, 1966, and this also came—these two policies—

Q. Is that A or B? [432] A. This is A.

Q. 1226-A? A. A.

Q. That became effective when? A. That became effective on February 3, 1966.

Q. And that related to what? A. These were outgrowths—

Q. No, the resolution or the policy relates to what matter? A. The assignment and transfer of pupils.

Q. Now, that policy and the other one were policies that your particular assignment as a superintendent required you to follow; is that right? A. That is correct.

Q. Now, please get out Exhibit 20 and turn to page A-6.

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[433] * * *

Q. Now, Mr. Johnson, please read that Number 1 recommendation on page A-6 of Exhibit 20. A. "The Board of Education should formally adopt the statement of policies which shall govern the establishment of school boundaries and the location of newly constructed schools and additions to existing schools. Two, the Board of Education should establish school boundaries in accordance with the neighborhood principle as herein described (subject to the exceptions stated in the committee's recommendation as to pupil transfer hereafter set forth.)"

[434] Q. Please, let's take these separately. Recommendation No. 1, was that in your bailiwick? A. That was in my bailiwick along with Recommendations to the Superintendent and other administrative staff members. They were done largely as the result of Superintendent's counsel working together.

Q. What did you do about Recommendation No. 1? A. There was a presentation to the Board on the basis of the policy that that's before us here, the establishment of school boundaries.

Q. And you read Recommendation No. 2. Did the Board respond with a policy statement? A. That is correct, that the Board responded that this policy statement as such establishes school boundaries in accordance with neighborhood principles as herein described and then with the exceptions that come a little bit later.

Q. Now, then, I am going to No. 3. Will you read that? A. "In addition to the unwritten rules which have heretofore controlled the establishment of boundaries and the location of schools, the adopted policy of the Board of Education in these matters should include acceptance of responsibility to minimize the effects of de facto segregation and the recognition that wherever possible and as a [435] matter to be considered of equal weight with guidelines presently used, boundaries shall be set so that the neighborhoods thereby established will represent to the extent possible a heterogeneous school policy."

[436] Q. Now, then, taking those three recommendations as a group, can you tell us what the school district has done to respond to those? A. In this respect the school district has established this policy and took it—as it refers here to the unwritten rules, which I have indicated were in existence before and established the ethnic and racial characteristics of school population, making to the extent possible—

Q. You're reading from what? A. I'm reading now from 1222-C, so the Board of Education in taking these unwritten rules that we had formerly operated under had moved in fulfilling the request of the committee, and inserting this particular statement upon the ethnic and racial characteristics.

Q. Now, then, Recommendation 4 on page A-7 of Exhibit 20, I think I can fairly say recommends that the

Board having adopted officially the written policy should review the validity of existing school area boundaries in terms of that policy. Was that done? A. You must remember that this policy now became effective on February 3. It was done on the basis of the last boundary changes that were made at that time—at that particular time. These particularly included George Washington boundary changes and so on. So far as a formal review of this policy, and being brought before the Board, [437] it has not been changed since that particular time. However, on the basis of changes in boundaries, likewise we have had no boundary changes as such.

Q. You tell us the boundary policy was adopted February 3, 1966? A. That is correct.

Q. Now, was there any interim policy statement to guide you in relation to boundaries between the receipt of Exhibit 20, this report, and the formal adoption of Policy 1226? A. You're speaking now of the 1226, Assignment of and Transfer of Pupils? Or, 1222?

Q. Well, Mr. Johnson, to refresh your memory, please look at what we have said is Exhibit 102, the policy statement.

Appearing at page 104 of Exhibit 21. What is that? A. This was the progress report to the Board of Education by the Superintendent, and on May 6, 1964, and this was a statement relating to the progress of recommendations of the committee, and in here various items were brought to the attention of the Board of Education for things that had to be done in this respect. Among those—

Q. What we're calling Exhibit 102, and what you have described as a progress report, does that contain a [438] general policy statement? A. No, in this particular exhibit it's a statement in regard to a summary of what's been

done about the recommendations relating to the administration and organization in which the optional areas were discontined.

Q. But on the first page of that, Mr. Johnson, it starts out, "General Policy Statement." I'm referring to Exhibit 102. It refers essentially to the first page of that exhibit. Are you familiar with that? A. Yes, I am familiar with this. This is a statement made by the then superintendent of schools, Dr. Oberholtzer, to the Board of Education as it conformed—

Q. What date? A. This was prepared on May 6, 1964. And the Board had accepted this statement.

Q. What does it relate to? A. This relates pretty largely to the attitude of the Board of Education and the Superintendent of Schools and his staff as it relates to the equality of educational opportunities and so on.

Q. Do you relate it to boundary lines? A. It relates to boundary lines in this respect; that it refers to the continuation of the neighborhood schools, has resulted in concentration of some minority, racial and ethnic groups in some schools; reduction of some [439] concentrations, and establishment of a heterogeneous and diverse group in schools desirable to achieve equality of educational opportunity. This does not mean the abandonment of the neighborhood school principle but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees.

Q. Now were you guided by this in your activities relating to the boundary changes in the adoption of Policy 1226-A? A. Yes. In fact, the superintendent and his staff brought this to the staff's attention constantly, that these were some of the things that we must consider in changing

boundary lines as it related to the neighborhood school principle. But, also, the necessity of a more heterogeneous population within these various schools.

The Court: Well, what tangible steps were taken to implement this number 3, this recommendation that there should be minimization to the effect of segregation? Did this just pass resolutions? Did they do anything about it? I mean, what have you got? What tangible thing can you point to?

The Witness: Your Honor, in this respect, to the boundary line changes—that came up after that, and relating to both the neighborhood school principle and in an [440] attempt to get more heterogeneous school population I think probably a good example of this would be the extension of the George Washington High School boundary lines further north. This happens to be one that came in, and whenever boundary line changes were essential, consideration was given to the two ideas, the one of more heterogeneous school population, and the second one on the basis of the neighborhood school principle which would appear to be in conflict, but it is one that had to be judged both ways. So it was utilized in the change of boundary lines.

The Court: Well, did you achieve any reduction in the segregation?

The Witness: Yes, using as a good example the George Washington change. This did bring more Negro students into George Washington. It did not bring a tremendous change in numbers but there were some slight changes made, Your Honor. But, not a tremendous change.

By Mr. Creighton:

Q. Referring to Exhibit 20 and the recommendations on A-7, Recommendation No. 4, I think I can paraphase that it urged you to consider—I beg your pardon—speaking now of 5, which is on page A-10. This one suggest—well, I'll let you read it because it is a little detailed. A. You're speaking at the botton of the page, now?

Q. Yes. [441] A. "The Board of Education should supplement its present transfer policy by the adoption of a plan of limited open enrollment generally in accordance with the procedures discussed above. The plan adopted by the school system in Detroit is suggested as a model."

Q. Did the district in fact create an open enrollment policy? A. Yes, such policy was created and adopted by the Board of Education.

Q. Is that particular policy still being implemented? A. Let's say that this is a carryover of the result of the limited open enrollment—this is still being implemented. For instance, individuals who had taken advantage of the limited open enrollment policy will continue in the schools in which they are registered if they so desire. So, to that extent. But, there are no new pupils in the limited open enrollment policy.

Q. Has this policy been supplanted by another? A. This policy would more or less be supplanted in this respect, that the new policy provides transportation for these pupils in certain schools.

[442] Q. What is the new policy called? A. The new policy is the open enrollment, rather than limited; whereas, the other was a limited open enrollment. This is an open enrollment with a transportation policy.

The Court: What does it mean?

The Witness: It means this; that wherever there is a space in any school in the city a pupil may request enrollment in that school with transportation provided by the school district if the ethnic—if the ethnic or integrated factor in that school is improved through the transfer; meaning that a child attending a predominantly white school may be transported to available space in a school that is predominantly Negro.

Q. Provided that school child is what race? A. Is of the white race; into the Negro school, or vice versa. So, whereas the limited open enrollment policy did not have the limitation of improving integration, the purpose has two new features in that it improves and must improve integration and secondly there is transportation.

Q. Now, is the mechanics of that—either of those enrollment policies—is that in your specific department? A. No, this would be in the Division of Education and under Pupil Services.

Q. Please turn to A13.

The Court: Well, as a practical matter, there [443] would be no openings unless students in these other schools desire to go to minority schools, is that correct? I mean, in the present crowded conditions of the facilities, as a realistic matter?

The Witness: Your Honor, in most instances, now with the overcrowding in the minority schools, it would be necessary for this transfer to be from the minority schools to the primarily Anglo schools unless we get sufficient number out of those schools

to provide vacancies for the white students to move in.

The Court: How about the Anglo schools? Are there openings in those schools, should minority people wish to go there?

The Witness: Yes, there are some available spaces in there. I'm not in a position to give you the exact number at the moment, because, as I say, this is in pupil services. But they have issued to the principals the number of spaces that are available in these schools and consequently the parents of those pupils may bid for those spaces and be transported and enter the schools. But, as you stated, the greatest problem we have now is a large pupil population in Northeast Denver where we do have predominantly Negro students. And this is one of the points that we have been working on. I think that Mr. Cruter did indicate the Hallett situation which is the only one we were able to work on until [444] such time as we have a settlement.

The Court: You're not going to finish with him, anyway, today, are you?

Mr. Creighton: I may be nearer the end than I think.

The Court: With that assurance, we will bear with you; that guarantee.

Q. I was about to ask you about that recommendation on Page A13. Would you just read that and tell us— A. "Optional areas should be fully eliminated at the earliest possible date."

And that was accomplished by resolution of the Board of Education shortly after this report.

Q. On Page B10, Recommendation No. 1. Please read it. A. "The principal policy of providing classroom facilities where they are needed because of increased population should be continued."

Q. Has that been followed as a matter of policy? A. Well, to this extent, to the extent that we have been able to provide the classroom space in those areas. Then, of course, we must refer back to a resolution which did affect the building of any new facilities in Northeast Denver. And so, consequently, that would have effect on this, although in some other instances, this policy has been [445] followed on the basis of population.

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Cross-Examination by Mr. Greiner:

Q. Mr. Johnson, as I understand it, on July 1, 1950, you became the Assistant Superintendent for Personnel Services. A. That is correct.

Q. At that time, who was your immediate superior? A. Dr. Kenneth C. Oberholtzer, Superintendent of [451] Schools.

Q. And there was a direct communication between you and Dr. Oberholtzer then? A. That is true.

Q. Now, what departments or divisions were under your supervision as the Assistant Superintendent for Personnel Services? A. Only the Department of Personnel Services as such.

Q. Now, as I understand it, that included employee personnel? A. Correct.

Q. And that includes teachers, does it not? A. Yes.

Q. Pupil personnel? A. Yes.

Q. And as I understand it, your responsibilities included the assignment of pupils and teachers to various schools? A. Yes, sir.

Q. And it also included the transfer of pupils and teachers from one school to another? A. Yes, sir.

Q. And it also included the establishment of school attendance area boundaries? A. Let me amplify that in this respect, that this [452] particular assignment was given to me in my office. However, the recommendation of school boundaries is made by the Superintendent and all staff members participated in recommendations to the Superintendent.

Q. Now, would that same comment hold true with respect to the establishment of optional zones of attendance? A. Yes, sir.

Q. So, you would work on that, in that area, along with Dr. Oberholtzer, is that correct? A. Well, Dr. Oberholtzer and any other members of the staff that he would assign to this, and it included other assistant superintendents as well as other staff members.

Q. Now, did your duties as superintendent with respect to personnel also include keeping track of school population? A. Only in this respect, that the Department of Budgetary Services made the necessary surveys and also kept the data concerning attendance and those were then referred to the Division of Personnel Services.

[453] Q. I take it then that when a school became overcrowded or became underutilized, that you acquired knowledge of that fact, is that correct? A. That is correct.

Q. Now, did your duties include the working of new schools into the existing system, the assignment of pupils to these schools? A. Yes, sir, this would be true.

Q. Did it also include the utilization of vacancies created when a new school was built and opened? A. That is correct. In consultation with other members of the staff.

Q. And it also included the placing of these mobile units, is that correct? A. This would be correct.

Q. And as I understand it, you also supervised the limited open enrollment program that was instituted in—When was that instituted? A. That was instituted in 1964.

Q. In September? A. In September of 1964.

Q. And that program also came under your department? A. Correct.

Q. Now, did you also administer the voluntary open enrollment program that was instituted in January of this year? [454] A. I assisted in this respect, as Deputy Superintendent at calls of meetings. However, this particular program now is under the Department of Pupil Services; that is, it's in the Department of Education. However, again, matters of this type are usually considered to be staff matters and there are many of us who were included. However, it is specifically in that department now.

Q. Now, you will recall Policy 1222C regarding school subdistrict boundaries? A. Yes.

Q. I take it the administration or the implementation of that policy was also under your jurisdiction? A. Only to the extent that the assignment of preliminary reports to the superintendent's office after consultation with other assistant superintendents would be submitted to the superintendent's office and he, in turn, would submit it to the Board of Education.

Q. Now, you also recall Exhibit 34 of Policy 1226A relating to the assignment and transfer of pupils? A. Yes, sir.

Q. I take it that that policy was also under your jurisdiction, is that correct? A. In the same manner as I stated for the other policy.

Q. Now, as to such matters,—well, take for example when a new school opened. How were the details of what students [455] were to go to that new school—how were those details developed? A. A new school being opened—there would be consultation with other assistant superintendents regarding the usability of that school. Immediately we would assume two things: one, the school is being opened in that area probably because it's a newly annexed area and has no schools. So, consequently, we would investigate the pupil population in that area.

If the school built in the city, beyond the annexations, then it undoubtedly was built because of overcrowding of other schools and then a survey would be made of the students living in the immediate area—geographic area who were attending other schools.

Q. Then I take it your staff would create a certain proposal for the filling of the new school, is that correct? A. That's correct.

Q. And that proposal then would be sent upward to Dr. Oberholtzer? A. That is correct.

Q. And except for boundary changes, was this same development of programs and proposals—was it always under your supervision by your staff? A. Yes, mine was more or less of a coordinating arrangement and I was held responsible to see that the materials [456] were pulled together and submitted to the superintendent.

Q. Now, as I understand it, you became the Deputy Superintendent of Schools when? A. In June, 1968.

Q. So then you were in your present capacity when the preparation of 1520, 1524 and 1531 was under way? A. I was Deputy Superintendent of Schools.

Q. And did you participate in the development of those resolutions? A. To the extent that the superintendent requested this. But most of these—the general work of the superintendent's preliminary report of a year ago of quality education fell pretty largely in the area of two other departments: one was the division of planning and engineering, and the department of research. And the director and assistant superintendent—or the assistant superintendent and director, respectively, of those two divisions and departments were held responsible for the coordination, and I participated as a staff member.

Q. I take it then you wouldn't characterize your participation in the development of these resolutions as being extensive? A. Only to the extent that other staff members who were called upon for assistance.

Q. Now, I also understand that until you became the Deputy Superintendent of Schools you were in charge of the [457] transfer of pupils and teachers from school to school, is that correct? A. Members of my staff were. I was the administrative head of the department. I personally did not make those transfers, but members of my staff did, and administratively, I was responsible.

Q. Did your duties include keeping track of the quality level at various schools; quality of the educational program? A. No, this—prior to this September, or really this September general reorganization, this came under the Division of Instructional Services, the quality of education; anything to do with the actual instructional programs in the school. Mine was pretty largely of an administrative nature and personnel.

Q. Do you ever consult with that division, oh, for example, relating to the question of teacher transfers as it might affect the quality of a particular school? A. Yes.

Q. I noted in the 1964 committee report which is Exhibit 20— Perhaps you would like to have that handy. There was a finding in that report, was there not, Mr. [458] Q. (Continued) There was a finding in that report, was there not, Mr. Johnson, concerning the assignment of teachers? A. Yes, sir.

Q. And did not that report also conclude that perhaps one of the reasons why there apparently were predominantly minority teachers in minority schools is the fact that some principals were hesitant in accepting minority teachers in their schools? A. I do not recall that statement being in the report.

The Court: What is that? Exhibit 20?

The Witness: Yes, Your Honor.

Q. I call your attention to Page D-13 in Exhibit 20, the last full paragraph at the bottom of that page— A. You are speaking of the next to last paragraph?

Q. Yes. A. It reads, "As a result of its interviews, the committee is convinced that race has been relevant in the assignment of teachers." Then it goes on to say, "It appears that the administration has been extremely reluctant to put Negro and Spanish-American teachers in predominantly white schools because of concern with the possible lack of acceptance on the part of a white neighborhood. In a realistic assessment of a possible lack of support by some principals and faculties—" and my point was that it [459] indicates that "it appears that the administration—" I thought that you had indicated this was the specific statement or recommendation.

Q. Well, now, I take it you are familiar with some of the problems that cropped up during this time period of assigning Negro teachers in Anglo schools, are you not?

A. That's correct, and I have recognized that problem ever since I became—since the period of time I became Assistant Superintendent for Personnel Services until leaving that assignment a little over a year ago.

Q. Do I mean to infer from your answer, Mr. Johnson, that you in the course of those assignments never ran across a lack of support by some principals? A. I never had a direct statement from a principal that he would refuse a teacher of a minority group. I do think that there have been—that it has been necessary for us to push to the extent that we could to get minority teachers or attempt to have at least one minority teacher in each school. We have also run into situations where the question of the number of minority teachers in a school was brought to our attention.

Q. In what respect? Too many or too few? A. In both instances. There are principals who have asked for minority teachers and because of transfer policies, availability and so on, we have not been able to place [460] minority teachers in those schools. There have been some problems existing that principals were aware that probably there were too many minority teachers in a school and attempts have been made to solve that, and we are still moving in the implementation of that.

Q. Well, let's look at the teacher transfer policies then, Mr. Johnson. As I understand it, from your testimony on Friday, Exhibit E, which is the Denver Teachers Association Contract, primarily now controls the question of teacher transfers. A. Yes, this is the policy adopted by the Board of Education in agreement with the Denver Classroom Teachers Association regarding transfers, so that, therefore, it is Board of Education policy relating to teacher transfers.

Howard L. Johnson—for Defendants—Cross

Q. Now, as I understood your testimony, Exhibit E expired some time in April of this year? A. Let us say this, that the agreement was signed on April 6, as I recall, 1967, with the provision that there would be an election to determine whether that association would continue as the recognized representatives of the teachers and in an election they were elected. However, now, as refers to the agreement, that there is a matter of negotiations that went on, and as a result of those negotiations this agreement was drawn up and ratified by the Board of Education, and upon that ratification it became [461] policy and that still continues for the time being until such time as the Board of Education makes any changes, and as a result of this summer's negotiations there probably will go before the Board of Education sometime in September or October for ratification, because the salary schedule is an important feature of the agreement.

Q. Am I correct in assuming that the teacher transfer portions of that contract are not being renegotiated? A. At the present time I cannot say whether there is any negotiation for a change in this policy or not. I am not in the negotiating session and, consequently, we have not come up with any specific tentative agreements, so in the meantime this policy prevails.

Q. Referring, if you will, to Exhibit E, Page 25, 14-2-1, on that page it talks about transfers which will result in the best educational program for the school district, is that correct? A. Yes, you are referring now to 14-2-1, did I understand you?

Q. That's correct. A. Yes.

Q. Now, I take it you have been administering the transfer of teachers under this contract, which is Exhibit E? A. The administration—however, this authority has

[462] been delegated to directors in division of personnel services and to the Executive Director of personnel services as of last September.

Q. Well, now, that would be a year approximately after this contract went into existence? A. That is correct.

Q. So, you have administered it for at least one year? A. Yes, at least one year, that is correct.

Q. Now, in your administration of this policy, have you considered it consistent with the best educational program for the District to transfer Black teachers from Black schools to Anglo schools? A. As it refers to this first statement, 14-2-1, remember this refers specifically to requests for transfers, and in this particular case it is a question of whether or not these requests will be granted.

Q. Pardon me, I believe you are in error, Mr. Johnson. These are general principals. A. Yes.

Q. That control transfer, are they not? A. They control transfers, that's correct.

Q. And transfers requested by a teacher are covered by subsection (3). A. That is correct.

Q. So these are general principals, is that correct? [463] A. That's correct.

Q. Now, what about the transferring of Black teachers from Anglo to Black schools? Do you have any policy about that? A. Black teachers from Anglo to Black schools? I don't think that the matter of the ethnic group enters in except in our desire to get a greater distribution of Negro teachers into the white schools. However, I think it would be consistent and certainly not fair to a Black teacher who happened to be in an Anglo school if he had sufficient reasons and so on that he should not be hurt. However, we would discourage this if at all possible and we have—I can think of only one instance at the present

time where a Black teacher was transferred from a Anglo school to a Black school. There may be others, but I am aware of one.

Q. And I assume that certainly one of the reasons for that policy is that there are in fact so few Black teachers in the Anglo schools, is that correct? A. Proportionately, this is true, and we are constantly endeavoring to get more Black teachers into Anglo schools.

Q. Now, Mr. Johnson, what about the transfer of Anglo schools to black schools? A. The same would prevail, but unfortunately we do not have many requests in this respect.

[464] Q. We are still talking about general principals, are we not, Mr. Johnson? A. We are.

Q. Now, then, if you would refer to Subsection (2) 14-2-2, I take it that—and, again, this is a general principal, is it not? A. That is correct.

Q. One of your general principals is to achieve a faculty which is well balanced, is that correct? A. That's correct.

Q. And the criteria are in terms of experience, general background and competence, is that correct? A. That is correct, and we are—

Q. Now, is a balanced racial composition in a school's faculty—is that an objective of your administration? A. It is one of the objectives, along with all the other criteria.

Q. It just didn't happen to be mentioned in 14-2? A. That is correct.

Q. Is distribution of minority teachers throughout the District also an objective? A. A distribution to the extent that it does assist in a better educational program. I could amplify it in this respect, that we recognize the fact that in schools that are predominantly Black we believe that we need a greater number [465] of Black teachers because

I think there's a better understanding in this respect. Now, the exact proportion is very difficult to arrive at and again I think this is very important. Likewise, in the Anglo schools I think it is exceedingly important that there be a minority teacher, not as much from the standpoint of direct contact with the students as the assistance that such teacher would give to other members of the faculty and better understanding of the philosophy of the Denver Public Schools as it works toward a better ethnic relationship.

[466] Q. Now, it also says the fact that it should be well balanced in terms of expense, does it not, Mr. Johnson? A. Yes, sir.

Q. Then why are there so many inexperienced or less experienced teachers in such black schools as Smiley and Cole, Barrett and Stedman? A. I think you are taking this on the basis of these general principles, and we agree on these general principles, but I think it is necessary to go into the entire Article 14 as it relates to transfer, and one of the reasons it is pretty largely this—

Q. Pardon me, Mr. Johnson, but my time is somewhat limited. You'll have an opportunity to be reexamined by your counsel. I believe you have answered my question.

Mr. Creighton: Your Honor, I think the witness should be permitted to fully answer.

The Court: Very well. Do you have something you wish to add?

The Witness: Yes, I would, Your Honor. I would like to add this: that we must recognize this agreement as a total agreement and consequnetly when vacancies occur in the Denver Public Schools through resignation or through retirement, all of

those known vacancies must be posted twice, in the spring of the year, in May and June. And any teacher in the Denver Public Schools has a privilege of making a [467] request to fill that vacancy and this is in accordance with the agreement, and it also states in this agreement, referring to Article 14-3-5, no assignment of new teachers in the school system shall be made until all pending requests for transfer have been processed. So consequently these teachers are not requesting transfer to certain schools in the district.

Q. The black schools, is that correct? A. That's right. I wouldn't say necessarily the black schools. I think probably there is a greater number in lower socioeconomic areas so I would not specify black schools as such. But I think they get established in a particular community and when these schools are listed, there is not a request for transfer. Now, consequently, after this first go-around of vacancies occurs, then we have additional vacancies and we have vacancies that are set up on the basis of the previous request for transfer. Now, again, the experienced teachers in the school system have an opportunity to request those vacancies which leaves us then with the only vacancies in the school system at the time we go into the summer months, which are many of these vacancies that have not been bid for by teachers. Now it is necessary to have manpower in those schools so, consequently, we do proceed then in filling those vacancies to the best of our ability.

Very often during this period of time we counsel with some teachers and ask them to fill certain spots so that we can [468] get this well-balanced staff. And sometimes we

are successful. Now, with these vacancies in the summertime it is necessary that we fill them with new teachers of the Denver Public Schools and in our attempt to equalize educational opportunities we do attempt to assign older teachers who have had experience in the outside—outside the city in the schools, but again, we are not as successful as we would like to be because we suffer the same in Denver as other large cities where roughly—under this there is turnover of teaching staff each year and this means we are handicapped in this respect.

So I thank you for being able to add this, but I think it is very important, that we assume that this article is taken in total rather than a portion.

Q. Now, I take it you did have my question in mind, didn't you, Mr. Johnson, and that was why such schools in particular, Smiley and Cole, Barrett and Stedman, have such a high proportion of black teachers. Now, I thought that the gist of your answer was that there were two points to it, the first, that there is a greater transfer out from those schools, is that correct? A. I would say there is a greater request for transfer from those schools and we attempt to control it to the best of our ability, but with this agreement it stands to reason unless we counsel the teachers—unless the teachers are counseled to remain—we do have an agreement with the [469] Teachers Association.

Q. You're not telling me you counsel the black teachers and ask them to remain? A. That we counsel with the black teachers to ask them to remain?

Q. Right. A. I wouldn't say we never do. I think there are some black teachers in certain of these schools that are almost indispensable to those schools because of their knowledge of the situation and the community and so on.

But we do counsel with some of them to transfer to Anglo schools where we are of the opinion they can be of assistance there.

Q. You also counsel them, as I understand it, with the experienced teachers in those schools and ask them to stay, is that correct? A. It may be the experienced teacher—let us say that we take all things into consideration—experience is very important in the teaching profession, but not always a most important factor for a specific teaching position.

Q. Well, for example, Mr. Johnson, isn't an experienced teacher better able to handle disciplinary problems that might arise in these schools? A. I wish that I could say yes to that. I don't think it's always true. I think we have some experienced teachers who do not do as well as first-year teachers in this respect. [470] I think it is generally known that experience would assist the teacher in this respect, having had certain situations before. But I would not make a blanket statement that experienced teachers are better disciplinarians than first-year teachers.

Q. Mr. Johnson, as I understand it, then, you try to get the experienced teachers in the black schools to stay, but you are not always successful? A. That is correct.

Q. And that is one of the reasons why we have lower teacher experience in the black schools, is that correct? A. I think this would be correct.

Q. And the other reason, as I understand it, is you do have these transfers out and you don't have as many transfer-in requests? A. That is correct.

Q. So you end up with vacancies in those black schools? A. (Nods affirmatively.)

Q. And the only personnel left to fill those vacancies just happens to be the brand-new teachers, is that right?

A. That is correct. Excuse me, if I may, but not only the transfer-outs, it's also the resignations from the teaching staff that I mentioned before, that adds to this particular problem.

Q. Now, I seem to recall your mentioning a statistic that [471] in the elementary schools the teachers with no previous DPS experience may be a misleading characterization, is that correct? A. I didn't say that it was misleading. I merely indicated that a first-year teacher in the Denver Public Schools is not necessarily an inexperienced teacher in the profession because, as we speak of probationary teachers, this refers strictly to Denver Public School experience. It would not include experience in other districts.

Q. Now, this experience could have been gained in any place, couldn't it; urban or rural, in other school districts? A. That is correct.

Q. And is there any reason to believe that the experienced portion of no previous DPS experience teachers in the black schools is any higher than it is in the white schools? A. I'm sorry. Will you repeat that, please?

Q. Well, as I understand it, some of these new schoolteachers are experienced. A. Yes.

Q. Is there any effort made to place these experienced new teachers in the black schools? A. Yes. There is the effort on the part of my position as an individual indicating to the executive director of Personnel Services that we should take a look at this background and experience and also the age element where it has [472] an opportunity to offset other qualifications. Also, in these schools, our Personnel Services people consult very closely with principals in those particular areas in there and assist to build a better staff in those areas, and I would say they are given greater opportunities probably in the selection of teachers than

other principals in the city. However, we are trying to strengthen even this. I think the principal should have more voice in the assignment of teachers in his school.

Q. Now, I take it you would have records which would reflect the fact that some of these new teachers coming into these black schools are in fact experienced? A. Yes, there would be evidence in their application blank and the recommendations and the certification of previous experience. We would have that.

Q. And you would have that for each of these individual schools we're talking about, wouldn't you; Barrett, Smiley— A. So far as teacher background, yes, we would have that.

Q. Now, as I understand it, teachers with seniority get preference as to transfer, is that correct, under Exhibit E? A. Let us say again, in accordance with this, teachers with seniority are given the preference. However, there are these other items in Article 14 that are taken into consideration. However, a teacher who has seniority has a perfect right to ask our Director of Personnel Services why they are not [473] given a transfer because of seniority and it is essential in accordance with that agreement that the teacher be given an explanation, and it may be for any number of reasons that the teacher is not transferred even though he may have seniority.

Q. Now, the seniority aspect—could that be another factor which leads to the result of less experienced teachers in black schools? A. Yes, I think the seniority factor would lead to this.

Q. Calling your attention then to Page 26 of Exhibit E, Mr. Johnson, Section 14-3-6, it speaks there in terms of considering the conveniences and wishes of the individual teacher, does it not? A. Yes.

Q. I take it that that doesn't reflect what might be called a neighborhood teacher policy, does it? A. Let us say this, that the statement here indicates that they will be honored to the extent they do not conflict with the instructional requirements and best interests of the school program. Let us say this, that a teacher who requests such transfer indicates to our Personnel Services that there may be some reason that they want to be in a specific school, then what we are really saying here, that certainly on the basis of good personnel relationship with [474] employees—Certainly, a contented employee and a happy employee is very, very important. So, consequently, if this can be done on the basis of not being in conflict with the instructional program of the Denver Public Schools, I think it has been done.

In other words, good personnel policy indicates that it is the responsibility of those people in charge of personnel or the administration of schools to have a happy staff to the greatest degree, and if an individual is forced absolutely contrary to some legitimate reason and it's not in conflict, certainly, I think this is consistent with good relationships.

Q. Well, now, this convenience of teacher aspect, that would apply to even a brand-new teacher once he was hired, would it not? A. It doesn't apply in accordance with this agreement from the standpoint of the agreement. The agreement does not cover the new teacher. However, it does not alter good personnel relationships.

Q. Well, now, is my understanding right then that Exhibit E doesn't cover probationary teachers? A. This Exhibit E covers the matters pertaining to teachers of the Denver Public Schools unless otherwise stated from the standpoint of recruitment and so on, and there are no points in here that refer to a teacher before he [475] is employed in the Denver Public Schools.

Q. Well, isn't a probationary teacher an employee of the school district? A. A probationary teacher is, after he has begun his service with the Denver Public Schools.

Q. That's what I'm talking about. A. I thought you were talking about newly-recruited teachers.

Q. I'm talking about those in the course of his three-year probationary period? A. He is represented by this agreement, yes.

Q. Now, this convenience factor, would it be something that would be taken into consideration in considering the request of an Anglo teacher to transfer out of a black school? A. Normally we would not transfer these individuals out of a black school if we refer to the principles of this particular case, depending, of course, upon other matters of competency.

Q. Well, Mr. Johnson, I'm talking now about a situation where that is the fact; where you're considering the transfer application of an Anglo teacher out of a black school.

Mr. Creighton: Your Honor, I want to make note of an objection to this form of questioning. We don't know what counsel means by black school or white school. I think this has got to be with somewhat more precision.

[476] Q. Mr. Johnson, do you know what I mean by black school, sir? A. I think you're referring to a school that has a large number of Negro students. However, I don't know whether you're basing this upon percentages or not. We normally speak of these schools, where we have a large number of culturally-deprived pupils or target area schools, because the points you're referring to do not necessarily refer to schools that are entirely or largely populated by

Negro pupils. It could be Spanish-American pupils or it could be Anglo pupils. And I'm assuming that you're referring pretty largely to schools where we have culturally-deprived pupils.

Q. I'm talking about black schools, Mr. Johnson, because it's the black schools that we're focusing on in this particular hearing.

Now, I believe I have a question pending and the question is, when you are considering a transfer request from an Anglo teacher in a black school who wants to transfer out of that black school, is 14-3-6 one of the criteria that are employed in judging that Anglo teacher's transfer? A. It would be employed there, and also your previous—

[477] Q. The answer to my question is yes? A. The answer is that they be given the same consideration as any other teacher with seniority prevailing.

Q. If you would refer then to Exhibit 26, over on Page 2, Paragraph 8, Exhibit 26 is Policy 1617-A, is it not, Mr. Johnson? A. That is correct.

Q. And 1617-A is supposedly the School Board's policy on teacher transfer, is it not? A. No, the School Board policy on teacher transfer is this agreement which supersedes all policies regarding teacher transfer.

Q. All right, now, look at Page 2, Paragraph 8, Exhibit 26, if you would. That Policy 1617-A provided, did it not, that certificated teachers were to wait three years before applying for a transfer? A. That is correct.

Q. Well, is it still the policy of the district, Mr. Johnson? A. It is not the policy of the district. They may apply in accordance with this agreement. However, again, seniority would normally prevail in this respect.

Q. Three years is the period of probation, is it not, Mr. Johnson? A. Yes.

[478] Q. Now, is there anything in Exhibit E, the teacher's contract, about how long a certificated teacher is to remain in a particular school before he transfers or requests a transfer? A. It indicates in here that seniority shall prevail and the interpretation of that, of course, is that on the basis of the transfer we do feel that a teacher probably should continue serving in the same school for a period of at least two to three years and that was the intent of the previous policy of the Board of Education.

Q. Well, Mr. Johnson, I'm a little confused. Take a teacher who has been at a school for one year, who is certificated. Is the fact that he has only been at that school for one year still one of the factors that you consider in passing upon his application for transfer? A. Yes, I think it would be considered, and I think in the case of that teacher of one year I think the recommendation of our personnel services would be that this teacher should not be transferred at that particular time unless there be some other circumstances for the best interests of the educational program.

Q. But I take it under 1617-A when that was in full bloom, that it would take a rather exceptional circumstance, would it not, for a certificated teacher to be able to transfer out of a school in less than three years? [479] A. Yes, it would, and I think this is also the case under the present—the existing agreement with DCTA.

Q. Do you think the teachers agree with you on that, Mr. Johnson? A. Well, let us again refer to the fact that it is—that we do have some other things in here, and even if this teacher—whether this teacher had one year experience or nine years experience, this agreement is so written that we can bring to the attention of the teacher

the fact that this policy was written for the best interests of the educational program as it related to all teacher transfers, and I am certain that the—that this point could be brought up through the Denver Classroom Teachers Association by the teacher if they objected, but I am likewise certain that in our anxiety to attempt to hold a staff in a particular school then probably they would recognize this.

Q. All right, let's then turn to 14-4 on Page 27 of Exhibit E. These then are the general criteria for transfer requests initiated by the administration, are they not? A. Yes. Yes, sir.

Q. As I understand your testimony on Friday, such administration initiated requests under Exhibit E have impressed in them certain options to the subject teacher, is that correct? A. That is correct.

[480] Q. For example, when you ask a teacher to transfer out of a school into another school, you also have to give him an available—a list of available other options, is that correct? A. That is correct.

Q. And then what happens if he opts for one of those other options, rather than the one you had selected him for? A. I think we would again have to give him a definite reason why we wanted him in a specific situation and he would certainly have the recourse of a grievance if he did not feel that we had been fair.

Q. So, I take it this then is one of the—one of the factors that sort of ties your hands, for example, in transferring out some of these concentrations of Black teachers in the Black schools, is that correct? A. I don't think this would necessarily tie our hands in this respect, because if these teachers had seniority and requested transfers—

Q. Pardon me, we are talking about administration initiated requests, Mr. Johnson. A. Oh, in this particular —in this particular request, if we were to transfer a teacher out of these schools, any of these schools that you are mentioning, then it would be necessary for us to give them a list of the vacancies throughout the city.

[481] Q. And you expect that they would ask—well, what do you expect to happen in such circumstances? A. Well, I think you are asking me a question here—we would have to know the individual. Who is the individual? If you could specify the background of the individual that requested this, what his ideas may be, I could give you the answer probably on a guess as to the type of school that he would want and so on, but to just ask me point blank on any individual I couldn't begin to realize what he may request.

Q. Mr. Johnson, has your administration ever used 14-4 to even attempt to transfer a Black teacher out of a Black school? A. Yes, sir.

Q. How often? A. I'm not in a position to tell you that number for this reason, as I related earlier these are handled by the Director of Personnel Services, but I do know of at least two cases of this type.

Q. When did that take place, Mr. Johnson? A. We had one within the period of the last year, year and a half. We had another one a matter of about four or five years ago before this agreement came into being.

Q. Well, that one four or five years ago isn't even relevant to my question. A. That is correct. It would be relevant to the old [482] policy.

Q. So, you have had one attempt by this administration? A. I stated that I know of one. However, we must remember that the Directors of Personnel Services, ele-

mentary and secondary, handle these transfers, and they do not report to the Deputy Superintendent or to the Superintendent regarding these. These are handled at that level.

Q. Well, a year and a half ago you weren't the Deputy Superintendent, were you, Mr. Johnson? A. That is correct and at that time they were not referred to the Assistant Superintendent unless there was some conflict.

Q. Well, let's turn then, Mr. Johnson, to the hiring of new teachers. As I understand Mr. Cruter's testimony, in 1968 there were approximately 686 new teachers hired by the District. Does that sound about correct to you? A. Yes, it would be approximately that number.

Q. And about 39 of these were Negroes, is that right? A. I don't know the exact number at the moment, but I would imagine on the basis of new teachers hired this would not be too far from being correct.

Q. You don't mean you have some sort of quota, do you, Mr. Johnson? A. No, sir, but I know what experience has brought us over a period of years.

[483] Q. You could tell us from your records, could you not, Mr. Johnson, just how many of these new Negro teachers just happened to end up in Black schools? A. Yes, our personnel services would have such records in the assignment of all new teachers.

Q. As I understand your testimony, each new teacher applicant is given an in-depth interview, is that correct? A. That's correct.

Q. How long does this interview last? A. This interview—I think when we speak of in-depth, I think there are two parts of it. One is a close examination of the application of the teacher, the references, the gathering of references, the transcripts and other pertinent informa-

tion. The interview vary in length of time—I am speaking now of the actual face to face contact—and probably would run 15 minutes to a half an hour.

Q. Would you say that most of your applicants—well, you tell me, out of your applications received, approximately what percentage of applicants get to the point where they have a personal interview? A. Well, as far as the applicants are concerned, any individual who has submitted his complete folder—that's the application blank, transcript of credits, names of references—and our gathering of those references and this data must be on hand first. On this basis, all individuals [484] who have submitted that information are entitled to an interview.

Q. Now, you mentioned on Friday some of the characteristics of the teachers which you are looking for with respect to the teaching of the urban culturally deprived child. Do you recall that testimony, Mr. Johnson? A. Yes, sir.

Q. Now, is this personal interview—is this one of the devices that you used for making this determination? A. It is one of them, along with the others.

Q. Well, what others do you use in this particular regard? A. The general background, previous experience, recommendations of other people and statements by the teacher at the time that—written statements that he may include in his folder or with his folder.

Q. Now, I believe you also stated on Friday, Mr. Johnson, that last year the School District had some 3,000 applications from new teachers. A. Approximately that number.

Q. About how many of those received one of these in-depth interviews? A. I would say that all of those that answered the schedule for interviewing. When we speak of

this 3,000, these are individuals who have been interviewed. They have [485] all their complete files and have been interviewed, because we do not consider an individual an applicant until such time as he submits such file and has been interviewed, so I would say 100—approximately 100 of these.

Q. All right. Three thousand of them. How many of those interviews took place on college campuses, for example? A. I would imagine that on college campuses that there were probably 35 to 40 of the colleges that were visited.

Q. And your recruiting year runs from what month to what month? A. Usually starts about the middle of November and—November, December, usually in the Colorado colleges, and then during the months of January, February and March and April.

Q. So, November through April? A. It's really about the middle of November or first of December. It varies, depending upon the schedules being arranged through the colleges and universities.

Q. Now, how many people are employed in the personnel department who participate in this interviewing process? A. In the personnel department, we have about five—five individuals in Personnel Services per se who participate in this. In addition to this, principals, directors and others are called upon to assist in interviewing, and I would [486] imagine last year as I recall Personnel Services submitted a list of about 20 principals and directors who were included some way or other in recruiting.

Q. Is my understanding correct, Mr. Johnson, that presently the personnel department employs no Negroes? A. That is not entirely correct. As of this last spring, we made a transfer of a Negro to that department in re-

gard to certain activities of Personnel Services. However, he is not listed at the present time under personnel, budget-wise, but the transfer is to be made the new budget year, and in the meantime the Division of Education is carrying this individual, but he is now under the direction of the Director of Personnel Services.

Q. How many Negro recruiters are there? A. The Negro recruiters that are listed for last year, as I recall there were three, four, that were listed.

Q. Is Mr. Cruter one? A. Mr. Cruter is one.

Q. Mr. Ward another? A. Mr. Ward is another.

Q. Who are the other two? A. Mr. Oliver, as I recall, is on the list, and I was under the impression that Mr. Small was called upon. I would not vouch for that, so let us say these three.

Q. All right, now, you mentioned the fact that you [487] recruited in 12 southern teacher colleges, is that correct? A. I did not mention that, but I think that is correct. I said we did recruit in southern colleges and universities. I don't recall the exact number. I may have, but I am not certain—

The Court: I think Mr. Cruter stated that.

Mr. Greiner: I am sorry.

Q. But that is a fact, Mr. Johnson? A. That's approximately the number, yes.

Q. Do you know what the background of teacher graduates from those schools is, Mr. Johnson? Let me be more specific. For example, do they come from an urban or a rural environment? A. I think probably the composition of such colleges and universities would be very similar to other private colleges in the United States, a combination

of both. I would presume that probably in the southern universities, as is true of—or, the southern colleges, as well as is true of the northern, I imagine there are quite a large number of rural students. This seems to be the case in most colleges of this nature.

Q. Now, when we are talking about these southern teachers colleges, Mr. Johnson, am I right in assuming that we're talking about Negro teacher colleges? A. That is correct.

Q. Now, how many of the graduates from those colleges, [488] Mr. Johnson, come from an integrated educational background? A. I don't know. I am speaking, of course, in the case of secondary school experience. I presume this is what you are referring to.

Q. Their prior public school experience. A. That I would not know.

Q. And these teacher colleges are primarily all Black, are they not? A. Yes, that is the ones that you are referring to, although we have many institutions where they are both.

Q. Now, I believe that you stated that in 19—well, as of September, 1968, you had increased the number of Negro teachers to approximately 400 in the school system, is that correct? A. That would be certificated people in the school system. As I recall, the latest figure I have is just short of that, about 394, the figure that I recollect, roughly 400.

Q. The figure that I have is 322. A. Have you included the administrators in this particular group, because we are referring to certificated employees?

Q. Oh, I see, I believe your testimony concerned only teachers? A. Yes, I was speaking of certificated people.

Q. So you have got 322 Black teachers, is that correct? [489] A. I don't know the exact number. I only know the total number of certificated employees.

Q. In September of '67 you had about 311 Black teachers? A. That sounds to be approximately right.

Q. And in 1965 you had 273 and a half Black teachers? A. That would be correct. Let me explain the half. One half, maybe it would be a half teacher in a school but may have one half other assignment.

Q. He works half days, is that right? A. Would work half days or half in another division.

Q. Now, in 1965 do you know approximately what percent of all teachers were Negro in Denver? A. I would imagine approximately 7, 8 percent.

Q. And as of September, 1968, do you know whether that percentage has gone up or gone down? A. I would say it is approximately the same because of the increase in the number of teachers.

Q. Now, there has been an increase in the number of Black teachers, is that right? A. That's correct.

Q. From 273 and a half to 322, and there has also been a similar increase, has there not, overall in the number of teachers hired by the schools? A. That is true.

[490] Q. So, today you don't have percentage-wise more Black teachers than you had back in '65? A. I would imagine it is approximately the same.

Q. Now, again, I believe you have Exhibit 20 in front of you. Would you turn please to Page D-13. Now, this committee was formed in 1962, is that correct, the committee that issued this report? A. Yes, that is correct.

Q. Now, during the course of their studies and deliberations, did that committee or members thereof meet with you, Mr. Johnson? A. Members of the committee met with me. I did not meet with the committee as a whole.

Q. Now, this committee says here that it is convinced

that race has been relevant in the assignment of teachers, is that correct? A. Yes, that is correct.

Q. Now, did that—and this was your department? A. That's correct.

Q. Now, who was actually doing the assignment of new teachers, say, back in 1963 and '64? A. The direct assignments of those new teachers would have been made by the directors of elementary personnel, director of secondary school personnel services, in consultation with other staff members, principals, as well as [491] instructional staff.

Q. When did they leave? A. When did they leave?

Q. Yes, are they still assigning teachers? A. They are still assigning teachers, that is correct.

Q. Now, there has been an improvement, has there not, Mr. Johnson, in the distribution of Black teachers throughout the school district? A. Yes, there is apparent improvement on the basis of Black teachers being assigned to other schools and we are moving in the direction of attempting improvement in certain schools.

[492] Q. From the standpoint of the administrator of this system, and of this redistribution, if you will, what is your objective in that redistribution? What are you doing? A. We see the necessity for teachers of various ethnic groups working very closely together and the fact that a school is the closest unit that we have, we believe that a majority group teacher, being in the midst of that particular faculty, can assist a great deal as the faculty is working on projects relating to minority. And we think it is also well worthwhile for pupils in the school to have an opportunity to associate with the teacher minority group if they happen to be of the Anglo ethnic group.

Q. So there are two purposes, one is to give, say, the Anglo teachers a little more knowledge about the Black teacher and the other is to give the Anglo students a little more knowledge about the Black teacher? A. To the extent we can. We must recognize, however, that unless they are in a special assignment that probably it would be pretty difficult for a teacher to have contact with very many Anglo students because of class size and so on.

The Court: Nevertheless, I assume you feel it's important. That was the question.

The Witness: Yes, we feel that it is important. We're working in that direction.

[493] Q. Well, Mr. Johnson, do you feel, having say one Negro teacher in an Anglo school satisfies that objective? A. No, sir. I do not feel that it satisfies it. And we're working as diligently as we can in the direction of getting more minority group teachers, and we have worked very diligently in this respect. But, unfortunately, we do need qualified applicants and we're trying desperately to get them.

Q. Now, Exhibit 20 was issued on March 1, 1964? A. Yes.

Q. That was some five years ago? A. Yes.

Q. And there is still 27 elementary schools with no black teachers, is that correct? A. Yes, that's approximately correct. You're speaking now of black teachers and not minority teachers?

Q. That's right. A. Yes.

Q. If you use all minority rather than just black, then it goes down to what? About 22 with all minority teachers? A. It would be less than that. I think the most recent counts we have would be roughly about 15.

Q. Would you please turn then to Page D15 in Exhibit 20 and I have particular reference to Paragraph 7 on that page.

Have you found that?

[494] A. Yes, sir.

Q. That's one of the recommendations of the committee, is it not? A. Yes, sir.

Q. And it says that in policy statements adopted by the board and the administration it should be made clear that teacher preference as to assignment is subordinate to other criteria? It says that? A. That is correct.

Q. And it also says that each qualified teacher in the system is expected to be able to teach and to be prepared to teach in any school where the administration thinks he can be most effective, is that correct? A. That's the statement.

Q. Now, is there somewhere in the written policies of the district where this recommendation has been adopted? A. Not exactly as stated here, no. This is not correct. However, when we say expected to be able to teach and to to be prepared to teach in any other school, I would say the criteria used in recruiting would bear this out; that an individual— For instance, when teachers are hired by the Denver Public Schools they are hired to teach in *the* Denver Public Schools and not for a specific school. And, consequently, in the interviewing, in the background of those individuals, we assume that the individual is able to teach [495] and prepared to teach in any school.

Q. So I take it you have—you feel you have adopted this policy, this recommendation? A. I would say that to the extent that this is one of the criteria for the selection of teachers from the standpoint of his willingness to do this, this is correct.

Q. And I then can assume that, for example, when you're having one of these interviews with a prospective Negro teacher, that you discuss with him whether or not he would be willing to teach in an Anglo school? A. That is correct.

Q. And the same would hold true with respect to a prospective Anglo teacher as to his willingness to teach in a black school? A. Yes. However, let me amplify it in this respect. This is the thought of the question. However, it's easy to answer yes or no. I think that a good interviewer must look deeper into this rather than ask the question pointblank because you will get the answer definitely in the direction you want.

Q. You will get the right answer? A. You'll get the right answer, that's right. So, consequently, let me say this is one of the purposes of the interviews, to find this out. But it is not asked the direct question, whether he would be willing to teach in an [496] Anglo school or whether they would be willing to teach in the other. I think it's important that this information be gained because, frankly, we do not want teachers in the Denver Public Schools, whether it's an Anglo teacher teaching in an Anglo school or whether it be a black teacher in a black school, who does not have the sincere objective in the direction of good relationship—good racial relationship. I think this is detrimental—just as detrimental to have an Anglo teacher in an Anglo school who has a dislike for other ethnic groups. I think he could do as much harm there as he would do even if he were assigned in a minority school.

Q. I don't think that anyone would disagree with you, Mr. Johnson. But I thought you told me you actually asked these questions in the course of your interviews and I take it you do not? A. That's the reason I amplified this.

I said this is information that we want. I purposely amplified it to say that you wouldn't get the answer you want by just asking the question directly.

Q. How do you go about obliquely getting this information if you don't get it directly? A. Pretty largely on the basis of asking about the background experience that they have had; finding out their relationships with various organizations within the community, their college activities, whether or not these are groups [497] in which we consider the human relations is of the highest order and so on. There are many leading questions that would vary with the particular applicant and the leads he gave you.

Q. Yhat kind of background would, for example, lead your interviewer to conclude that the Anglo—that an Anglo would be willing to teach in a black school, for example? A. Well, we have many requests of many Anglos for teaching in black schools.

Q. But not quite enough? A. Not quite enough. But we have these. I think probably, on the basis of the background as recorded from a college or university regarding the sociology courses they may have, the type of student activities they participated in, whether they are graduates of a school that may have a reputation as being a well-oriented school from the standpoint of racial relations, and particularly an integrated college or university, and these are some of the things. Although we can find the quality teacher we want probably in strictly the Negro school or strictly the Anglo school, but we must do it with care.

Q. Sociology is generally a required course, isn't it, Mr. Johnson? A. We are thankful that recently this is getting to be [498] required. However, this was not neces-

sarily a requirement of education graduates a few years back. We find that the colleges and universities are moving in this direction and it's one of the reasons I think that the academic background of our newer teachers in the school system or any school system is of a better nature.

Q. I believe you indicated earlier that these black schools, Smith, Stedman, Barrett, Hallett—

Mr. Creighton: I object to that characterization, Your Honor.

The Court: Well—

Mr. Creighton: He can call them by name.

The Court: I don't think it's practical. I think he ought to have some way to refer to these schools in a group. Do you have any suggestions?

Mr. Creighton: Yes, majority black; majority white.

The Court: Well, if that would make you feel better. Be assured that we are not going to be influenced by any characterizations here. We're seeking out the true facts.

Mr. Creighton: I am mindful we are making a record, too, Your Honor.

The Court: Beg pardon?

Mr. Creighton: I'm mindful that we're making a record, too.

[499] The Court: Well, I will leave it to you, Mr. Greiner, to work this out.

Mr. Greiner: I'll do my best, Your Honor.

Q. Mr. Johnson, these majority black schools, they have a greater turnover of teachers, I believe you indicated, is that right? A. Yes. I would say that the schools that you

mentioned probably have a greater turnover of teachers, but not necessarily so. I can think of two of those schools that probably does not have a greater turnover.

Q. Which ones? A. I think that you included Hallett there, for instance, and I think Hallett—I think Hallett probably has less turnover than the average in the city, although I would want to check my records on that particular point.

The Court: You told us earlier that there were more vacancies on the faculty in those schools than in other schools.

The Witness: Your Honor—

The Court: That you have a problem of filling vacancies all the time in these schools.

The Witness: Yes, Your Honor, but I brought out the point that vacancies exist in the summer, filling them with these new teachers. We have vacancies throughout the city, but they are filled during the months of May and June— [500] or April and May by our experienced teachers who have requested transfers. That's the reason we have a greater number of vacancies in this particular area. That is correct.

By Mr. Greiner:

Q. Now, the 1964 report focused on a concentration of black teachers in the black schools, is that correct, Mr. Johnson? Or, pardon me. In the majority black schools? A. Well, in some instances, it so happens there are schools that show a majority of black teachers but I believe, if my recollection is correct, I think Phillips is a school—and I

don't believe this is one we have attempted to get a Negro or Spanish-American teacher in—I believe that's a good example.

Q. Phillips is an integrated school, is it not? A. Well, I think on the basis of percentagewise, it depends on what you call an integrated school.

Q. It's predominantly Anglo? A. Well, then, we might move to Hallett. Hallett, I think, has—I think that out of that faculty they have, I think, three teachers. So I would say that it doesn't hold true. Although I would concur with you generally, I would concur with you generally that we do have a concentration in a number of those schools. That's correct.

Q. I think you would be working to reducing the concentrations of black teachers in these majority black or [501] predominantly black schools. A. I would say that we are attempting to do this. That is correct.

Q. Now, you mentioned Hallett. I see that in 1965 Hallett had one black teacher and that in 1968 it had three. A. That is correct. And I think probably on the basis of proportion, and I'm not certain of the proportion that we should have for the best interests of the school—but we do know that this has helped the faculty.

Q. Barrett in 1965 had eight black teachers and today it has 10, is that correct? A. And the proportion would be about the same. I think they are roughly—I think about fifty percent.

Q. Well, according to my figures in 1965 Barrett had 20 teachers and today it has 19, Mr. Johnson. A. That is right.

Q. And Smiley is another example, isn't it? Ten black teachers in 1965, 23 today, is that right? A. That is correct.

Q. Cole is another one. Twenty-seven in 1965 and 31 today. A. I would say all the figures that you are stating I think generally are correct. I do not have the figures before me and I am assuming that you have those from a reliable source.

[502] Q. Then I take it your efforts to reduce the concentration of Negro teachers in predominantly black schools hasn't been very effective, has it, Mr. Johnson? A. Not as effective as we would like to have it. But we have been effective in incorporating a greater number of black teachers in the Anglo schools.

Q. We touched briefly on—It was discussed briefly in your testimony on Friday concerning building capacity. Do you recall that testimony? A. I think the question was asked of me regarding the formula of the 30 pupils per classroom.

Q. And that is what's known as rated capacity, is that right? A. Yes, sir, it could be called a rated capacity or normal capacity.

Q. And it is the rated capacities which are published by the school district, is that right? A. They are published in this respect; that this is the figure that is used by Planning and Engineering for the reports that go to the Board of Education.

Q. Well, it goes to the public, too, doesn't it? A. The public—it has access to these records. But it is of a consistent manner in setting the normal capacity of a school.

Q. Well, now, then, I take it that there is also another [503] kind of capacity and this is arrived at by more subjective criteria, is that correct? A. This is not necessarily numerical or published capacity. There are many things taken into consideration at the time that a building—when this building is used. For instance, we do know that there

are some older buildings that probably have 30 or maybe to a greater capacity. We know there are many situations where 30 is probably a lower figure than we have. But in addition to this particular thing the physical structure, the special programs in the building, the types of things that our division of education wishes to utilize the building for, would be all taken into consideration.

Q. But now I take it that wasn't the gist of your testimony on Friday, that a school, for example, such as, oh, Barrett School or Smith School, with 12 mobile units or Stedman School with 4 mobile units—I take it you agree those schools are currently overcrowded, is that right? Over capacity? A. No, I don't think that I would concur entirely with this, for this reason: that we have made attempts to relieve those schools through various means such as transportation out of those communities. You have already indicated the mobile units. And I think we are maintaining educational programs in many of those schools probably that would have [504] fewer pupils per classroom than the others; double sessions are sometimes used, and the extended school day.

Q. Would you agree, Mr. Johnson, that when you are dealing with these predominantly minority schools that rated capacity generally overstates their actual capacity? A. I think that could be a generalization, yes.

Q. And a good example of that is Smiley, isn't it? Smiley has a rated capacity of 1,635 students. Last year it had 1,553 students. Is that correct? A. That is correct.

[505] Q. Yet, it was on double sessions? A. It was on double sessions upon the request for certain special programs, additional personnel and so on, so this is correct. Smiley is one good example.

Q. I believe you mentioned limited open enrollment.

This was a program that began in September of 1964? A. That is correct.

Q. And this was begun, was it not, at about the same time that the optional attendance zones were expanded? A. Yes, at the same time, as I recall.

Q. Now, it is true, isn't it, that limited open enrollment had no racial balancing conditions attached to it? A. That is correct.

Q. And under limited open enrollment the student had to supply his own transportation? A. That is correct.

Q. And this was the policy then of the district until what? November of 1968, is that correct? A. Yes.

Q. So that was the policy for some four years? A. That is correct.

Q. Would you agree, Mr. Johnson, that limited open enrollment with no transportation provided by the school district made it somewhat easier for Angles to participate in the program than it did Blacks? [506] A. No, I would not agree on that. Largely for this reason, that there is no stipulation regarding the ethnic factor. There is no transportation, but for reasons stated there was an opportunity for the Black students to request the open enrollment to schools not too far away and many of them did. It also enabled those white students who wished to go to the schools in the northeast Denver area an opportunity for them to take advantage of it, so I don't think that it would indicate one way or the other from the standpoint of their ability to take advantage of this. In fact, this was the purpose of the limited open enrollment in 1962, because we had many requests for parents to transfer their children to certain schools.

Q. Well, now, you would agree, would you not, Mr. Johnson, that limited open enrollment really didn't serve

to integrate any particular schools, did it? A. Yes, I think it served to integrate. I don't have the exact figures before me, but I do know that it did serve to integrate certain schools. I think probably a good example of this, because I had referred it to George Washington extention of boundary line, George Washington at the same time that the boundary line was changed, there was an integration, and I believe at the present time there is somewhere between 85 and 100 Negro students in George Washington as compared with roughly ten pupils at the time [507] prior to this open enrollment. I use this only as one example and—but, there are others, so I think that the point is that it serves the purpose both ways, but I think it would be a mistake to say that it had no effect.

Q. Mr. Johnson, limited open enrollment could be used, could it not, by an Anglo student in a transitional school, one that was going from Anglo to majority Blacks, could be used by that student to get out of that school and go to a predominantly Anglo school, could it not? A. Yes, the limited open enrollment would provide this. There is no stipulation regarding the ethnic factor.

Q. And, in fact, some Anglos used the limited open enrollment for just that purpose, did they not? A. There was evidence that many of them used it to go from a predominantly Anglo school to another predominantly Anglo school. Likewise, we found there was a great deal of transfer in the northeast Denver area on schools that had similar proportions of Blacks by Black students, merely requesting transfer from school to school there, so it was working both ways. There seemed to be no exact pattern in this respect.

Q. Do you have any question in mind, Mr. Johnson? A. Do I have your question in mind? As it refers to the

opportunity for an Anglo to move to another Anglo and a Black to another Black?

[508] Q. That's the one. Now, what's the answer to that question? A. Anglo to Anglo?

Q. An Anglo in a predominantly Black school transferring to a predominantly Anglo school. A. It would be possible under that arrangement.

Q. I asked you if it was not in fact done, Mr. Johnson. A. I don't know that—not to any great degree that I can recall, because I think that in an limited open enrollment we found that more people usually stayed pretty well within the confines. The numbers involved citywide would indicate that there was no great number, and as I recall a proportionate number of Negro pupils who requested it was almost as many as Anglos, although they constituted only about 15 percent of the population of the city, so I—

Q. Well, Mr. Johnson, I am handing you what has been marked as Plaintiffs' Exhibit 99, and on Page 4 that exhibit reflects, does it not, the number of transfers received by Montclair School. A. That is correct.

Q. Yes, sir. How many came from Stedman, Mr. Johnson? A. Five from Stedman.

Q. How many came from Montclair Annex?

Mr. Creighton: I object, Your Honor, until this exhibit is offered and admitted.

[509] The Court: Hasn't it been received yet?

Mr. Greiner: It hasn't been received?

Mr. Creighton: No.

The Court: What number is it?

Mr. Greiner: Number 99, Your Honor.

The Court: I have no record of it having been received.

Q. Can you identify Exhibit 99 for us from the front page? Exhibit 99 was prepared by the Division of Personnel Services, is that correct, Mr. Johnson? A. Yes, this evidently—September 16, 1966—

Q. So this was prepared by your Department, is that correct? A. Evidently was.

The Court: Do you consider it authentic?

Mr. Creighton: This is one we—

The Court: He says his department prepared it.

Mr. Creighton: Yes, if I may, let me look at it. It is authentic, I am sure.

Mr. Greiner: Your Honor, we offer 99.

Mr. Creighton: No objection.

The Court: It will be received.

(Whereupon Plaintiffs' Exhibit No. 99 was received in evidence.)

Q. Now, where were we? We were with five transfers [510] from Stedman and one from Montclair Annex, is that correct? A. That is correct.

Q. Now, handing you what has been marked for identification as Plaintiffs' Exhibit 100, I ask you if you can identify that? A. Yes, I imagine this would be released at the same time.

Q. Exhibit 100 was also prepared by your department? A. Yes, I would think so.

Mr. Greiner: Your Honor, we would offer Exhibit 100.

Mr. Creighton: No objection.

The Court: It will be received.

(Whereupon Plaintiffs' Exhibit 100 was received in evidence.)

Q. Now, I believe that Exhibit 100 shows the racial and ethnic characteristics of students participating in the limited open enrollment program, does it not, Mr. Johnson? A. Yes, sir.

Q. Now, if you will refer to the Montclair I believe it is, how many of those six students transferring into to Montclair were Anglos, Mr. Johnson? A. To Montclair would be four.

Q. Four out of six, right? [511] A. Four out of six.

Q. Now, did you have anything to do with the voluntary enrollment program that began in the second semester of this past school year? A. In consultation with other members of the staff, yes, sir.

Q. That was passed by the Board in November of 1968? A. That is correct.

Q. Now, when the Board passed that, was it your understanding that the administration was to encourage participation in voluntary open enrollment? A. It was to encourage in the voluntary, that is correct.

Q. Was the administration to offer any assistance in the establishment of voluntary open enrollment program? A. That is correct.

Q. Well, what did the administration do, Mr. Johnson, in those regards? A. The administration members of the staff moved forward in trying to implement that at a very late time in the school year, at a school semester, trying to achieve this for the date I believe of the second

semester of January 25th, with the Christmas intermission included at that particular time.

Q. Were letters sent out to parents telling them [512] about voluntary open enrollment? A. As I recall, those were prepared by the school-community relations, and they were contacted, yes, and the Division of Education also had contacted principals regarding letters.

Q. Is Plaintiffs' Exhibit 36 the form letter that was used by the administration? A. This came out of the Division of Education, but I have seen this particular letter, yes.

Mr. Greiner: Is 36 in evidence?

The Court: No.

Mr. Greiner: Your Honor, we would offer Exhibit.

Mr. Creighton: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit No. 36 was received in evidence.)

Q. Now, other than the mailing of Exhibit 36, Mr. Johnson, what did the administration do? A. Well, the report that I had on this, contacts were made with—to the administrative directors of elementary education and secondary education with the principals that they move forward as fully as they could toward the implementation of this particular plan.

Q. Did your department, Mr. Johnson, receive any [513] requests for assistance from parents trying to establish VOE programs? A. They weren't directly by my department but I know one situation where I discussed the matter with a group of parents.

Q. What school was involved? A. As I recall, I am not certain of the exact school. These parents indicated they represented a number of schools in southeast Denver and Hallett School.

Q. These were Anglo parents? A. Yes, sir.

Q. And they wanted to get together some Anglo students and voluntarily open enroll them in Hallett School, is that correct? A. That's correct.

Q. And what did they ask you to do, Mr. Johnson? A. They asked us to move forward on the basis of assisting them to get as I recall about 300 or 400 parents and they wanted to send a letter out right after the principal had sent out a letter indicating that they were interested in gaining these parents, but they had a couple of stipulations in the letter and one on the basis that there would be these transfers if Hallett could be predominantly an Anglo school. That is, it would be more than 50 percent.

Q. Well, now, Mr. Johnson, this letter that this [514] group of Anglo parents wanted the administration to send out, that was going to Black parents, was it not? A. No, I think there was a letter that went out to Black parents. I don't recall that the letter they had—although I think that they were working with a group from Hallett School in addition, but the letter they discussed with me was one to go to white parents encouraging them to sign up to go to Hallett School.

Q. Now, did you get a similar request from a group of Hallett parents for administrative assistance? A. I think that there was a—you are now asking questions that were directly related to the Division of Education and the Division of School-Community Relations. I was not involved in that except as I would be as Deputy Superintendent and knowing about it. Now, I can tell you gen-

erally in this respect, but I did not work directly with them. The only direct involvement I had was that at the time that the parents in southeast Denver came into the administration building to see the Executive Director for Elementary Education. He asked me if they could meet with me and I met with them and discussed that letter. Now, I know that there are many other letters. I know there was a great deal of involvement, but this did not come directly through me.

Q. You personally received no communications from [515] Black parents at Hallett? A. I'm not aware of direct communications you mean. I am aware, however, that the Black—that the parents in Hallett were working through the Executive Director of Elementary Education and School-Community Relations to establish this program. Now, I do not recall a direct request to me on this, but I was aware of this situation and, frankly, this was a part of our attempt to gain integration between the schools of southeast Denver and Hallett.

Q. Now, what the Hallett parents wanted, was it not, was to find one Anglo school where under VOE all of those Black children transfer to? A. I don't know the particular details. I understand that the Hallett parents who were interested in this wanted to transfer in order to relieve and make room for the Anglo parents.

Q. Well, it was just the other side of the coin of the University Park program was it not? A. That's correct.

Q. Now, what help did they receive, Mr. Johnson? A. They received the help of the principal. They received the help of the Department of Elementary Education and also the school-community relations to the extent it was possible at that late date and would not confuse the entire issue. The concern that our administrators had at that

[516] particular moment was not with the plan. They were heartily in favor of the plan but it was the confusion that was existing, particularly when one of the stipulations was that there be sufficient number of white parents who accept this and a sufficient number to exchange and this happening really during the early part of December, in fact, I am not—the Board of Education at its regular meeting on November 21—I see no date on this communication from elementary education, but we know that this was an attempt to get this entire thing done within a—prior to January 27 opening of school, so, consequently, there was a time element here that was almost impossible to meet, particularly with the stipulation that there had to be this balance and the number involved was almost impossible and our staff members had some indication and I think it was stipulated that there should be about 300 Anglo parents and 300 Negro parents, and as far as an exchange was concerned, to the extent that it be possible, I think our staff cooperated, but they couldn't cooperate on the basis of saying, "We will go right up until a week or so before the second semester and if we don't get them, then the whole thing is off." You can't operate and program children in a school on that basis, so I think it was a matter of how far this should go. There was no question regarding the importance of this. The question was is it administratively feasible at that late date to do it?

[517] Q. When did you get this request from the Anglo parents? A. As I stated to you, I did not have the request. The request was—

The Court: When did it come in?

I think we will take a recess.

(The Court recessed at 3:11 o'clock p. m.)

[518] (Following a recess, the hearing resumed at 3:31 p.m.)

The Court: I think, if you could just listen to the thrust of his question and try to respond directly. I mean, to the essence of the question, it would be easier for you and easier for us, too, you know.

The Witness: Yes, Your Honor.

The Court: Just listen to what he is seeking to obtain. You have to concentrate on that rather than pick the outer fringes of the question and respond to that, you know. Go right to the center of it, if you can.

The Witness: Yes, Your Honor.

The Court: Good.

Q. (By Mr. Greiner) You will recall, Mr. Johnson, that we were discussing a request by white parents to make Hallett a sort of a target school for voluntary open enrollment, were we not? A. Yes.

Q. And you have in front of you Exhibit 36. And do you recall when Exhibit 36 was mailed to the parents? A. No, sir.

Q. It was mailed, I assume, prior to the Christmas vacation, was it not? A. I'm not certain. It did not come under my direction.

Q. Now, as I recall, you said you had a meeting with [519] some of these University Park parents, is that correct? A. Yes, sir.

Q. And approximately when did that meeting take place? Was it in early January? A. I don't recall the date on that. I'm inclined to believe that it was earlier than that;

that it was probably prior to the Christmas or the winter intermission.

Q. Now, I take it that these white parents were asking the administration to help them in publicizing the fact that Hallett was to be a target school, isn't that correct? A. That is correct.

Q. Now, was there any discussion during that conversation regarding what you believe to be your responsibility as to whether or not you were to encourage voluntary open enrollment? A. Yes, there was, and we indicated that we had this responsibility.

Q. Do you recall that Mr. Barnes was present at that meeting? A. I'm sorry. I don't recall who was at the meeting, but there were two gentlemen and it's entirely possible it may have been Mr. Barnes. As I recall, the group consisted of three or four ladies and two gentlemen, as I recall. And I don't think I could give you the names right at the moment although I'm inclined to believe—now that I see Mr. Barnes—[520] that he was at the meeting.

The Witness: Were you?
Mr. Barnes: (Nods affirmatively.)

A. I think I recognize Mr. Barnes as being one of the gentlemen and there were two of the ladies that I knew, but I can't place them by name right at the moment, but I have had discussions with them on previous occasions.

Q. You didn't state at that meeting that your only responsibility was simply to announce the program and that you had no authorization to encourage it? A. I did not make such statement; that we did not have responsibility. Because this was definitely a matter that we should push forward, but I did question the particular communication

they wished to send in conflict with other communications that were going out and the matter of timing.

Q. Now, the general policy of voluntary open enrollment, Mr. Johnson, was to achieve some sort of racial balance, was it not? A. Let us say this, that the purpose was to achieve integration in the Denver Public Schools at that particular time. That was our intent; to move as far as we could toward integration and, if racial balance could be achieved, that was it. But it was our understanding we were working for integration.

Q. Well, maybe I don't understand. What do you mean [521] by integration as you use that term? In Hallett, for example? A. Well, Hallett—

Q. How would you integrate Hallett? A. As far as integration is concerned, this must be—there must be, of course, some integration of whilte pupils into Hallett and likewise some of the Negro pupils out of Hallett. Now, I think that, in addition, as we speak of integration, I think there are many factors and that is a complete understanding as we—of the various ethnic groups and so on. A great deal of integration can be done in other ways other than actual contact. And I think that the integration of Hallett would be the result of having probably that proportion of various ethnic groups, that particular type of curriculum; that type of program that would bring about the thing we're all striving for.

Q. Hallett was 95 percent black at the time, is that right? A. I believe that figure is—It is high. I don't remember the exact percentage.

Q. In fact, as I recall, there was one Anglo child in Hallett at the time, is that right? A. I can't testify to that, but I know there were very few.

Q. Well, again, returning to my original question, Mr.

Johnson, how many Anglos would you have had to put into [522] Hallett in order, as you use the term, to integrate Hallett? A. I think this is pretty largely the matter of the advisory committee of Hallett parents working with the principal staff generally to determine what they would consider to be a good composite figure to get this particular job done from the standpoint of teaching through integration.

Q. How many letters did this committee want you to send out, Mr. Johnson? A. As I recall, it was a single communication that I remembered; just one communication, and that being from the parents in the southeast, to the southeast parents.

Q. To how many parents was that letter to be sent? A. I think they were under the opinion that—they were hoping that the principal would send them out and I took it that they wanted them to all parents in that particular area. But it would be a number of those schools in that area; four or five schools involved.

Q. Well, did the principal send them to you to get authority for that mailing? A. No, sir.

Q. Did the principal make the mailing? A. I'm not aware of it.

Q. In Exhibit 36, in fact, is it not—its' the only one—the only written communication sent out to the parents on a voluntary open enrollment at that time? [523] A. I cannot testify to that because, again, this is sent by the Executive Director and remember, we are now in the field of Division of Education and it was handled in that particular area and not through the Deputy Superintendent's office. I was aware of it in my position as Deputy Superintendent in generalities.

Q. Well, let's talk about mobile units, shall we, Mr. Johnson? A. Fine.

Q. As I understand it, you said that when the mobile units were placed in Northeast Denver they were placed there with the concurrence of the parents, is that right? A. Let us say they were placed there on the basis of having consulted with the parents.

[524] Q. Well, were the parents in favor of the placement of those mobile units? A. I think that the provision under which the mobile units were placed there were a number of possibilities and these possibilities would be such as this: would you prefer double sessions? Would you prefer extended school day? Would you prefer our attempting to go on this basis? Transportation out or mobile units? So, it was more or less of an alternate plan rather than specifically asking them about mobile units as such.

Q. How did you describe this alternate of busing out, Mr. Johnson? That was one of the alternatives discussed? A. It was, and in these particular meetings that—at that time I attended as the Assistant Superintendent in charge of instruction to that meeting, who had discussed this with the parents. There was two of us in attendance and only at one school was I in attendance and that was at Smith Elementary School.

Q. Smith, is that the one with 12 mobile units? A. That is the one with 12 mobile units.

Q. When did that meeting take place? A. I cannot give you the exact date. However, it was—let's see, I was there approximately three years ago. I would say during 1966.

[525] Q. You have Plaintiffs' Exhibit 101 in front of you? A. Yes, sir.

Q. When does it show on Page 2 the first mobile unit going into Smith? A. 1965.

Q. Now, does this mean that you are talking about—was that before there were any mobile units in Smith?

A. As I recall, the meeting that we are talking about I think was after the first group of mobile units in the school.

Q. After you had put in six in '65? A. Yes.

Q. Then you put in six more in '67? A. Yes.

Q. Pardon me, '66. A. '66. I am inclined to believe that the meeting that I am talking about—I'm inclined to believe that they had mobile units at Smith at that particular time and it has been the result of the principal having worked with the parents and others in the community. It was before we put in the large number.

Q. Now, did you tell me that the parents preferred mobile units over double sessions, is that right? A. In attending the meeting I attended I would say, number one, the parents did not appear as though they [526] wished to be transported out of the area. They preferred the neighborhood schools.

Q. Mr. Johnson, you heard my question. Do you have it in mind? A. I do not.

Q. The parents expressed a preference for mobile units over double sessions? A. As I recall, they did.

Q. And the parents expressed a preference for mobile units over extending class days, did they not? A. As I recall, they did.

Q. All right, now, we will get down to the transportation, Mr. Johnson. Now, what did you tell them about transportation? A. Well, this was presented by the principal prior to our particular meeting and the meeting was to have the parents there to discuss this matter of transporting out. The statement that was made was that if they were interested in transportation we would designate certain schools in the city where they would be trans-

ported and those schools—we had a general list, but no specific schools in mind at that particular time. What we were interested in finding out was whether or not they wished to be transported.

Q. Well, now, how many schools were on that list, Mr. Johnson? [527] A. There were approximately 12 schools in—primarily in south and southeast Denver.

Q. And what we were talking about then was the prospect of transporting approximately 180 students? A. Depending on if they wanted to eliminate the—it would have been more than 180, because in addition to mobile units they were overcrowded. I don't think an exact number was—but, later, as we moved into it, we had asked for somewhere in the neighborhood of 250 students.

Q. Well, now, as I understand it, Mr. Johnson, this meeting took place at a time when Smith already had six mobile units? A. As I recall.

Q. And when the administration was considering putting in six more, isn't that right? A. That is right.

Q. So, your conversation was, "You want six more mobile units or do you want transportation out?" That was the subject, was it? A. This was generally the subject. That is, which would you prefer, because they were overcrowded.

Q. So we are talking about at least 180 and perhaps more? A. That is correct.

Q. Now, of the 180 children minimum that were to be [528] transported, did you offer to transport them to only one or two or three schools? A. No, they were—the schools available were listed. We had a certain number. We did not have that much space in one or two schools. It had to involve at least eight or ten schools.

Q. So you had to split them up? A. We had to split them up because of lack of space in any single school.

Q. You had no schools down in here that were being underutilized? A. Not to that extent that we could take that many pupils.

Q. Some schools became underutilized in 1967, did they not? A. Underutilized to this extent, that they could take possibly 20 to 30 to 40 pupils, but not to the extent that we had, that number, until such time as the building program was completed in south and west Denver, and then there was two schools, namely University Park and Asbury Schools, where these pupils had been attending, and when the Frank Traylor Elementary School was opened this did give us space in those schools but probably more space in Corey than any one other school.

Q. Now, back in '66 when you attended this meeting, [529] Mr. Johnson, were those Negro parents told that the receiving schools under the transportation which was being offered, did they ask were there going to be any reception programs in those receiving schools? A. Yes, they were told this because our department of school-community relations had been working on similar programs.

Q. And they were told that there would be some sensitivity training at those receiving schools? A. That is correct.

Q. Were they told, Mr. Johnson, how bad the achievement was at Smith? A. I don't recall any statement being made to that effect.

Q. That wasn't released publicly until October of '68, isn't that correct? A. The test scores were released in 1968.

Q. Now, even in 1964, and I call your attention to Exhibit 20, which I believe you cited for the proposition of the committee approved use of mobile units, there were some conditions, weren't there, attached to the committee's approval of mobile units? A. The only conditions that I can recall that were attached were the conditions that these were not to become permanent, a permanent part of the educaiton plans. They [530] were to facilitate it at the time of emergencies.

Q. Yet, according to Exhibit 101, some of the mobile units placed in northeast Denver in 1964 are still there, aren't they? A. Well, of course, it is then a matter of what constitutes permanency on this and they are still continued there because there is a need for two things. One is the fact that we have an excessive number of pupils in certain schools there. The other one is that particularly at Smith School they were left there because—even though we had relieved the membership as related to the capacity—that thre are not special programs going on in those mobile units, and that is the reason, and I think probably the mobile unit is very worthwhile for a special type of program.

Q. Well, Mr. Johnson, didn't you tell me just a moment ago that Smith is still overcrowded? A. Not if we were to take normal capacity and include the mobile units.

Q. Was there any provision under the resolutions which have now been rescinded for increasing the transportation out of Smith? A. Only to the extent that we do promote to a great degree the voluntary open enrollment plan and make some other provisions.

Q. Excuse me, Mr. Johnson, I am talking about 1531. [531] Do you know what 1531 is? A. Yes, that's a previous resolution that was rescinded, is that—

Q. That's correct. A. Yes.

Q. Didn't 1531 contemplate the elimination of some of the mobile units at Smith? A. 1531 from the standpoint of reduction in membership, yes, that is correct.

Q. So, if you reduced the membership further you could get along without those mobile units? A. Depending upon the special programs.

Q. Oh, you couldn't have the special programs? A. The programs at Smith School are of such a nature at the present time that they probably need normal capacity of over the 30 to one room, so it would necessitate a movement of a greater number of pupils in this respect.

Q. Now, there are 12 mobile units there today? A. There are—yes, that is correct, there are 12.

Q. Well, even 1533 talks about removing part of those. A. That is correct.

Q. And there isn't going to be any increase in the special programs, is there, Mr. Johnson? A. We hope that we can accomplish both and that would be to relieve the membership and continue the special programs.

[532] Q. Now, this conditional acceptance of mobile units in the committee report—at the time that report issued, there were only eight mobile units in all the City and County of Denver, is that right, Mr. Johnson, referring to Exhibit 101? A. Well, the mobile units, according to this report—there were—

Q. Eight? A. A total of eight in this area, yes.

Q. And none of them were in northeast Denver, were they, Mr. Johnson? Read off the schools. A. Dowell, Wyatt—

Q. Now, Dowell is down here? Wyatt is up here? A. Wyman.

Q. That's over in here somewhere. A. That's right, and, excuse me, Wyatt had three and Greenlee three.

Q. Where is Greenlee? A. In West Denver.

Q. So, there were none in northeast Denver? A. That is right.

Q. And then shortly after this report was issued northeast Denver got quite a batch of mobile units didn't they? A. That is right.

[533] Q. How many? A. Well, Philips received four, Smith the original six, Park Hill three, Hallett two, and then Smith's additional six, from the period of September, 1964 and on.

Q. So, by the time we got to September, 1968, the total mobile units in Denver had gone from eight to 28 or 29? A. Twenty-nine.

Q. How many of those 28 or 29 were then in northeast Denver? A. Out of the northeast Denver group, there would have been 21 of these as I count them.

Q. Maybe you'd better count again, Mr. Johnson. A. I have 21.

Q. All right, so 21 out of 28 were in northeast Denver? A. That is the figure I have.

Q. As of September of '68? A. Yes.

Q. Now, I believe you mentioned that there were some units at Hallett? A. Yes, sir.

Q. How many? A. Hallett had two of these, two of these units.

Q. They got two in November of '65? A. November of '65.

Q. I believe you mentioned on Friday that the units [534] were removed at Hallett because Hallett student membership had declined? A. Well, then, there was some additions there, that is correct.

[535] Q. There were eight new classrooms built at Hallett, were there not, Mr. Johnson? A. That is right.

Q. And that is when the mobile units got moved? A. As I recall, that is correct.

Q. Now, would you say that today the attitude of the residents up in Northeast Denver are a little less favorable to the use of mobile units?

Mr. Creighton: Objection. No indication he knows what the attitude might be.

The Court: He may. We will find out.

A. No, sir, my answer would be I don't know the attitudes, specifically.

Q. You knew them back in 1965 and 1966? A. At that time there was contact with the parents and they had indicated the desire to use them.

Q. You knew them back in 1965 and 1966? A. At that time there was contact with the parents and they had indicated the desire to use them.

Q. And you have no indication that they are less desirble now than they were then? A. I have no indication.

Q. Now, even as early as 1967, weren't there requests for busing out of certain of these Northeast Denver schools to relieve overcrowding? A. I think the Stedman School—we had some requests at Stedman School.

Q. That's the only one? [536] A. That was the only one that indicated a specific request for busing at that time.

Q. How about Phillips? A. Phillips School was a school that became overcrowded in—I don't recall the year—two years ago, and we had taken some pupils out of Hallett to relieve Hallett and then we did consult with the principal

and the parents and those pupils in that area were transported to Southeast Denver.

Q. How about Smith? A. And the same thing happened at Smith. There was quite a concerted effort on the part of our school community relations department working with parents and many of the parents in that particular area did work and we transported out of Smith.

Q. Now, actually, ever since February 2, 1966, the district has had a policy, namely, 1223, has it not, concerning the busing of students out to relieve overcrowding? A. Yes, that's been a policy and the practice—we also had the practice prior to that time.

Q. Now, at Stedman today, as I understand it, there are about 286 students being bused out? A. That's approximately the number.

Q. But there is still four mobile units at Stedman? A. That is correct.

Q. And at Smith there are 214 students being bused out, [537] is that correct? A. That is correct.

Q. But there are still 12 mobile units at Smith? A. That's correct.

Q. And at Phillips, you have some busing out? A. Yes.

Q. Thirty, as I understand it, students to Ashley, and 50 to Palmer? A. I believe that's the number, although I don't remember the exact schools.

Q. Is Phillips School overcrowded, Mr. Johnson? A. Phillips at the present time is beginning to get back to capacity that they can handle with mobile units.

Q. You're busing 100 students out of Park Hill School? A. That is correct.

Q. Is Park Hill School overcrowded, Mr. Johnson? A. Park Hill, I think, with the 100 being transported, I think the program at Park Hill is a very efficient program.

Q. Now, you mentioned in your testimony the Doull School was a good example of how mobile units are used. Do you recall that testimony? A. Yes, sir.

Q. Doull is down here, is it not? A. Yes, in that area.

Q. And I believe you said that Doull—that it was [538] expected that Doull student enrollment would decline? A. That is correct.

Q. And that's why the mobile units were brought in to cover this temporary situation? A. That was our attempt.

Q. Well, I take it that is not your meaning, Mr. Johnson, that it is expected that the student population in Northeast Denver is going to decline? A. We doubt very much that it will decline.

Q. So there is really not much of a corollary between what happened at Doull and what's happening in Northeast Denver, is there? A. Not from the standpoint of expectation.

Q. Now, do you consider the presence of mobile units to be an indication of overcrowded schools? A. Mobile units are a facility to be used in the case of an overcrowded school.

Q. Are these schools then schools which have an excess number of students? A. That is correct.

Q. Now, you recall, do you not, that guideline that the Board of Education passed in June of 1967 regarding the construction in Northeast Denver? A. Yes.

Q. And you recall that there was another facet of that [539] guideline, was there not, that concerned transportation? A. The guideline centered around the—no additional building in that particular area. But, on the basis of getting relief, and, of course, transportation, transporta-

tion or double sessions would be the only provision that we could have.

Q. I'm handing you Plaintiffs' Exhibit 29—

Mr. Greiner: Is 29 in evidence?

The Clerk: Yes, it is.

Q. —which is in evidence, Mr. Johnson. Page 15 thereof contains the exact language, does it not, of this guideline? A. Yes. You're referring to the specific statement that "follow existing Denver Public Schools Policy 1222C and 1226A with the additional guidelines, no new building or additions in Northeast Denver, transportation of excess students to other instructional schools in the district"? Those voting yes were—

Q. It passed, is that right? A. Yes.

Q. Now, that was in June of 1967? A. That was June 29th.

Q. And by that time we had 12 mobile units at Smith? A. They were there at that time.

Q. And we had 4 mobile units at Stedman? [540] A. That is correct.

Q. And I think we had some mobile units at Phillips, too, didn't we, then? A. At Phillips we had two, as I recall.

Q. And those schools had excess students? A. That is correct.

Q. And it was the policy of the Board to bus out those excess students, is that correct? A. That is right.

Q. Now, you didn't take it though that that policy guideline—that that guideline had anything to do with the removal of those mobile units? A. It was not stated, however, I think it was referred to that we were to transport

and try to equalize—to lower the membership in that particular area and transport elsewhere if possible.

Q. That objective wasn't achieved, was it, Mr. Johnson? A. No, sir, it was not achieved.

Q. You mentioned the opening of Traylor School. A. Yes.

Q. That's a school in Southwest Denver? A. The very southwest part of the city.

Q. It opened in January of 1968? A. Yes, sir.

Q. With a capacity of approximately 750 students? [541] A. Yes, sir.

Q. Before Traylor was opened—and Traylor is right here, is that right? (Indicating on Exhibit 7.) A. That is correct.

Q. Now, before Traylor was opened, where did all of the students down in this area go to school—elementary school? A. Those pupils were transported to University Park.

Q. Now, just a minute. Let me find University Park. A. I think it's directly below South High School.

Q. All the way from here over to here. All right. How many of them were at University Park? A. I imagine University Park had around 350 or 400 of those.

Q. Were they also at Cory? A. University Park and Asbury, those groups particularly, although we had some from that general area to Cory as well. They were all involved in the Southwest Denver transportation. Cory was involved in Asbury.

Q. So you had Asbury, University Park and Cory? A. Yes.

Q. And altogether about how many students did those three schools have, Mr. Johnson? A. I would imagine in the final—

Q. From Southwest Denver? A. From Southwest Denver, there were approximately [542] 800—roughly 800 pupils; 750 to 800.

Q. Okay. Now, up here in Smith, you had 12 mobile units? A. Yes, sir.

Q. About 360 children? A. Yes.

Q. And at Stedman you had 4 mobile units? A. Yes, sir.

Q. About 120 children? A. About that.

Q. When Traylor opened, all of these students that you have described at Asbury, Cory and University Park, they were—they went to Traylor, is that right? A. Yes.

Q. Didn't that open up a few vacancies, Mr. Johnson, at a school like University Park? A. Yes, sir, it did.

Q. About 350 vacancies? A. Yes, approximately that, although those schools, as a result of the Southwest Denver, were slightly overcrowded. But I would say roughly 350.

Q. You had about 40 vacancies at Cory? A. Forty, about, at Cory.

Q. And about how many at Asbury? A. Probably about —roughly 100 on the basis of [543] capacity.

Q. So that is nearly 400—nearly 500 vacancies down there? A. I would say approximately 500 as a result of that.

Q. Now, it's also true, isn't it, that you had some slight overcrowding at some predominantly Anglo elementary schools in this area? A. We had some there.

Q. And you relieved some of this overcrowding in these predominantly Anglo schools by transferring Anglos—a few to Asbury, some to University Park and some to Cory, is that right? A. That is right.

Q. Now, this was also the time when you started busing

36 black children from Phillips, isn't it? A. Yes, 36 would be the approximate number.

Q. And they were all sent to University Park? A. That is correct.

Q. Now, even after you adjusted the balancing here, the over capacity and underutilization of those Southeast Denver schools, Cory, University Park and Asbury, how many spaces did you still have left, Mr. Johnson? A. In addition to this, we had an excess number on the basis of new annexations in the Southeast—in Southeast Denver and part of those spaces were utilized in these schools [544] on transportation again across the city. I think at the present time we do have available space in University Park. We hope some in Asbury and some in Cory and these are some of the schools that we are hoping to use on the basis of voluntary enrollment.

Q. But you had about 350 predominantly black children up here in Northeast Denver? A. That is correct.

Q. In overcrowded schools? A. That is right.

Q. And you had an opening down here of about 500 spaces, is that right? A. I think that's a little high when we consider—but let's say—

Q. About 500? A. About.

Q. And you got 36 of those black children down here to University Park, is that right? A. That is correct.

Q. And a few more, I think—about 40 more from Phillips into another one of these schools? A. Into University Park, Cory School, Smith School. That is correct.

Q. And all the other black children were left up there, is that right, Mr. Johnson? [545] A. That is right, and—

Q. All right. Now, you mentioned in your testimony on Friday—you will recall that the policy that the Board passed about improving the ethnic distribution at schools

by means of boundary changes. A. Yes, sir.

Q. That is Policy 1222C, isn't it? A. That is correct.

Q. And that is in evidence as Exhibit 33.

Now, 1222C says the policy of making, to the extent possible, a heterogeneous school community— A. That's one of the items in the policy.

Q. Now, I believe you cited as an example of that a boundary change between East and George Washington High School? A. That is correct.

Q. That boundary change involved, did it not, what had previously been an optional area between East and George Washington? A. As I recall, a portion of it was, and then a small portion of it was formerly in East District.

Q. Now, the area that we're talking about—this is the area right up here, isn't it? A. Yes, sir.

The Court: Right where? I mean, what's the street?

[546] Q. Do you recall what street it is? A. I don't have it before me but it went up to 32nd, the official boundary line, as I recall.

Q. That is correct. Did it go down as far as Colfax? Is it from Colfax to 32nd? A. Approximately Colfax.

Q. And this area had been predominantly an optional transfer area between East and GW?

Mr. Creighton: Excuse me, Your Honor. Would counsel indicate with a little more precision both for the record and for me over here when he indicates.

Q. This area that you have described between Colfax Avenue and 32nd, shown here on Plaintiffs' Exhibit 7, that

was an optional area between East and George Washington High Schools? A. Yes, the majority of it was. However, it also encompassed some area that was formerly East.

Q. All right. Now, the boundary change you're talking about was that the northern boundary of George Washington was moved from Colfax up to 32nd? A. Yes.

Q. And you stated that that was a change, as I recall, that contributed to a heterogeneous school community, is that correct? A. I indicated this was a move in that direction. And, [547] if I may amplify this particular point—

Q. Well, I'll give you a chance to answer the questions. A. Very good.

Q. Now, the elementary schools in this area that got picked up in the George Washington boundary—what elementary schools served that area, Ashley? A. Ashley would have been one.

Q. Montclair? A. And Montclair—part of Montclair.

Q. Ashley and Montclair are predominantly Anglo schools? A. Yes, sir.

Q. They were then, weren't they? A. They were at that time.

Q. This boundary change was effective in September of 1964? A. In 1964 it went into effect.

Q. Now, is it fair to characterize that neighborhood that got brought into George Washington in 1964 as being a predominantly Anglo neighborhood, Mr. Johnson? A. At that time.

Q. Do you recall how many Negroes there were in George Washington High School before that boundary change? A. Before that boundary change, as I recollect, we had about 10 Negroes in George Washington in about 1963.

[548] Q. Your recollection is pretty good. You had 9, Mr. Johnson.

Now, after that boundary change, do you have any recollection of how many Negroes there were in George Washington? A. I don't know immediately after the boundary change.

[549] Q. 1964? A. 1964, I would imagine probably around 20 or 25, and now about 85.

Q. Your recollection is very good. It went from nine to 20 and this was a boundary change that you believe contributed to the heterogenous school community, is that right? A. Yes, sir.

Mr. Greiner: No further questions.

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[585] * * *

Recross-Examination by Mr. Greiner:

Q. Mr. Johnson, with respect to that boundary change at George Washington and East— A. Yes, sir.

Q. We covered the fact yesterday, I believe, that that boundary change added eleven Negroes to George Washington. A. I don't recall the exact number but it was somewhere in the neighborhood of ten to twenty.

Q. I think we failed to cover the fact, didn't we, that it added 205 Anglos to George Washington? [586] A. There was an increase. I don't recall the exact number.

Q. And George Washington today is still about 96 percent Anglo, is that correct? A. Yes, approximately 96 percent.

Q. Now, I beileve with respect to the junior high schools, on redirect examination you testified, Mr. Johnson, that the purpose of the Cole-Smiley boundary changes was

again to add to the heterogeneity of the populations in those two schools, is that correct? A. I had included one other school and that was Gove. That was a combination of Gove, Smiley and Cole, three schools involved.

Q. Let's focus on Smiley. It is my understanding in 1963 Smiley was 46 percent Anglo, is that correct? A. I believe that is correct.

Q. And in 1964 it was 40 percent Anglo? A. About 40 percent.

Q. And in 1963 Cole was 10 percent Anglo? A. Approximately.

Q. And after the boundary change it became 9 percent Anglo? A. It would have remained about the same.

Q. So those boundary changes made those schools blacker, did they not? [587] A. Let's say there is no reason they should be blacker because we did take quite a number of the Negro students into Gove. However, during this period of time there was certainly an increase in the populaton in those areas and Negro population. It was not the result necessarily of boundary change; it was the result of mobility into those areas that caused it, because we did take—we did take a percentage of those black students from that particular area and put them in Gove and increased it, so I would say proportionately that because of the increased population, the black population, this would be true, and the main effort at that particular time, as has been since that time, is to relieve the membership of Smiley Junior High School, as well as Cole.

Q. Well, Mr. Johnson, you don't mean to tell me, do you, that it was even thought that as a result of the boundary change there would be more Anglos in Smiley or more Anglos in Gove? A. As I indicated in my statement that the real—the primary purpose of the boundary changes

in 1964 was a resolution passed by the Board. At the same time that the boundary lines were changed, this resolution, stating that we should eliminate all optional areas, this was the primary purpose of the boundary change in 1964, to eliminate the optional areas.

[588] Q. You testified, Mr. Johnson, that when Traylor opened up, it created some 500 spaces in the Southeast Denver schools, is that correct? A. I indicated that there were approximately that number that were transferred from the South Denver schools back to Frank A. Traylor, yes.

Q. Now, you had some other students in annexed areas that you had to accommodate, is that correct? A. That is correct.

Q. So you put them all in the Southeast Denver schools, is that right? A. In the schools named, South and Southeast Denver.

Q. Well, now, I—and those schools are overcrowded today? A. You are speaking of the schools generally in that area or are you specifying these three schools?

Q. Well, Exhibit R shows that University Park is somewhat overcrowded, is that right? A. Yes, on the basis of normal capacity, slightly.

Q. Even today, is University Park overcrowded to the degree that Stedman is overcrowded? A. No, sir.

Q. There aren't any mobile units at University Park, are there? A. Not at the present time.

[589] Q. How about Cory, Mr. Johnson? A. No mobile units.

Q. And it's not nearly half as overcrowded as Stedman, is it? A. That's correct.

Q. What about Asbury, Mr. Johnson? A. That is correct.

Q. Any mobile units at Asbury? A. No mobile units at Asbury.

Q. I direct your attention to what's been marked for identification as Defendants' Exhibit 89. Can you identify that exhibit for us?

Mr. Creighton: 89?

Mr. Greiner: 89.

Mr. Creighton: That's plaintiffs' exhibit.

Mr. Greiner: Pardon me, Your Honor. Force of habit.

A. I can't identify this as an exhibit as such. It appears as though this is a plaintiffs' statement and taken from sources of three sources. So I don't recognize the exhibit as such, but I assume that the data included came from those sources. This is the first time I have seen this particular statement.

Q. Do you recognize the sources? A. (No answer.)

[590] Q. They are all from the public schools system, aren't they? A. Yes, I recognize the sources. Evidently there is a typographical error on one of these, if the source is stated correctly, and that is that there is no office of the Assistant Superintendent for Personnel Services as of May 1, 1969.

Q. That's right. That should probably be 1968. A. Well, I don't know whether the date is incorrect or whether the title is incorrect. That is, it would be the Executive Director for Personnel Services. So either the date is incorrect or the title of the office is incorrect. I'm not sure which.

Q. What does that Exhibit 89 purport to show, Mr. Johnson? A. 89 purports to show the L.O.E., which would be Limited Open Enrollment.

Mr. Creighton: Your Honor, now that we know what this exhibit is about, it seems to me it goes beyond the scope of redirect. This is limited open enrollment. This has been covered earlier.

The Court: Well, true, but—

Mr. Greiner: Your Honor, we offer Plaintiffs' Exhibit 89 for the purpose of showing that in September of 1968 according to this exhibit there were 482 extra seats in [591] Anglo schools, even after the absorption of all of these annexed areas, and we offer it for that purpose.

The Court: I think it's relevant in view of the way the examination has gone. I mean—

Mr. Creighton: It wasn't apparent.

The Court: On redirect you introduced some fresh facts today, I take it, that had not been referred to at all.

So it will be received.

(Whereupon, Plaintiffs' Exhibit 89 was received in evidence.)

By Mr. Greiner:

Q. With reference then to Plaintiffs' Exhibit 89, Mr. Johnson, how much under capacity is there stated there for the listed schools? A. It is listed here 482.

Q. What is the average percent of Anglo enrollment in those schools, Mr. Johnson? A. This exhibit shows 93.

Q. And how many Anglos are being bused into those schools? A. 1,071.

Q. And how many Negroes are being bused into those schools? A. 121.

Q. Now, I call your attention, Mr. Johnson, to what's been marked for identification as Plaintiffs' Exhibit 90,

[592] purporting to show the limited open enrollment space in predominantly Negro or Hispano elementary schools in 1968. Can you identify that exhibit for us? A. Not the exhibit as such, and I have the same comment as I had on the other—regarding the other one.

Q. And Exhibit 90 shows the spaces in the minority schools whereas Exhibit 89 showed the spaces in the Anglo schools, is that correct? A. That's correct.

Mr. Greiner: Your Honor, we offer Exhibit 90.

The Court: Has Mr. Creighton seen this?

Mr. Greiner: Yes.

Mr. Creighton: Well, let me look at it. I don't seem to have it.

No objection.

The Court: 90 will be received.

(Whereupon, Plaintiffs' Exhibit 90 was received in evidence.)

Q. Now, Mr. Johnson, Plaintiffs' Exhibit 90 shows, does it not, that in September of 1968 there were 270 spaces available in the minority schools. A. It shows this, yes, sir.

Q. How many of the Anglo children from the annexed areas, Mr. Johnson, were placed in those vacancies? A. (No answer.)

[593] Q. None. Isn't that right, Mr. Johnson? A. I do not recall that we have any annexations— Normally, annexations have been in the Southwest and Southeast Denver area, as I recall.

Q. Well, isn't it true, Mr. Johnson, that when you were trying to accommodate the children from annexed areas, these are Anglo children, are they not, Mr. Johnson, basically? A. Basically.

Q. Now, when you were trying to accommodate those children, how far did you bus them? A. We attempted to bus them to the nearest elementary school that had vacant spaces.

Q. Some of those bus rides were as long as ten miles, weren't they, Mr. Johnson? A. I think the longest one was from Southwest Denver to the Asbury, University Park, Steele and Cory.

Q. In response to a question from the Court, Mr. Johnson, you indicated, as I understood it, that some of the elementary schools in Southeast Denver were on double sessions, is that correct? A. Had extended days.

Q. Pardon me? A. Extended days, and double sessions; an overcrowding.

Q. What is the difference between an extended day and a double session? [594] A. An extended day is very often accomplished by starting the school day slightly earlier in the day and extending longer, as in contrast with actually two groups of students coming at a particular time.

Q. Now, how many of those Southeast Denver Anglo elementary schools were on extended days in— What is the appropriate time to look at this? In January, 1968, as opposed to September of 1968? A. I would say that the appropriate time would be to—I imagine that the height of this would probably be in about 1966-1967, from the standpoint of the greater number.

Q. Well, I thought you told the Court, Mr. Johnson, that when Traylor opened up and that was in January of 1968, is that right? A. That's correct.

Q. That you had Southeast Denver schools on double sessions. Now, is that or is that not the fact? A. That is an incorrect statement on my part. They were overcapacity. There were no double sessions.

Q. And there were not even any extended sessions, were there, in January of 1968? A. There were some in the kindergarten group.

Q. Where, Mr. Johnson? A. I can't state right at the moment.

Q. You said that Steele was overcrowded. [595] A. It was necessary to relieve Steele of further crowding because we had reached the capacity.

Q. How overcrowded was Steele, Mr. Johnson, in September of 1968? A. I don't have the figures before me but I know it was necessary to eliminate transportation into Steele, and we were able to take some of those pupils and keep them in the Southwest Denver schools.

Q. How many mobile units did you put in at Steele to relieve that overcrowding? A. There were no mobile units in that area.

Mr. Greiner: No further question, Your Honor.
Mr. Creighton: No questions.

* * * * *

Mr. Jackson: Call Dr. Robert Gilberts.

Robert Gilberts, [596] recalled as a witness by and on behalf of defendants, having previously been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jackson:

The Court: You have already been sworn, Doctor. Just take the witness stand.

By Mr. Jackson:

Q. Dr. Gilberts, what is your present position with the Denver Public Schools? A. I'm the Superintendent of Schools.

Q. And would you describe briefly for the Court, please, your responsibility in that position? A. My responsibility is to administer the Denver Public Schools within the general guidelines of the Board of Education's policy and within that context, to provide the best possible quality of education to all the students in the school district.

Q. How long have you been superintendent in the Denver Public Schools? A. From August 1st, 1967.

Q. And what was your employment prior to that? A. I was Superintendent of Schools in Madison, Wisconsin.

* * * * *

[597] * * *

By Mr. Jackson:

Q. Dr. Gilberts, as you heard, there is one comment on this that I placed thereon that reflects current membership in a national committee, FAASA. Would you explain to the Court and counsel what that means? A. This is a national commission from the American Association of School Administrators to look at the state of preparation of school superintendents throughout the United States and to make recommendations for changes in programs.

[598] Q. And you are presently a member of that commission? A. Yes.

Q. And what is the number of members on that commission? A. I believe there are nine members on that commission.

Q. Dr. Gilberts, how do you personally view the position of the Superintendent of Schools in Denver today? A. Well, I think that the Superintendent of Schools in any urban center today is faced with a rather major problem of looking at how one might reconstitute the entire processes of education for children in order to improve its effectiveness

and certainly a major element is that—of that is dealing with the problems of underachievement in those schools that have been referred to in this trial.

[599] Q. I think it is important for you to advise the Court as to how you would define the word "integration" as we have heard it. A. I would accept Dr. Dodson's definition that integration is a psychological willingness of people to accept people of all races without prejudice.

Q. Does this then form a part of your general overall view of restructuring the educational process? A. Yes, it does. I think this is extremely important in dealing with the problems in our entire society.

Q. Do you identify any particular problems in this area? A. Yes, there are many problems in this area, the problems of how one best goes about accomplishing this in a city the size of Denver or any city, for that matter. There is tremendous diversity of opinion as to how one can accomplish this end. There are those who believe the only way it can be done is through racially balancing the schools. There are others who feel that other kinds of systems and techniques can be used to provide vehicles for modifying the values and attitudes of people within the school system.

Q. Would you describe briefly some of these other systems? A. Well, I believe that within the entire process of [600] education there are many possibilities for doing this. We have within our school system presently several programs that are under operation as the result of the advisory committees, one being the cultural arts program, the cultural understanding being the second one, wherein youngsters are given the opportunity to look at arts and various kinds of cultural contributions of people from different backgrounds and to understand their origins and

the meaning of them and to relate one to another in some physical proximity.

I believe Dr. Dodson indicated that he felt, also, that it was necessary for a youngster—

Mr. Greiner: Your Honor, I do object to this witness summarizing what Dr. Dodson has said.

Mr. Jackson: If the Court please, I believe the witness is merely attempting to answer the question in relation to the facts of this case.

The Court: Overruled. We may proceed.

The Witness: I lost my track. I forgot where I was going at the time.

Q. You were discussing other systems for achieving this. A. I talked about the cultural arts program and cultural understanding programs, which are examples of ways in which this can be accomplished.

Oh, and I certainly accept the fact that some kind [601] of physical proximity of youngsters in this process is extremely important as a vehicle for accomplishing these changes in attitudes and values that are so necessary in our society.

Q. You mentioned racial balance, Dr. Gilberts. How does this fit into your view of the problem? A. I do not believe that racial balance as such is necessarily the only answer or the only approach to achieving integration as I have defined it. I think there are many other ways and I think that certainly the schools are not the only institution in our society that have responsibility of achieving that end, though we do have a major role, I believe, to play in that process.

Q. Is there, in your opinion, any one approach that must

of necessity be successful? A. No, I don't believe that there is any one approach that can be successful. I think conditions are so varied in these United States that there must be a number of ways in which the solution to this problem can be undertaken. If one assumes that there is only one approach, for instance, racial balance as such, then many of our major cities are already lost. There is no possibility of changing them. And I personally or professionally am not willing to accept that as an end.

Q. After your arrival in Denver in 1967, Dr. Gilberts, [602] Resolution No. 1490 was subsequently passed by the Board of Education, was it not? A. Yes.

Q. And what was your specific responsibility under that resolution? A. Well, this resolution called upon me to present a comprehensive plan for the integration of the Denver Public Schools by September 30th, I believe it was, and there were a number of other kinds of considerations within that resolution, which were added to provide some kind of guidance in developing that plan.

Q. Subsequent to that resolution, did you prepare such a plan? A. Yes, I did.

Q. You have before you what has been marked for identification purposes as Defendants' Exhibit D. Can you identify that? A. This is the copy of the plan which was presented to the Board of Education and to the community in the early part of October.

Q. And this is the plan which you submitted to the Board in response to the Resolution 1490? A. Yes, it is.

Mr. Jackson: At this time, we would offer Defendant's Exhibit D, Your Honor.

[603] Mr. Greiner: We have no objection, Your Honor.

The Court: D is received.

(Defendants' Exhibit D was received in evidence.)

Q. Dr. Gilberts, would you describe generally the concept of your plan now received as Defendants' Exhibit D?

A. Well, in devising this plan, we looked at the overall problems of an urban center and all the kinds of systems that we thought we could identify that might contribute to the improvement of the general quality of education throughout the school system, and the major portion of this, as I indicated before, was providing for experiences that would be integrating in nature and provide for integration in the Denver Public Schools.

Basically, we took a look at the format of education in an urban center. One of the major problems, I believe, in the restructuring of education in urban centers is taking a look at the way in which the schools relate to the publics that they serve. One of the major difficulties in large school systems, it is my opinion, is the remoteness with which the school functions in the community, so we began taking a look at a way in which we could restructure the organization of our schools to enhance opportunities for integration, ways of involving the community in the operation of their schools, and at the same time restructuring the [604] physical school organization to provide better educational kinds of experiences for children. We had felt that the proximity of the school and the relationship of the school as one of the basic institutions in the community to those people it serves is an extremely important one.

There is a very interesting article that came out after

this plan had been developed, written by Dr. Dioxydis, who is an internationally-known and renowned city planner, in the mid-December, 1968, issue of the Saturday Evening Review. The basic thesis of this article was that, since the beginning of time, man has up until recently enhanced the opportunities of man to relate to additional institutions and to additional individuals, but only recently have we begun removing some of the more immediate kind of institutional relationships which are important in an urban setting and life for all of us. Therefore, we looked at ways in which we could devise an organizational structure, not as the result of this article, but using the same general concept, which would provide for expanding opportunities for children to relate in different ways to the education institution and at the same time, as indicated, provide for integrating experiences within our school system.

Within this kind of structure, we provided for the reorganization of schools to press out the decision making responsibility further from the superintendent's office, to [605] allow the teachers, principals and community members more effectively to influence the kinds of decisions that were made in determining educational programs, and hopefully through that to provide a closer sense of relationship between community and staff and students with the school itself. This restructuring also involved the reorganization of kinds of services that might be provided through the school.

We felt, for example, that many of the community agencies presently operating independently might very well be coordinated through this kind of an organizational structure and that many of the services that presently are operating quite independently and sometimes causing many

gaps in services that are necessary to people and sometimes overlap, that through this organizational structure we might effect that.

We also provided within that organizational structure, keeping consistent with what we felt was important in the reorganization, such as proximity, geography, number of schools, size, et cetera provided opportunities for planning new kinds of educational opportunities within these structures which would enhance general education as well as trying to get at the integrational opportunities that I know are important.

Q. When you speak of the integrational opportunities, are you referring now to the opportunities as consistent with [606] the definition which you have just given this morning? A. Yes, I am.

Q. So the plan then is really a proposal for quality education as opposed to any finite, refined plan for specific movement? A. Yes, the entire plan was a conceptual type of plan and in the period of time in which we had to produce this, which I believe I indicated was about sixty working days during the summer months when a good many staff members were not available to us, and this is always a difficult time to put something like this together, we did not spell out all of the details, all of the concepts that are included within it, and there is a great deal of work, for instance, in refining the concept of the complex as a functional unit within the school system, as well as many other elements within the plan.

Q. Directing your attention, Dr. Gilberts, to Page 32 of Exhibit D, what general heading is contained on this particular section? A. "The Elementary Model School Complex."

Q. And would you explain, please, generally, what that

concept is? A. Well, I think that if one would refer to the schematic just after Page 35, that it would describe this. It really is a grouping of schools or a consortium or [607] whatever you would like to call it within which we would provide a special supporting educational center for special educational opportunities. In addition to this, these schools would become a part of administrative units so that educational programs could be planned both within the schools and between the schools and could be coordinated at the local level with a complex structure. We had expected within this complex to develop many kinds of supporting and exemplary educational programs that we felt could lend support to all the concepts we were talking about, integration certainly being one of them, but also the general improvement of educational experience for the youngsters within these complexes.

We saw the opportunity here within the organizational structure to begin involving in an advisory way, more effectively in an advisory way, I should say, the members of the community that are affected within these complexes and to leave the complex director a good deal of latitude in terms of decision making as it related to programs within these schools. Obviously, the superintendent's office and supporting staff would make a contribution to both planning and supervision and evaluation. Within this center we have identified a number of items that we thought might be relevant. Now, as we get into our specific planning, we may find others more imporant. We may find that we want [608] to change the configuration of this as we look at it. I assume there will be some differences between complexes around the city in terms of needs of those areas.

Robert Gilberts—Recalled—for Defendants—Direct

Q. Did you in your planning tentatively divide the elementary schools of the city into various groupings or complexes? A. Yes, we did.

Q. Directing your attention to the map which appears between Pages 107 and 108 of Exhibit D, Dr. Gilberts, can you identify that portion of the exhibit for us? A. Yes, these were the tentative identifications of complexes throughout the city, grouping schools in the best way we felt we could to accomplish all of the purposes that we had set forth as being important.

The Court: What exhibit is this?

Mr. Jackson: Exhibit D, Your Honor.

The Court: Still Exhibit D?

Mr. Jackson: Yes.

Q. Now, Dr. Gilberts, directing your attention to Plaintiffs' Exhibit 6, and in particular to Resolution No. 1533, which appears at the back of that exhibit, would you please read for the Court, Point 1 of that resolution? A. "Superintendent is directed to continue the development of plans in accordance with the concept of the elementary school complex as outlined in his report entitled [609] 'Planning Quality Education' heretofore received by this Board of Education and to initiate voluntary implementation of such plans commencing with the opening of schools in September of 1969 for the following groups of elementary schools of this district to be known as Complex 1 and 2."

Under Complex 1 is a list of schools that were included in it and under Complex 2 the same.

[610] Q. Are those groupings of schools as contained in Resolution 1533 the same as are shown on the maps which we have previously alluded to in the Exhibit D occurring between Pages 107 and 108? A. Yes.

Q. What is the specific purpose of this particular complex arrangement as shown here in Point 1, Dr. Gilberts? A. Well, the purpose is to begin the more detailed planning of the organization and operation of these complexes. It is a concept that needs a great deal of development and we felt that these two complexes would provide us a basis for organization and planning and testing.

Q. Is the Point 1 in Resolution 1533 consistent with your overall planning of quality education? A. Yes, it is.

Q. And will this involve the community in any way? A. Yes, it will.

Q. Generally, in what respect will the community itself become involved in this—in these complexes? A. We intend to involve the community in all the organizational elements, that being a part of all—first of all, in the planning process. One of the parts of the planning process is to identify an effective way of involving the community in a continuing basis in the terms of general operations of these complexes and the schools within them.

[611] Q. Directing your attention, Dr. Gilberts, to Point 4 of Resolution 1533, would you read that for us, please? A. "For the purpose of improving education and furthering the integration of schools included in elementary school complex 5, as described in the report 'Planning Quality Education,' such schools shall be grouped for cooperative planning with the elementary schools of other elementary school complexes as follows, or with such other or different schools as the superintendent may designate from time to time, utilizing the criteria of ratio of school and group memberships, racial composition of memberships, potential for promoting educational understanding, and utilization of school facilities; that such cooperative planning shall be accomplished by the local schools included within such

groupings through planning committees composed of school staff members, P-TA representatives, parents and other citizens in the school community; that such planning committees shall be selected and shall operate under rules and regulations prescribed by the superintendent; that any cooperative plans so developed shall be mutually agreed upon by such committees prior to the implementation thereof; that implementation of such cooperative plans may be undertaken by the superintendent within the limitations of law and the policies of this Board of Education; and that participation by individual families shall be optional."

[612] And then it lists the schools in Complex 5 and those that they are grouped with.

Q. And the listing of schools in Complex 5—it's the same as that shown on our map, again, in Exhibit D? A. I believe so. I'm not—yes, I believe it is.

Q. Now, was this matter of pairing specifically proposed in your overall plan for quality education? A. No, it was not. This particular proposal came out of the discussions that were held with the members of the community and Board of Education. It was something that we could embark upon immediately. In my plan I had recommended that the schools in Area 5 be operated at the pre-school, kindergarten, and primary levels with the students in the fourth, fifth, sixth, seventh, eighth and ninth grades transported out to other schools within the city. Manual High School in that area at the same time being developed as a special magna type school, which we are proceeding with at the present moment. But this was not something that could be accomplished immediately. It would require some additional facilities rather than waiting until we had

money through a bond issue to accomplish it, this was something that we could do right now.

Q. Is the objective under this pairing concept the same as under the complex concept as contained in Point I of this resolution? [613] A. No, not exactly. The planning here will be done jointly with the schools involved in this. However, it will be on a school-to-school basis rather than on an organized intermediate kind of administrative unit.

Q. Is the pairing concept as contained in Item 4 here consistent with your overall plan? A. Yes.

Q. Dr. Gilberts, generally speaking, are there any other educational programs within your plan, Exhibit D, which provide for enhanced educational opportunities in interracial communication? A. Yes, there are quite a number. We have talked in this plan about the need for changing curriculum to provide for general application of knowledge and information with respect to minorities in our culture. We have had proposed in this a ballerette outdoor education center which we hope to have space for approximately a thousand pupils at a time which will be, we hope, in the very near future; a live-in kind of educational setting. We are now in the process of working on that. We have the land and are working in the development of it, both program and facilities. We have proposed an expansion of cultural arts kind of program within the context of this plan. At the junior high school level we talked also about a complex arrangement very much like we have at the elementary level. The senior high school level [614] —we have made a recommendation that there be a secondary school complex dealing with specialized educational offerings both general and vocational and technical to which students from all the senior high schools throughout the entire city—to which the students from all the senior

high schools throughout the city could go. I think there are probably a number of other minor elements in there, too. There are many, many ideas.

Q. Now, Dr. Gilberts, directing your attention once again to Resolution 1533, I'd like to direct your attention to Paragraph No. 5 in that resolution and ask you if you would read that to the Court, please. A. "The present practices of transporting pupils from the attendance areas of schools of this district deemed to be overcrowded in other schools of this district, whenever necessary to relieve such overcrowding, be continued."

Q. Would you explain the purpose of this to the Court, please? A. Well, the purpose of this is to allow us the latitude to move youngsters from facilities that are overcrowded to other facilities where we have space. And it is our intention to pursue this particular policy throughout the city. I might throw in here an example as Mr. Johnson was talking about the readjustment of space throughout the central part of the city. Before this plan was put out, [615] another reason was to provide spaces in more schools to be utilized for both voluntary and for the relief of overcrowded schools. However, the Resolution 1490 intervened before any such plan could be undertaken.

Q. The determination as to when a school is overcrowded within the context of this paragraph, is that based on the strict formula approach that we have heard? A. No, I believe it's been discussed also as a matter of looking at the kind of program that we feel is necessary for that school and then judging the amount of space, classroom space that is necessary for pupils to implement that program.

Q. Now, Dr. Gilberts, directing your attention for a moment to Defendants' Exhibit P, which is before you,

can you identify that document? A. Yes, it's the Board minutes of April 25, 1968.

Mr. Jackson: At this time, Your Honor, we'd like to move the admission of Defendants' Exhibit P.

Mr. Greiner: No objection, Your Honor.

The Court: P will be received.

(Whereupon, Defendants' Exhibit P was received in evidence.)

Q. Dr. Gilberts, directing your attention to Page 5 of those minutes at the bottom of the page, would you read what appears there to the Court, please? A. The last paragraph?

[616] Q. Yes. A. "Superintendent Gilberts referred to Resolution No. 1486, adopted on January 18, 1968, by the Board which authorized funds for the purpose of providing accommodations for the junior high school pupils of the district and for relieving crowded conditions at Smiley Junior High School. He read from the resolution as follows:

'Now, therefore, be it resolved by this Board of Education that upon the payment of all amounts and obligations incurred or to be incurred by this school district in connection with site acquisition, construction and equipping of Jessie M. Hamilton Junior High School, not less than 80 percent of the capital reserve fund of this school district and such amounts as may be recorded therein from time to time shall next be expended for the provision of necessary facilities for the specific purpose of providing relief from the excessive pupil population of Smiley Junior High School and for the general purpose of assisting in the accommodation of junior high school pupils of the school

district. Such facilities will be located in a manner so as not to contribute to the further increase of de facto segregation.'"

Q. Did you make specific recommendations to the Board based upon that resolution? A. Yes, I did.

Q. Would you explain to us what those were, please? [617] A. Well, I recommended that there be an initial twelve classrooms added to Jessie M. Hamilton immediately to provide relief for Smiley in the second semester; also to provide some relief for Hill Junior High School. I also recommended that a new high school be built at East Florida and South Quebec after which is now named Place Junior High School, which would provide further space for the relief of junior high schools in the area and the opening of spaces for the further relief of Smiley as a junior high school and also possibly Cole.

Q. Now, were those recommendations acted upon by the Board? A. Yes, they were.

Q. And what were the results? A. It was approved.

Q. Now, was any actual busing of students from Smiley accomplished when Hamilton opened? A. Yes, it was.

Q. And do you recall the number? A. I believe that all told from the Smiley area there was somewhere between 250 and 300 pupils transported to both Jessie M. Hamilton and Thomas Jefferson High Schools.

Q. The Place Junior High School, I believe you referred to as the other high school at Florida and Quebec? A. Yes.

[618] Q. That is in the construction process, is that right? A. It's in the bidding process right now. We hope to have it opened during the 1970 school year sometime.

Q. Will that provide any additional space for busing further students from Smiley? A. Yes.

Q. Dr. Gilberts, referring you back once again to Para-

graph 5 of Resolution 1533, is there any other additional busing taking place at this time for the purposes of relieving the overcrowded conditions of the schools? A. We're moving students from Stedman Elementary School, I believe—that's been mentioned. We are moving students from Phillips Elementary School. Students are being moved on a voluntary basis from the Smiley Elementary School.

Q. And where are these students being transported to? Which area of the city? A. To the south, general south. And south central area.

Q. Dr. Gilberts, directing your attention to Paragraph 6 of Resolution 1533, would you read that for us, please? A. "The superintendent is directed to proceed with plans to reduce the pupil population of Stedman Elementary School to the extent that the four mobile units now located at that school may be used where needed in other schools of this district by soliciting approximately 120 voluntary pupil transfers from Stedman School to other elementary [619] schools of this district having space available and with transportation provided by the district."

Q. Can that same process be utilized to relieve other schools where there are mobile units? A. Yes, it can.

Q. Is it your intent to proceed in that direction? A. Certainly, as we can and as space is available and as one considers the overall space requirement needs for the entire city. Before a great deal can be done in this area it is going to be necessary that we have funds for additional facilities.

Q. Referring again to Exhibit D, your plan for planning quality education, do you have figures within that plan relating to the capital construction cost to fully implement that plan? A. We had an estimate. We tried to quantify

it as best we could within that particular frame of what fiscal dollar requirements would be necessary to implement this plan so that people would have some measurement of that.

Q. Can you find those figures? A. They're in the back here. I believe the total is on Page 99—where we have all of the phases included and throughout the entire plan we estimated at that time approximately $126,900—excuse me. $126,910,000. And this was an estimate.

[620] Q. Generally speaking, Dr. Gilberts, is Resolution 1533 consistent with your overall plan of achieving quality education? A. Yes.

Mr. Jackson: No further questions.

Cross-Examination by Mr. Greiner:

Q. Dr. Gilberts, under 1520, 1524 and 1531, did you as superintendent prepare some statistics as to how many children would receive an integrated education under those resolutions? A. Yes, we did.

Q. Do you recall the total number—what the total number was? A. I'm sorry, I don't without looking at the record.

Q. These were published in the reviews, were they not? A. I believe so.

Q. I am handing you what's been marked for identification as Plaintiffs' Exhibit 10 and 11 and ask you, first, with respect to 10 if you can identify that for the Court, please? A. Yes, this is a publication of the school system summarizing the secondary elements of the plan.

Q. And then Exhibit 11, as I understand it, summarizes the elements of the plan in the elementary schools, is that correct? [621] A. Yes.

Q. And these exhibits were prepared by the school district? A. Yes.

Q. And the review is designated the official publication of the Denver Public Schools? A. Yes.

Mr. Greiner: Your Honor, we offer Plaintiffs' Exhibit 10 and 11.

Mr. Jackson: Your Honor, according to my records, they have already been received.

[622] Mr. Greiner: Now, which exhibit—pardon me, is that correct?

The Court: That is correct.

The Clerk: Yes.

Mr. Greiner: Excuse me.

Q. Which exhibit has the data to which I referred on the total number of students who would be integrated under these resolutions? A. I thought that Exhibit 11 had it, but I don't—

The Court: Which one was that?

A. (Continuing) Oh, yes, here it is on the front page.

Q. Which exhibit do you have reference to? A. Exhibit 11.

Q. And what is stated there, please? A. It says, "This plan will provide integration for 10,102 elementary pupils in 22 schools by the reassignment of 2,001 additional pupils."

Q. Now, have you developed a similar statistic, Dr. Gilberts, for Resolution 1533? A. No, I have not.

Q. Do you have any idea what that statistic would look like? A. It would be impossible to even estimate that at this time until we have these programs in operation.

[623] Q. Is it safe to assume, Dr. Gilberts, that it's going to be substantially less in September of '69? A. Yes, I think—

Q. Than it would have been under these resolutions? A. On a short term basis I think it will be less. On the long term, it is another question.

Q. You discussed your view of what integration means, Dr. Gilberts. At what point in your mind does a school become segregated? A. Well, I don't believe that I have any particular figure in which it becomes segregated. I have defined integration as a social or psychological process. Integration—or segregation, I suppose, might be the opposite of that. I am not sure. That is, a psychological feeling of the opposite of an integrated feeling, but I don't have any particular number at which I would attach a segregated school.

Q. Well, let's take a look at some of the target schools under the rescinded resolutions. Is Barrett a segregated school? A. Barrett has about 90 some percent black youngsters in it, I believe.

Q. That would just about meet anybody's definition of a segregated school, wouldn't it, Dr. Gilberts? A. I would think so.

Q. What about Smiley? It is what? Seventy-five percent [624] black? A. I believe that is correct.

Q. What percent Hispano, do you recall? A. About 12 is my recollection; I could be wrong.

Q. About what percent Anglo is Smiley? A. Seven or eight percent.

Q. Pardon? A. Seven or eight percent. This is an estimate on my part. I am not sure. I would have to see the figures.

Q. It has over a 90-percent minority population? A. True.

Q. Is that a segregated school? A. I assume it would be by most people's definition.

Q. Now, as I understand the complex program as illustrated in Defendants' Exhibit D, which is the Gilberts plan, isn't it true that one of the defined complexes would have a predominantly minority composition?

Do you have that in front of you? Please refer to Page 108 of Exhibit D. I have specific reference to Area 5. A. Would it have a predominantly minority population?

Q. Yes, Dr. Gilberts. A. My recommendation for Area 5 was the transportation of pupils from that area, as I indicated, in the intermediate and junior high school grades, the development of a magnet school at Manual, and then I had also planned to make [625] attractive the pre-school—primary program, so I would assume that, if I could have accomplished those ends, it would not have been a segregated area. It would have been an integrated area.

Q. Well, look at the two extreme right-hand columns on Page 108. Doesn't that purport to show the proposed complex population, the percent minority and percent Anglo? A. As it stands, without having made the modifications I have talked about, because this would not be the percentage if we could do those.

Q. Now, without modification, the racial composition of Area 5 would be 97 percent minority and approximately two percent Anglo? A. I believe that's correct.

The Court: Wait a minute, when you speak of the transportation, you mean that contemplated in these resolutions, 1520, 24 and 31?

The Witness: No, sir, in the plan. In the plan I proposed that Area 5 would have all students in the intermediate and junior high school grades trans-

ported out of Area 5 into other schools, Southeast and Southwest Denver primarily.

Mr. Greiner: Further along that regard, Your Honor, there is an asterisk of some type, isn't there, next to the two-percent Anglo for Area 5, Dr. Gilberts?

[626] The Court: Yes.

The Witness: Yes.

Q. And if you will refer down, what does that asterisk designate? A. "Transportation will be required to maintain integration."

Q. So, you're going to have some mandatory busing? A. This is what I proposed, yes.

Q. Not voluntary busing? A. No.

The Court: This comports with 1533?

The Witness: No, sir, it does not. The element for Area 5 because of necessity here of having additional space to implement this was the pairing of schools in Area 5 with groups of schools southeast and southwest, and that's something we can begin on next fall, but in the long range, if the Board will approve this plan that I have, it will provide for the movement of those youngsters in this area out of those schools to other schools where we have space.

The Court: Essentially 1531 disapproves the use of busing to bring about segregation, doesn't it?

The Witness: To bring about integration?

The Court: Integration.

The Witness: It requires that those programs that are identified with it be voluntary, yes.

[627] The Court: So, this would require changing policy?

The Witness: Yes, it would, if this were to be implemented.

The Court: If you were to carry out this particular plan, I take it?

The Witness: Yes, it would.

Q. Dr. Gilberts, do you have Plaintiffs' Exhibit 6A in front of you? That's Resolution 1533. A. Yes, sir.

Q. Would you refer to Paragraph 5 on Page 4 of that exhibit, please? A. Paragraph 5? Yes.

Q. That paragraph talks about transportation out to relieve overcrowding? A. Yes.

Q. And I take it that, under Paragraph 5, the transportation out of Phillips would be continued? A. Yes.

Q. Is that today or in September was that Phillips busing out voluntary or mandatory? A. It is mandatory.

Q. And is there some busing out at Park Hill? A. I don't believe there is. I think that was a misstatement yesterday.

Q. I am sorry. Is there any busing out at Barrett? [628] A. Not on a compulsory basis.

Q. There is some busing out at Stedman, is there not? A. Yes.

Q. And that's also on a mandatory basis? A. Yes.

Q. There is no busing out at Smith—or, is there? A. There is, but that's on a voluntary basis.

Q. Well, now, Paragraph 5 that I drew your attention to, that talks about mandatory busing out to relieve overcrowding, doesn't it? A. Yes.

Q. Isn't that the purpose of that? A. Right.

Q. How does that square with Paragraph 6 on the next page? Why is the further busing out to relieve overcrowding at Stedman going to be voluntary rather than manda-

tory? A. I imagine that it was stated that way as a matter of Board policy and in their wisdom they felt this is what should be done, and my job is to implement it.

Q. Doesn't the Board have a policy, 1222C, I believe it is —or, pardon me, 1226A—a policy that's been in existence since 1966, I believe,— A. In terms of the transportation to relieve overcrowding?

Q. Yes. [629] A. I believe so.

Q. And that policy calls for mandatory busing, does it not, Dr. Gilberts, not voluntary? A. I do not believe it is stated in quite those terms, but it allows for the identification of youngsters to relieve overcrowding for transportation.

Q. Now, under the complexes proposed in the Gilberts Plan, Defendants' Exhibit D, at what point in a child's school life does he begin to participate in the complex program? Isn't it at grade four? A. Not necessarily. This has not been identified as yet and will be part of the final process.

[630] Q. You're telling me it's going to be earlier? A. It might be.

Q. You don't know yet? A. No, the planning has not been done so I don't know.

Q. Well, weren't these two complexes the subject of Resolution 1531, Dr. Gilbert? A. Yes.

Q. And that was passed in April of this year? A. Yes.

Q. And your planning hasn't progressed very far since then? A. No. Educational planning is rather complex and involves a lot of people and a lot of time.

Q. Now this pairing concept that you had reference to that is contained in 1533, what sort of opportunities for integration, Dr. Gilbert, are implicit or inherent in that pairing plan? A. Here again there are many kinds of

programs, I believe, that can be developed within these schools. We are here involved on the—with the type involved; the teachers and principals and parents of various school areas to identify programs that are educationally sound and are acceptable within these communities so we can get maximum participation in them. Again, these are in the process of [631] being considered by schools; some of them have already done some planning. I couldn't enumerate what all their ideas have been up to this particular point but I am sure there will be many kinds of approaches taken.

Q. So, again, the plans under the pairing are today not very well defined? A. Well, I couldn't say for sure. They may be very well defined in some schools but I couldn't tell you what they are in each of the schools.

Q. Well, now, does pairing include the concept of, say, fourth graders from School A going to fourth grade in School B? A. It could conceivably.

Q. Does it? A. It could, I say.

Q. Are any plans such as that on the drawing board? A. As indicated, I don't know what the specific plans are in each of these schools; therefore I couldn't answer that.

Q. Now that would require some transportation? A. Yes.

Q. And yet participation in the pairing is made optional; is that right? A. Yes, sir. This is the same way in which it is handled in the cultural program, yet, we have about a 99.9 [632] percent participation in it.

Q. Pardon? A. In the cultural arts program where it is left to be optional with parents, here, we have an extremely high percentage of participation in those offered the opportunity. My figure of 99.9 percent is a personal

estimate. I don't have the exact figures on that but I know it should be very high.

Q. It is very clear, though, that, for example, if there is to be a mixing of a particular class, say the fourth grade, it shall be optional? That's the same way 1533 reads, isn't it? A. That's right.

Q. Well, now, when you testified earlier in this case, Dr. Gilbert, you told me what the concept was behind Resolutions 1520, 1524 and 1531. As I understood it it was to achieve some stability in the schools of northeast Denver begnning in the elementary schools and culminating in East High School which is now a transitional school. A. Yes, this was our major objective.

Q. And very clearly I think you recognized, did you not, that it wouldn't do much good to change the racial composition at East High if you didn't also stabilize the composition at Smiley? A. Well, these were all interrelated and any effect [633] in one would have a continuing effect in the higher grades.

Q. And likewise it wouldn't do much good to change the racial composition at Smiley unless you stabilized the racial composition of the elementary schools that were feeding into Smiley, is that correct? A. Yes; as I say, they are all interrelated.

Q. Well, Dr. Gilberts, do you honestly believe that 1533 is going to be—going to accomplish that objective? A. I think I also indicated in the testimony that it's a little early to tell whether or not this kind of an approach will really attract the kind of participaiton that we feel will be necessary to do this. I believe that in the overall context of the approach that we indicated in this general plan, that the involvement of people who are going to be a part of these plans is extremely important and—that is, as a part of

changing attitudes of the community, a certain amount here of involvement and salesmanship in terms of the schools' part is going to be necessary.

I believe the participation of people who do this willingly will be a lot more productive in terms of definition of integration than those who are put into situations who feel personally they are not acceptable to them.

[634] Q. Dr. Gilberts, you are telling me that mandatory integration is bad? A. No, I'm not saying that. I am saying that the other approach, I think, has some real merits and something that needs to be tested, and we are in that process.

Q. That's the only thing you are testing currently, isn't it? As between mandatory and voluntary? A. Well, actually a good number of ideas in this plan are not being tested currently because we have not proceeded with planning far enough to do that; have not gotten full approval from the Board for the entire plan.

Q. That you're not telling me, are you, Dr. Gilberts, that mandatory integration achieved by boundary changes, achieved by cross-busing—you're not telling me that that doesn't achieve the purpose that you set out to achieve in the three rescinded resolutions, are you? A. I did indicate in my testimony that we have some indication that those kinds of changes would stabilize the community. But, whether they will or not, is something yet to be determined.

The Court: Well, this is a secondary approach to mandatory busing, anyhow, isn't it?

The Witness: I don't understand, Your Honor.

The Court: I suppose that these resolutions, the ones in suit here, were the primary policy provisions [635] with respect to attempted integration of these

northeast Denver area schools?

The Witness: In that particular area, yes, sir.

The Court: Now, when those are wiped out, why, you have a second approach. But, it also involves mandatory busing.

The Witness: Some of it does, yes.

The Court: And it couldn't succeed, I don't suppose, without it?

The Witness: Well, sir, I think that still remains to be seen. I have the feeling that if we can develop the kind of program that I think we can, develop the kind of community system of communication that will be necessary, I believe that we can promote a good deal of integration.

The Court: There will be no interracial relationships, will there?

The Witness: Yes, there will be.

The Court: Where will they come from?

The Witness: Because I think in the programs we are talking about, the example given by the attorney here is one that could occur, where schools, grades, may exchange within these schools for differing periods of time. There may be other kinds of educational experiences, [636] field trips, et cetera, that may provide that kind of basis as well. It will take a shorter-term kind of experience.

The Court: But this is all on a voluntary basis.

The Witness: Yes, so far as—

The Court: This would be another variation of this regional approach of yours; on a voluntary basis, communication.

The Witness: I suppose in some sense—although, this is a quite different kind of concept in terms of

the operation of the complexes in this pairing of area 5 in the southeast and southwest schools.

The Court: We will take a short recess.

(Whereupon, the hearing recessed at 10:52 a.m.) [637] (The court reconvened at 11:10 o'clock a.m.)

Mr. Greiner: If it please the Court.

By Mr. Greiner:

Q. Dr. Gilberts, as I understand Resolution 1533, does it provide for the desegregation of any school? A. If the voluntary enrollment plans work as we hope, it could provide for that. There is more specific provision for the special demonstration program at the Hallett School, which we hope to have a major effect upon the members of minority youngsters in that particular school.

Q. But the VOE is voluntary, is it not? A. Yes.

Q. And the Hallett program is to be voluntary? A. Yes, it is.

Q. So, there is no mandatory desegregation under 1533? A. Except—

Q. You understand what I mean by desegregation? A. Now, will you define it for me?

Q. Under 1533, is there any mandatory program whereby any of these schools in northeast Denver which are now predominantly minority are going to change to predominantly Anglo schools? A. No, there is no such mandatory requirement.

Q. Well, aside from the busing out aspect for the [638] purpose of relieving overcrowding, under 1520, 1524 and 1531, approximately how many students were to be mandatorily bused? You might refer to Plaintiffs' Exhibits 10 and 11.

The Court: He said 2,000 more than are presently being bused at one time.

Mr. Greiner: Yes, I would like to also leave the busing out for overcrowding from that figure, Your Honor, is my purpose, if it's possible.

A. I don't believe that is possible, but the number, as I recall, was additionally approximately 2,000 pupils being bused.

The Court: About 12,000 altogether.

The Witness: Being bused in the total school system, approximately.

Q. That's 12,000 out of what 95,000? A. Approximately.

Q. Now, as I understand it, under Resolutions 1520, 1524 and 1531, the new—

The Court: Do you have 1533 before you there, Dr. Gilberts?

The Witness: Yes. Would you like it?

The Court: If you please.

The Witness: It is in the back of that.

Mr. Greiner: I think we have it as a separate exhibit.

[639] The Court: I am sure you have. I think it is one of the earlier numbered exhibits, and I undoubtedly have it noted.

Mr. Greiner: Yes, it is Exhibit 6A. Did the Court have a question?

The Court: No, not right now. Thank you.

Q. Dr. Gilberts, as I understand it, under 1520, 1524 and 1531, the object or the subject of this manadtory bus-

ing program would have been both Anglos and Negroes, is that not correct? A. That would have been both Anglos and Negroes transported, yes.

Q. This is what is known colloquially as a cross-busing program? A. I am sorry, I do not believe I have seen a good definition of cross-busing. I wouldn't classify it as that.

Q. Pardon? A. I wouldn't classify it necessarily as cross-busing.

Q. Let's not get hung up on a term. I take it there were white students sent into black schools. A. Yes, schools that were formerly black, predominantly Anglo when the transition was made.

Q. That's how they got predominantly Anglo, because [640] you were busing Black into them? A. Right.

Q. At the same time busing blacks out of them? A. True, but not to the same schools.

Q. In other words, it wasn't a totally mutual exchange from school to school. A. Right.

Q. Now, on your 1531, as I understand it, Dr. Gilberts, aside again from busing to relieve overcrowding, there is no mandatory busing, is there? A. No.

Q. There are no Anglos being bused into white schools. Anglos being bused into black schools? A. On a mandatory basis?

Q. Right. A. No.

Q. So, if there is to be any reduction, for example, if Barrett is to go from a predominantly black school to a predominantly Anglo school as was contemplated under 1531, that's all going to be done voluntarily? A. Yes.

Q. And is it also true, Dr. Gilberts, calling your attention now to the busing to relieve overcrowding, the busing to relieve overcrowding under 1533, is that essentially the

same as it was under 1531? [641] A. Yes, I believe so.

Q. And that's what I would call one-way busing. Just black out; is that correct? A. We have that kind of busing, of course, in other parts of the city, where we have to transport youngsters for other requirements, too.

Q. That doesn't have anything to do with 1533? A. Yes, it does, because that's a general provision that we will still utilize that policy, not just in that area but other areas of the city, too, I assume.

Q. You mentioned the cultural arts program, Dr. Gilberts. A. Yes.

Q. Now, as I understand it, would you tell the Court please how many days a week a student participates in the cultural arts program? A. I am sorry, I can't recall just exactly what the schedule is on that.

Q. Well, I hand you what has been marked as Defendants' Exhibit F. That is the description, is it not, of the cultural arts program? A. Yes.

Q. Does it say for how many days a week a student is to participate? A. Yes.

[642] Q. How many days a week is it? A. Two one-half days a week for one term.

Q. One term? A. One semester.

Q. And is transportation provided by the District? A. Yes.

Q. Where do they hold these cultural arts programs? A. We are presently holding them at two locations. The Gilpin Elementary School is one.

Q. That's up here in the core area, is it? A. It is on the west side slightly there.

Q. Right here? A. Yes.

Q. So it is north central in the core area. All right. One at Gilpin. Where is the other one? A. I am sorry,

it has slipped my mind. I can't recall. I don't see it on these.

Q. This program lasts for a semester, is that correct? A. Yes.

Q. And it involves only students in the sixth grade, that's also correct, is it not? A. Yes, so far.

Q. And it is on a voluntary basis? A. Yes.

[643] Q. And you have got a 99 percent participation in that program, is that right? A. Off the top of my head, estimate.

Q. Well, approximately? A. Approximately.

Q. And you think that is similar to what I was talking about in mixing grades under pairing? A. No, I said that it was a program that can contribute to the definition of the integration that Dr. Dodson used and I used.

Mr. Greiner: I have no further questions.

[643-A] *Redirect Examination by Mr. Jackson:*

Q. Dr. Gilberts, there was a question as to the racial composition at Smiley which was raised. I'd like to direct your attention once again to Plaintiffs' Exhibit 10, the bottom of Page 2—

The Court: I read that. I think the numbers are less than indicated. Is that what you're going to bring out?

Mr. Jackson: No, Your Honor. As I understood it there was some question as to whether it was 90 percent Negro or—

The Court: Seventy-five was the testimony. But it's seventy-one, I think, or sixty-eight.

Mr. Jackson: Sixty-seven; 27 percent Anglo and—

Well, so long as the Court understands, there is no need to—

The Court: I think I got that from the document here.

Mr. Jackson: Yes, I was referring specifically, Your Honor to Dr. Gilberts' testimony here.

The Court: All right.

Mr. Jackson: I have nothing further.

The Court: I get the feeling from what you have said that you're not convinced that integration is essential to quality education or alleviating any kind of a problem?

[644] The Witness: No, I have not said that, Your Honor.

The Court: You think there are substitute measures that are just as good.

The Witness: I think there are many ways of going about what I have defined and what Dr. Dodson defined as integration. I think, certainly, this matter of physical presence, as he indicated, and as I have talked about, too, can be an extremely important part of that, but I don't believe there is any particular form in which that kind of presence has to exist.

The Court: Now you're talking about community integration?

The Witness: No, I'm talking about school integration.

The Court: Well, I thought that you endorsed a program which would not call for any pupil integration except as it can be accomplished on some voluntary basis.

The Witness: No, sir. My program that I en-

dorsed involved, of course, the subject at hand here today, together with a number of other kinds of systems that I wanted to test to see whether or not we could accomplish those ends.

The Court: I had thought you approved, if necessary, a voluntary busing program even in connection with this regional matter as a part of it?

The Witness: Yes, sir, we did—

[645] Q. So you don't think then pupil integration is really an important and essential aspect?

The Witness: I'm not sure that it is absolutely an essential. At least, as one looks at it from the point of view of racial balance. I indicated in my earlier testimony that there is no evidence that integration per se has an effect, let's say, upon the achievements of youngsters. I believe that integration is important in the process of changing the attitudes and values of these kinds of things which are essential today in our society, but I do not believe that that particular change or that objection has to be accomplished, let's say, through racial balance, which has been substituted here extensively. I think there are other ways of doing it. I think other ways of modifying attitudes—there has always been this very heated debate across the entire country. In addition to that, I think some rather substantive changes are necessary in the change of process of education. Dr. Dodson referred to this as well. I don't agree with the factors he wrote out as cliches are unimportant in the process of education. They are important. I do tend to agree that we have used them as excuses

more than we should. And that we get into the whole area of modifying the processes of education there is some extremely important substantive changes that are necessary that relate both to the children and the community.

[646] And unfortunately we in education have a great deal to learn along these lines and I don't believe we can put all our eggs in one basket for solutions. We have got to try as many different approaches to this problem as we can and this is why we have such a range in this particular proposal of approaches to this.

The Court: Well, you do not predict that there will be anything in the nature of racial violence as a result of voluntary busing?

The Witness: No, sir, not in the definition that was given in the earlier parts of the trial, the approximation of percentages throughout all the schools—

The Court: I get the impression also that the community won't accept this voluntary busing unless it is in an atmosphere of a balanced school.

The Witness: I think, sir, that that is definitely a factor at the present time. I think there are a great number of attitudes that need to be changed and I think that the schools in their particular domain have a great deal of responsibility in formulating approaches that will begin helping modify those.

The Court: So this is an obstacle right at the outset, I suppose.

The Witness: Yes, sir, I think it is.

The Court: The white community won't send a [647] minority of white students into a Negro school, of which the population is—

The Witness: I think that's true. However, I wonder if, for example in this area of pairing schools in the north central with southwestern and southeastern schools, if we can get the involvement of parents and youngsters in the process of considering mutual problems; whether or not some of those attitudes can't be changed. I believe that they can be and I believe that we can develop some kinds of techniques that will reassure individuals both through the development of programs that make sense to parents as well as getting them more acquainted with some of the problems. And this is the question which can only be determined by a trial.

The Court: What is your program for accomplishing this?

The Witness: Well, as I indicated, I think there are many kinds of—the basic problem is one of communication, understanding of the difficulties. This is the basic problem, I think, between communities. We believe that there are ways that we can identify, or means that we can identify where we can get members of each of these communities together, to look at these problems, to discuss them, to learn to understand one another's viewpoints and, through this process, to begin to identify elements of programs which [648] could involve the interchange of pupils on many different bases. This really is the foundation it seems to me of that kind of approach. And it's an opportunity to begin approaching people on the basis of understanding problems through contacts.

Now, maybe this is an overambitious objective. I think not. If it can be done this way I think the

results in terms of the definition of integration that I have used and that Dr. Dodson used is probably going to be more successful than any other kinds.

The Court: It's too late to accomplish any substantial integration by changing school boundaries, I take it? Have you approached it in that manner?

The Witness: Yes, sir. It is very difficult because of the concentration of these youngsters both Hispano and black in those areas of the city and the overlapping of these areas. There are not enough adjacent areas into which these youngsters can be changed in order to accomplish what we would like to do. It has to go beyond that and has to involve a broader population base than those that are contiguous enough to do what you're discussing.

The Court: Now this is going to intensify, as time goes on, if the trend is not reversed?

The Witness: Yes, sir. It is likely to intensify. And the question is, how does one intervene in that process. [649] And so far as I'm aware, there has been no system which has been identified at this point that has intervened effectively. Now, there are those who feel they have identified things that could do this but I think they're all open to question. We feel that the things that we have identified and in the process of this plan and I'm sure there are other ways, too, will have as much of a chance of doing that as any approach. But, obviously, there are people who feel differently about it.

The Court: Do you have anything further?

Mr. Greiner: Yes, just a few more questions, Your Honor.

Robert Gilberts—Recalled—for Defendants—Recross

Recross-Examination by Mr. Greiner:

Q. Dr. Gilberts, you mentioned some of these pilot programs that are going on in the minority schools. A. I don't recall that I did.

Q. You said that there was special programs being conducted at certain schools. A. I was talking about cultural arts and cultural understanding.

Q. Well, there are compulsory educational programs, are there not? A. Yes.

Q. Would you identify for us, please, Plaintiffs' [650] Exhibit 35? A. This is a report to the Board of Education, Extension of Pilot Programs in Elementary and Secondary Schools.

Q. By whom was this prepared, Dr. Gilberts? A. It was prepared in 1963 and 1964, I assume, by the staff of the school system.

Q. What does it purport to discuss, do you know? A. Would you like me to go through it item by item and talk about them?

Q. No, I just want to identify it for the record. A. Well, it appears here that there are four major categories in curriculum and instruction, vocational-technical education; cultural and human relations education; in-service programs for personnel; and extension of pilot programs in schools.

Then they go on and list documents and talk about some of those programs in the elementary and secondary schools. I notice an item in here as being one of those items you're talking about.

Q. Dr. Gilberts, Exhibit 35 has been a report on progress and results in one of these pilot compensatory programs, is that correct? A. I'd have to read it to be sure. I'm not personally familiar with this document.

[651] Q. Take your time.

Mr. Jackson: If the Court please, I think that at this point I will interpose an objection. This is a matter that we did not discuss on direct examination. The exhibit itself talks in terms of a period of time prior to Dr. Gilberts' arrival in the city. He has indicated to counsel he is not familiar with the document and has not had an opportunity to read it, and I would object to any further questioning along this line at this time.

The Court: Do you think he should have an opportunity to read it first? We will give him that opportunity.

The Witness: Sir, there is a good deal of technical material in here in terms of the evaluation and so on which I don't believe I can read very quickly.

The Court: Okay. Well, then, we will sustain the objection for the time being. Maybe at a later time you would want to call him back. I don't think that he should be called upon to spend a lot of time—

Mr. Greiner: I think, Your Honor, we can approach it in a different way.

Q. Dr. Gilberts, you described to the Court some of the programs I believe that are contemplated or in the planning stage, the objective of which, as I understand it, was to overcome the low levels of achievement that exist in some of these predominantly minority schools, is that correct?

[652] A. Yes, in several different ways. I have talked about this general complex approach with some changes that are necessary there. I have not talked about specific plans.

Q. Well, I take it that there are so-called compensatory educational aspects that—are there not, of the Gilberts Plan. Exhibit D? A. There certainly will be as it develops. There are not as yet.

Q. Does 1533 provide for any particular compensatory educational programs, Dr. Gilberts? A. Well, in the context of the complex, I assume that there is an assumption that these kinds of plans will be developed by the Board, I'm sure, just as it has been by you.

Q. Now, as I understand 1533, these complexes—there is going to be no desegregation in the schools, is that right? A. I don't believe that you can make that assumption. The complexes have been designed in such a way as to get the best kind of composition within these complexes that we possibly could. And I assume that, within the development of these programs there will be elements that will provide for integration.

[653] Q. Well, is that going to require mandatory transportation, Dr. Gilberts? A. Until those programs are developed and designed, I don't believe I can answer that question.

Q. We just don't have the details yet, do we? A. That's right.

Q. Now, Dr. Gilberts, with regard to these compensatory educational programs, you keep referring to Dr. Dodson's definition of integration. Didn't he say that the first step is first you mix them up and then you start the integration process? A. That was his statement, yes, I believe.

Q. First, you have got to have the mixing of the bodies? A. That was his opinion, yes.

Q. Now, there is evidence, is there not, Dr. Gilberts, as far as the educational benefits that can be derived through

integration? A. Such as what benefits are you referring to?

Q. Well, I have reference to what I believe has been marked as Plaintiff's Exhibit 27, a report by the United States Commission on Civil Rights, published in 1967, "Racial Isolation in the Public Schools." A. Yes.

Q. Does this report treat the subject of [654] compensatory education programs versus integration?

Mr. Jackson: If the Court please, I am going to object to questions regarding this particular exhibit. My records do not show this exhibit as in evidence, and if it were tendered I would object to it.

The Court: He is not seeking to introduce it. He is cross-examining with respect to it, going to the credibility on the question of necessity for physical integration. I think it is proper. It may be that Dr. Gilberts will say that he is not familiar with the passage involved or that he hasn't read the report. If he does, that's the end of it.

A. I have read the report and I am generally familiar with what's in it, but I would have to look it over to talk about any specific points.

Q. Well, do you recall four programs that are described in the report, one at Syracuse, New York, one at Berkeley, California, one at Seattle, Washington, and one at Philadelphia, Pennsylvania? A. I am familiar with the Syracuse, the Berkeley—I am not absolutely certain about the Philadelphia or the Seattle one.

Q. Now, those programs generally did what, Dr. Gilberts? They had a segregated school to begin with, isn't that right? [655] A. Well, let's take them one by one.

Let's talk about Syracuse first. Syracuse began developing plans for attacking some of the problems of the core city back about six or seven years ago. Dr. Barry, with whom I am personally familiar, in Cincinnati, developed a plan of satellite complexes of elementary schools in order to begin replacing some of the older schools in the city. These complexes were on the periphery of the school system. This was a proposal.

I believe that the first one of those complexes is just now in the process of construction.

Q. I do not believe you are talking about what I have reference to, Dr. Gilberts. A. Well, refresh my memory.

Q. I am talking about the Madison area project. A. That was the transportation of black students from core area schools out to two or three—

Q. Anglo? A. —Anglo schools on the periphery of the city.

Q. What did they do? And then the segregated school from which those students came remained, did it not? They didn't close that? A. They didn't close that school, no. There were small numbers of youngsters involved, as I recall.

Q. They tested those youngsters left behind and [656] they tested the youngsters bused out into white schools, didn't they, Dr. Gilbert? A. Yes, they did.

Q. What did they find? Oh, pardon me, and the children that were left remaining in the black school, they were made the object of intensive compensatory educational programs, were they not? A. I am sorry, I just don't recall the actual details of that particular case, but if you say so I will accept that. I just don't remember.

* * * * *

Richard Koeppe—for Defendants—Direct

[658] RICHARD KOEPPE, called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

The Court: Give your name and address for the record.

The Witness: My name is Richard Koeppe. I live at 8679 East Kenyon Avenue, Denver, Colorado.

The Court: How do you spell your last name?

The Witness: K-o-e-p-p-e.

The Court: You live where?

The Witness: 8679 East Kenyon Avenue.

The Court: All right.

Direct Examination by Mr. Craig:

Q. Please state your occupation, Dr. Koeppe. A. Currently the Assistant Superintendent in Charge of the Division of Education for the Denver Public Schools.

Mr. Craig: Your Honor, we have identified as exhibits Dr. Koeppe's background information and vital statistics, which counsel for the plaintiff has seen.

Mr. Greiner: It has been submitted, Your Honor, and we have no objection to it.

The Court: All right, have it marked and it will be received.

[659] Mr. Craig: Defendants' Exhibit U.

The Court: All right.

(Defendants' Exhibit U was received in evidence.)

Q. Dr. Koeppe, have you ever been a teacher in any

public school system? A. Yes, I taught in the Milwaukee Public Schools from 1956 to 1958.

Q. At what level? A. Junior high school, grades 7, 8 and 9.

Q. At any other level? A. I served as a counsellor on a part-time basis in senior high school, grades 10 through 12, for approximately 12 years.

Q. Would you briefly describe your responsibilities as Assistant Superintendent for the Division of Education. A. I am basically responsible for maintaining and enhancing the instructional program of the Denver Public Schools and in that capacity have within the division six departments, the Department of Elementary Education, the Department of Secondary Education, the Department of Adult and Vocational Education, and Department of Instructional Services, Department of Radio and Television, and Department of Pupil Services.

Q. Dr. Koeppe, were you in the courtroom at the time [660] Dr. Gilberts testified this morning? A. Yes, I was.

Q. Did you hear him allude to certain existing educational programs within the Denver Public Schools which provided and enhanced opportunity for interracial communication and understanding? A. Yes, he alluded to a number of them.

Q. Would you please describe the programs. A. Well, one that he alluded to was the early childhood education program primarily as it relates to a dimension in Planning for Quality Education and also as it relates to Complex Area Five. In one way, this is a new program starting this fall. In another way, it is not new. The preschool program has primarily been under the Head Start, which is OEO money under the Denver Opportunity.

There also were follow-through programs, some of which are a full-day program through OESA, Title I. This fall we are going to completely fund by DPS three childhood education centers. Basically at this time we will work on either half-day or full-day involvement with four-year-olds. There shall be an attempt to involve the parents of these youngsters. We are deliberately selecting children where parents both don't work or at least one parent is available to become involved in the program. We also under this arrangement will have the teachers in the centers under [661] objective administrative supervision of the honorary schools in the area, which means they will attend faculty meetings with the other teachers, which is not true under Head Start.

The Court: Will you keep your voice up?

A. (Continued) We will have the teachers under the Early Childhood Education Centers under the administration of the schools in the area, which means they will in turn attend faculty meetings and be considered part of that faculty. It will give our teachers or kindergarten teachers an opportunity to observe the early childhood education centers in operation.

Q. Do these programs offer any opportunity for interracial communication? A. Well, at this time we are starting on a small scale because we are really going to work out our curriculum and procedures especially with the parents and so forth. We are going to be working primarily, and I would say exclusively, with minority youngsters, but our intention is, based on our experience with the programs, to expand them possibly to the point where they would be of such a nature as to attract youngsters

from the Anglo and possibly Hispano areas of town, but not for the 1969-70 school year.

Q. Do you know if the Board of Education has placed [662] any special emphasis on these programs? A. Well, it was the—as I mentioned, it was in the report, "Planning Quality Education," and I believe it is also in one of the recent resolutions passed by the Board.

The Court: The Head Start programs are filled to capacity with minority youngsters, aren't they?

The Witness: Yes, they are.

The Court: So, there are no openings for even other minorities?

The Witness: This is right. This is really an expansion of that.

Q. Dr. Koeppe, I hand you Plaintiffs' Exhibit 6, which is admitted in evidence, and direct your attention to Resolution 1533 contained therein, and ask you whether you can identify in that resolution any special emphasis on these programs. A. Yes, Item 3 of the resolution states that the Superintendent is directed to take steps to establish preliminary educational programs in the schools in the north central portion of the district in September 1969, as proposed in the said report, "Planning Quality Education."

[653] Q. Dr. Koeppe, we won't go over the same ground that Dr. Gilberts has covered, except where we might add something.

Mr. Craig: Dr. Gilberts has identified Defendants' Exhibit F, a brochure on the cultural arts program, and we would offer that in evidence at this time.

Mr. Greiner: No objection, Your Honor.

The Court: F is received.

(Whereupon, Defendants' Exhibit F was received in evidence.)

Q. Can you add anything to Dr. Gilberts' description of that program? A. I think a point of correction—the office for the cultural arts program is located at Gilpin School. The actual arts programs are located at Fairview School. We have four teachers at Fairview School and four teachers at Ebert.

Due to the additional program planning that is going on for Fairview School, we in all likelihood will have to move that center to another school for this fall. The staff is currently looking at that. So we will have the office—the office will stay at Gilpin. One of the centers will stay at Ebert and one at Fairview will have to be moved to another elementary school.

I might mention in terms of expansion, we do have hopes for expansion of this program even without additional facilities. For example, since its inception the staff [664] taught youngsters for four days a week. And the fifth day was used to work with the consultants and the artists that were brought in to do planning and so forth and the staff now feels they have been at this sufficiently long that they can actually run the program five days rather than four, and whether we can begin this September or not, we don't know, but somewhere in the near future we will be running it five days a week rather than four.

Also, we do have in the 1970 budget four additional teachers for the cultural arts program. This is based strictly on the assumption that we're going to find additional facilities somewhere in the district, but I'm hopeful that when a bond proposal is put together for submission to the Board, one of the components included therein will

be a true, full-blown cultural arts program which will be a separate facility specifically for this program and that at that time we can involve, of course, many more youngsters than we do at the present time.

Q. What youngsters are eligible to participate A. I think the superintendent mentioned this program is in the—is in operation at Grade 6.

There is another correction I would like to make. I believe the 98 percent that he referred to was—the program is optional. It's offered to parents in selected schools and approximatly 98 percent of those who have the opportunity [665] sign up for it. I think the percentage of youngsters actually involved in the program is considerably less. I think, because of our limited facilities and so on we fully only involve something like 60 or 70 percent of the current sixth-graders. But it's basically at the sixth-grade level. The groups that are brought together—he was correct—we brought together two half days a week, I think it's for a quarter, however, and not a semester. I think they rotate four different groups through the centers. And each group is composed of one-third Negro, one-third Hispano, and one-third Anglo youngsters. The media of art, drama and music is used in the presentations and also some of the artists in the community are brought in as instructors.

Q. I believe Dr. Gilberts mentioned a program of teaching about minorities. Can you expand on that a little bit? A. Well, Denver, like most urban centers a number of years ago received requests from minority populations that they be included more accurately in the teaching of the history of this country. And Denver, like most urban areas, adopted two basic strategies in trying to reply to this request: one was to develop specialized elective courses that dealt with the history of the minorities; for example, the history of the Afro-American or the Negro, for example,

in this country. This program, to my knowledge, was developed [666] during last summer and, I think, started for the first time the second semester of this year, in the summer high schools and exactly how many it will be next fall and where, I don't know.

The other basic strategy that we followed like other urban centers was to give increased prominence or give some prominence is probably more accurate, but hopefully significant appropriate prominence to the contributions in minorities within the required courses as—such as American History, Grade 8, and U.S. History at Grade 9. Of course, the development of materials has been a slow process and we're moving ahead on this, and along with this we have carried out in-service work with teachers either our own or in concert with local universities and colleges.

Q. Dr. Koeppe, are you acquainted with the Hallett Elementary School voluntary exchange program? A. Yes, somewhat.

Q. What is the purpose of that program? A. Well, the purpose of the program, I think, is somewhat indicated in the title that is used in the resolution to make Hallett a demonstration integrated school and the purpose is, of course, to integrate Hallett, and in the process integrate a number of other elementary schools in the district.

Q. Are you acquainted with the administrative goals [667] set up for the beginning of school year in September, 1969? A. Yes, in a general sort of way. My recollection of this is that when the goal was first proposed to the Board of Education for their consideration the number 500 was used and I think it was used in terms of an ultimate goal that would have to be arrived at to make Hallett an integrated school. The number, goalwise, was never included in either Resolution 1531 or 1533, and the use of the term

"administrative goal" is a correct one. The major responsibility for carrying out the integration of Hallett Elementary School resides with the office of School Community Relations, and right at the very outset it was Mr. Cruter's feeling that in terms of this fall, 300 might be a more appropriate number. And now that we have gotten into it a bit we feel that perhaps 250 or maybe 200 is more realistic for this fall, but we're working on it throughout next year and, based upon our experience this year, we hope to have the 500 in by the fall of 1970. That's my understanding of the goals.

Q. Are you advised as to the progress in obtaining volunteers for that program? A. Yes. I consulted with Mr. Cruter—members of his staff and my staff—that we know where we stand numberwise because there are implications for possible staff shifts.

Q. I hand you what's been marked as Defendants' Exhibit G for identification. [668] A. This is an interdepartmental memorandum dated July 18th from Mrs. Archuletta, who is the supervisor in the office of School Community Relations, to me, which gives me a status report of the number of volunteers into Hallett and out of Hallett as of July 18th.

Q. Would you read the total from that exhibit of the volunteers?

Mr. Greiner: Pardon me, Your Honor. I don't believe the exhibit has been offered.

Mr. Craig: We will offer it now.

Mr. Greiner: May I see it?

Mr. Craig: I think I provided you with a copy.

Mr. Greiner: I have no objection.

The Court: Exhibit G is received.

(Whereupon, Defendants' Exhibit G was received in evidence.)

The Witness: Your question again, Mr. Craig?

Q. Would you read the total to Hallett? A. 163.

Q. And the total from Hallett? A. 104.

Q. Would you consider that an encouraging report in view of your goals? A. I would to the extent that in terms of the recruiting in the Hallett area, this was just really begun, to my knowledge, [669] on Monday, I think, two weeks ago. And we—I think the intention of the office of School Community Relations is to run about a five or six-week block-to-block, door-to-door campaign, and Mrs. Lewis, who has been very instrumental in getting a number of volunteers out of the Smith Elementary School, has been employed, again, as of two weeks ago, to head up this project, and it is her estimate that we can reach the 200 to 250 mark by August sometime.

Q. Now, Dr. Koeppe, when will the persons who have applied for this program be notified whether or not their requests will be accepted? A. As I recall, the persons who were on voluntary open enrollment last fall, those who have requested a continuation, are to be notified on or about August 1st and those who are new requests will be notified on or about August 11.

Q. Are these notifications prepared by persons under your supervision? A. Yes, they are prepared by the office of Attendance of Pupil Records, which is part of the Pupil Services Department.

Q. Dr. Koeppe, I hand you what's been marked as Defendants' Exhibit H and ask you if you can identify it? A. Yes. This is a request for a continuation of Sara Wenger at Hallett, Grade 3. She was at Hallett, Grade 2, last year.

And the second attachment is an approval to [670] continue on voluntary open enrollment to improve integration, a standard form, again dated August 1st, and this is ready for mailing.

Q. It has not yet been mailed? A. No, it has not.

Mr. Craig: We offer Defendants' Exhibit H.
Mr. Greiner: No objection, Your Honor.
The Court: H is received.

(Whereupon, Defendants' Exhibit H was received in evidence.)

By Mr. Craig:

Q. Dr. Koeppe, are you also acquainted with the so-called voluntary open enrollment program other than the Hallett program? A. Yes. It's the application of that to the Hallett situation, actually.

Q. How does that plan operate? A. Well, it basically allows individuals who are interested in transferring from one school to another to do so provided certain conditions are met; one, that there is room in the school to which the youngster desires to go, and, secondly, his presence will both improve the racial balance of the sending and receiving schools, and if these conditions are met, the request is granted and transportation is provided.

Q. When did this program first go into effect? [671] A. The Board adopted this at its November meeting this year and the first time it really went operational was the second semester of 1968-1969.

Q. Do you know how many pupils took advantage of this program in the second semester of 1969? A. As I recall, approximately 850 students were transferred at the semester under this policy.

Richard Koeppe—for Defendants—Direct

Q. Dr. Koeppe, I hand you Defendants' Exhibit I and ask you if you can identify that? A. Yes. This is an interdepartmental communication from myself to Mr. McWilliams, who is director of the office of Attendance and Pupil Records, also dated July 18th, and it gives me a status report on voluntary open enrollment—really, two aspects of it: one, the number of continuing requests and the number of new requests, and the total of July 18th, and also a report on the number of spaces that appear available for this fall for this program.

Mr. Craig: We would offer Defendants' Exhibit I.

Mr. Greiner: No objection, Your Honor.

The Court: It's received.

(Whereupon, Defendants' Exhibit I was received in evidence.)

The Court: Are you going to have him testify from it?

Mr. Craig: Yes, Your Honor.

[672] The Court: What's he going to say about it?

Mr. Craig: He's going to testify as to what it says in terms of numbers of spaces open for open enrollment.

The Court: Okay. Proceed.

Q. Calling your attention to the spaces provided for open enrollment in the senior high schools, how many available spaces are there in the senior high schools? A. There are 505 available.

Q. How many are available in the junior high schools? A. 725.

Q. And, according to this exhibit, how many are available in elementary schools? A. Actually there are two parts to that report: one is dated in Mr. McWilliams' handwriting, May, 1969, which shows 1,081, and in the cover to the attachments he indicated that the available—the total spaces available at the elementary level are approximately 1,300.

Q. And does that exhibit give the total number of voluntary open enrollment applications received as of the date of the exhibit? A. Yes, it does. It indicates that, as of this date there are 836 new applications.

Q. Does it also include those continuing voluntary open enrollment? A. Yes, 541.

[673] Q. Has the administration actively solicited volunteers for this program? A. No. The only exception is the Hallett program and we have not, pending the decision in this hearing.

Q. Dr. Koeppe, I hand you—

The Court: May I see that, please?

Q. —Defendants' Exhibit J and ask you if you can identify that? A. Yes. This is a copy of a form letter which will go out to students who would have been affected by 1520, encouraging them to consider taking advantage of the voluntary open enrollment plan.

Q. Doesn't this letter also apply to those who were involved in Resolutions 1524 and 1531? A. Yes, there are actually quite a few variations of this letter because it had to be modified depending upon what school area he was going to.

[674] Q. Now, were these letters prepared by persons under your supervision? A. Yes, signed by David R.

McWilliams. Again, it was under his direction and supervision.

Mr. Craig: We offer Defendant's Exhibit I.

(Whereupon, Defendants' Exhibit I was received in evidence.)

Q. Now, Dr. Koeppe, are these letters ready to be mailed whenever you are permitted to do so? A. Yes, to my knowledge there are approximately 4,000 of these ready to be mailed.

Q. Now directing your attention to Defendants' Exhibit I again, I will hand you a copy. Can you tell us how many of those spaces in the senior high schools are open for or would improve integration if a Negro were to transfer. A. Well, the senior high schools listed, you would have to subtract the spaces at East and at Manual High School, that's 50 and 75, is 125—approximately 475 or 480 spaces would be available for Negro transfers.

Q. And the same question as to junior high schools. A. At the junior high school level I believe all 725 would be available spaces to Negro pupils.

Q. How many spaces would be available at the elementary school level? [675] A. Of the 1300, approximately 900 would be available.

Q. So, have you kept a total on the total number of spaces at all levels? A. 900 and 725, 16, 25 and—about 2,000 spaces.

Q. Then, would you have to subtract the number of spaces for which you already have voluntary open enrollment applications? A. Yes, you would only have to subtract the new voluntary open enrollment inasmuch as the continuing in most cases are already counted as staying at

that school, so you would have to subtract 836 from 2,000, and that would give you the spaces still available as of today, or as of Friday.

Q. So, assuming all these spaces were filled by voluntary transfers from Negro and other minority pupils, would this free up a similar number of spaces for transfers by Anglos— A. Well, that—not completely, because as I think has been mentioned on previous occasions, the schools from which the Negro youngsters would be coming are ones in which we are intending to either maintain a lower enrollment or actually reduce it further, so if we were to get 2,000 Negro youngsters out of these schools it wouldn't in turn open 2,000. It would be 1,000 or 1200, I don't know what [676] the number would be but it wouldn't be a one-for-one exchange.

Q. But, assuming all these spaces were filled by transferring Anglo pupils, would that free up a similar number for additional minority pupils? A. Right, you would get a snowballing effect, because you would again have spaces elsewhere. This is one reason for the late date of notifying parents of the acceptance of the request because if we made the decision in June we might have to say no. On the other hand, if we have a child coming out of that school we could say yes, so we have to wait until all the data is in and take a look at it. But, yes, we free the space and the numbers would continue to snowball.

Q. Carrying this on to a theoretical conclusion, would this process repeat itself until there would no longer be any pupils in the Denver School System eligible for transfer? A. In theory, yes.

Q. And what would you call this plane? A. Oh, racial balance, I suppose, in the schools. Integration. Racial balance.

Q. Dr. Koeppe, I call your attention to Plaintiffs' Exhibit 6, the minutes of the meeting of the Board of Education of June 9, 1969, and ask you to read the part [677] starting with "B" on page 10. A. On voluntary open enrollment, it says, "It was moved by Mr. Southworth that in addition to the existing voluntary open enrollment policies with transportation provided that—" Is that the place?

Q. Yes. A. "which includes all schools in the district, superintendent and staff be directed to develop and initiate concentrated and effective plans and programs designed to achieve the voluntary exchange of pupils now residing in the Smiley Junior High School and East High School attendance areas with pupils now residing in the attendance areas of South, Thomas Jefferson, and George Washington High Schools, provided that such exchanges in school assignment result in improved understanding and integration both in the sending school and in the receiving school, that such plans and programs be made effective as soon as feasible and by the opening of school in September of 1969, if possible, and if not by the commencement of the second semester of 1969-70 school year, and all such exchange programs shall be with transportation provided by the District."

The motion was—then it has a roll call.

Q. Passed? A. Was seconded by Mr. Perrill and then there was a roll call.

[678] Q. Do you know the purpose of this motion? A. The purpose, of course, I think is also stated in the motion itself, and I think it is an attempt to do voluntarily what 1520 and 24 had done, to stabilize the schools at East and at Smiley and to bring about integration and understanding.

Q. Now, Dr. Koeppe, have you received any information as to the implementation of this motion? A. Yes, one communication from the superintendent.

Q. I hand you what has been marked as Defendants' Exhibit K and ask you if you can identify it. A. All right, this is the memorandum from the superintendent to a number of persons in the central office and it is dated June 12, and the subject is staff meetings on Tuesday, June 10, regarding modification of plans as a result of Board of Education meeting on June 9, and it deals with a number of things.

Mr. Craig: We offer Defendants' Exhibit K.
Mr. Greiner: No objection, Your Honor.
The Court: Exhibit K is received.

(Whereupon, Exhibit K was received in evidence.)

Q. Dr. Koeppe, would you read paragraph 4 on page 2 of that exhibit? A. "Regarding the resolution which calls upon us to [679] devise special intensive programs for the voluntary transfer of pupils in the East and Smiley areas together with South, George Washington and Thomas Jefferson junior and senior high school areas, we will spend the summer in laying out a plan which will involve such organizations as the student council and P-T.A. that have volunteered to help. Our objective will be to have this plan completely laid out so that in the fall of this year we can involve the principals, teachers and other people in this program during the first semester with our target being the implementation of it the second semester. This in no way implies that we will not encourage or consider voluntary enrollment by pupils in these schools un-

der the existing open enrollment with transportation provided policy. It is felt to be quite important that this program be well designed and well planned so that we are successful in its implementation. It was thought that too great a risk would be run in trying to implement this program in the first semester, that failure in our efforts here might have serious effects on our future ability to promote these programs. It was indicated we ought to have this program sufficiently completed by November 1st so that we know how many people will be participating."

Q. Dr. Koeppe, are you now working on the implementation of the planning directed in that communication? A. We haven't specifically started on this, but we [680] intend to early next month. Mr. Liddell Thomas, who is currently principal at South High School, as of August 1st will become the Assistant Executive Director of Secondary Education, and he has already been notified that one of his first priorities upon assuming this position will be to follow up on this directive from the superintendent.

We have also alerted other staff members such as Mr. Room, who work with our student councils and others, that we will be doing this during the month of August, so that we are ready to put it in operation during September and October to do our intensive recruiting.

Q. Dr. Koeppe, do you have any opinion as to the possibility of success of such a plan? A. Well it is really very difficult to say. Out of the 850 that volunteered for the second semester this past year, I think something like 250 or 300 were at the secondary level. I don't think we got really very much requests at the junior and senior high school level for this fall simply because 1520 has sort of precluded that. These schools were not eligible then for voluntary open enrollment. We have some indication

that among the student bodies some of the most concerned and interested in bringing about integration are the senior high school students and they all seem to have a bit more influence over their parents than certainly elementary children. I think with a [681] properly executed program with involvement of the students themselves it could be successful, but I just really don't know. We have to wait and see.

Q. Dr. Koeppe, Dr. Gilberts has already mentioned the Balarat proposal, the Balarat Outdoor Education Center, and I hand you what has been marked as Plaintiffs' Exhibit L and ask you if you can identify it. A. Yes, this is a—as stated, "a Proposal to the Board of Education, the Balarat Site, Development of an Outdoor Education Center for the Denver Public Schools," and prepared in this form for September 1968.

Mr. Craig: We will offer Exhibit L.

Mr. Greiner: May I ask just one or two questions?

The Court: That's Exhibit M?

Mr. Greiner: This is L, Your Honor.

Voir Dire Examination by Mr. Greiner:

Q. Dr. Koeppe, the Balarat Site, when is that to be put in effect? A. Of course, in stages. We actually have a group of 30 youngsters on site there this summer, living in tents, preparing trails, preparing campsites and so forth. We have budgeted for 125 day trips to this site and back during 1969-70 and we are in the process now of working with the [682] Division of Planning and Engineering to decide exactly where permanent facilities will be constructed as Balarat, but I assume it will be several years

before it becomes fully operational, but we are really just beginning the planning stage.

Mr. Greiner: Well, Your Honor, I object on the basis of relevancy. I don't see how the presence of what is being described in Defendants' Exhibit L is going to have any effect on the fact of the rescission of these resolutions and the immediate impact in September of '69, so we would object.

The Court: May I see it, please?

Mr. Craig: Your Honor, the purpose of offering this exhibit is the same as the other programs that we have mentioned, that one of the purposes of this program is to offer opportunities for interracial communication, and I just wanted to bring that point out.

The Court: The exhibit will be received.

(Defendants' Exhibit L was received in evidence.)

The Court: Do you wish to see it? Do you need it?

Mr. Craig: No, Your Honor. I believe Dr. Koeppe has a copy.

[683] *Direct Examination by Mr. Craig* (Continued):

Q. Dr. Koeppe, directing your attention to page 4, would you just list by heading the various purposes of this outdoor educational center? A. Educational, scientific, cultural and socio-economic, recreational.

Q. Then, would you come back to page 5 and read paragraph 1 under "Cultural and Socioeconomic." A. "To provide a site in which pupils from throughout the metropoli-

tan area can congregate away from the atmosphere in which prejudice breeds, one in which children of all races and economic backgrounds can meet in an atmosphere conducive to the development of understanding and respect for each other."

Q. Has this program been given any top priority in terms of implementation? A. Yes, it is definitely a very high priority item, but as I said, our basic characterization of what we are going to be doing at Balarat during 1969-70 is planning, with some programs going operational. I mentioned the group up there this summer, plus the 125 trips being planned during the year, and that's what we will be doing during '69-'70.

Mr. Craig: I have no further questions of [684] Dr. Koeppe at this time.

* * * * *

[685] * * *

Cross-Examination by Mr. Barnes:

Q. Dr. Koeppe, I believe you testified to the early childhood education centers which are maintained an operated by the Denver Public Schools. A. That will be.

Q. That will be? A. Right.

Q. Have any of these programs gone into effect as of this time? A. Not those that are fully funded by DPS, no.

Q. How many children do you expect will be involved when they do go into effect? A. I would guess in the neighborhood of 75 to a hundred.

Q. When do you first expect those programs to go into effect? A. September of this year.

Q. And as of this date you have no results from any such program undertaken in the past? A. Not that I'm aware of.

Q. Turning your attention to the cultural arts [686] program which you described, do you recall from what recommendation that proposal arose? A. I believe a program similar to what finally became the cultural arts was suggested in an advisory committee report to the Board.

Q. That would be the report of the advisory council on the equality of equal educational opportunities in Denver Public Schools? A. I believe so.

Q. Plaintiffs' Exhibit 21? A. (Nods affirmatively.)

Q. Directing your attention to page 53, to the last paragraph, does it state there what the objectives of the cultural arts program are? A. Yes, it does.

Q. And the concept of that committee.

Would you read the first sentence. A. It says, "The objective would be to develop in each child the fullest potential for creativity and appreciation while striving to stimulate general enthusiasm for education in those who are not now being fully motivated or receptive to the present standard curriculum being offered by the Denver Public Schools. Moreover, it was hoped there would be enhancement of broader understanding, a greater degree of cultural integration, and participation in meaningful activities involving intergroup [687] relationships among pupils. . ."

Do you want me to go on?

Q. No, you can stop there.

The Court: What's he referring to? Exhibit 21?

Mr. Barnes: Yes, this was Exhibit 21.

Q. The cultural arts program which you describe is at least in part in response to the recommendation that is contained in this Exhibit 21? A. Apparently.

Q. What are the offerings of the cultural arts program? A. As I understand it, they present instructions through four basic media: the art, drama, music and dance. These are either presented at the centers at Fairview and Ebert or youngsters are taken to various places in the community to take part in these programs.

Q. I show you Defendants' Exhibit F and ask you to look at the paragraph there which is entitled, "What do we do?"

Do you see that paragraph? A. Yes, I do.

Q. Does that list among other things that the contents of the cultural arts program will be to watch a play? [688] A. Yes.

Q. Dance with Russian scarves? A. Right.

Q. Joust with poles? A. (Nods affirmatively)

Q. Now, is that program—do you think that's going to be effective in establishing motivation with regard to the standard curriculum pursuant to the advisory council recommendation? A. It might actually be too early to determine that. I don't think the cultural arts program—It went into effect in 1967 and one of our problems with the program due to limited facilities has been relating the experience in the cultural arts center to the regular curriculum. One of the real problems has been that the regular teachers have not been really aware of what the cultural arts program has done and they really haven't been able to participate in it.

Our intention is, once we get a cultural arts center, the regular classroom teacher will actually attend the center with the youngsters and observe what they are doing so

that there can be a greater relationship between the two. This is one problem we have right now.

[689] Q. Is there any serious thought that the courses and the offerings that are described there will result in higher achievement test scores in the predominantly black schools? A. I think the word that was used in the advisory council spoke of motivation and I think went beyond motivation to assume that this in turn might then bring about better achievement, yes.

Q. Turning your attention to the Hallett Elementary School project which you described, as I understand it their project was to be entirely voluntary, is that correct? A. Yes, it is.

Q. And as originally initiated it was to include a total of a thousand students, 500 in and 500 out? A. Right.

Q. You testified that estimate is now down to a hoped-for 100 or 200. A. Well, you would have to double that, too.

Q. Right, 400. A. Right, possibly 500.

Q. Is there any relationship between the drop in your expectation of the participation in this program and the effect of the rescission of the integration resolutions? [690] A. First of all, let me state that I never made the expectation of 500. That number was put into the proposal when it went to the Board of Education. To my knowledge that was put in there by the division of planning and engineering as an estimate of what it would take to racially balance the school. Our division was not consulted as to that number nor was the office of school and community relations, and I think for that reason no number was put in either resolution. And I think the first expectation that either that office or our division had of what

we could accomplish by this fall, we would not have said 500 ourselves.

Q. But that was a recommendation of the superintendent at that time? A. Yes, it was, and the second part of your question? I am sorry, I have forgotten.

Q. The second part was whether you saw any relationship between the drop in your estimate of the participation in that program and the effect of the rescission of the resolutions. A. I don't think so. I think Mr. Cruter and members of our staff would have felt if we could have accomplished 250 to 300 given the time we have and the time of the year, the fact that the school was not going to be in session during July and August, I still think we would have set [691] that goal.

Q. As I understand it, all white parents who participate, who volunteer, are notified their children will be sent to Hallett. A. No, no one has been notified, no, because in order to make this plan operational it is contingent on getting a like number out of Hallett to vacate the seats.

Q. The school to which the children will be sent is identified? A. Yes.

Q. Is the same identification given to the black parent who is going to send his child out for the other part of the Hallett program? A. Not to the same extent. We are, as I recall, trying to recruit through approximately 30 elementary schools in southwest, south central and southeast Denver, and in turn we are trying to vacate significant numbers of spaces in approximately 8 of these schools, so we are trying to pick what Mr. Cruter has called focal schools so that we can tell the parents at Hallett that it is very likely that they could have the option of going into one of these eight schools rather than have them consider 30.

Q. But at the present time they are being told it may be one of somewhere between eight and thirty schools? A. I think our strategy is to talk at this time [692] about the eight and not thirty, and we are quite hopeful to concentrate on the eight because we know this is what is of concern to the Negro parent sending out his child.

Q. It affects the way it works? A. Yes.

Q. Part of the program depends upon the ability of parents to conceive the school their child will be going to attend? A. That is correct.

Q. One of the difficulties at the present time is that the black parent cannot actually see the school his child might attend? A. That is correct.

Q. Have you received requests from white parents that a single white school, predominantly Anglo school, be identified as a target school to which Hallett children could go? A. Yes, I can't recall whether we have gotten it from Anglo or Negro, but I know we have gotten them.

Q. One of these suggestions was, was it not, that white children presently being transported to University Park be diverted to other southeast Denver schools, that University Park be made a target school for Hallett children? A. You say that was suggested?

[693] Q. Yes. A. Yes, I believe it was.

Q. According to Plaintiffs' Exhibit 89, which I believe is in evidence, there are 482 spaces in Montclair Annex, Pitts, Cory, Ellis, Denison, Traylor, Asbury, Slavens, Carson and Goldrick, is that correct? A. I am not familiar with the document.

(Counsel handed document to witness.)

Of course, now, this is data as of 1968, and the data I reported on this morning was data as of the present.

Q. Is there some way in which that data should be modified? A. Which data?

Q. This data. A. Well, I think the memorandum that I got from Mr. McWilliams indeed supersedes this one. That's the data which we have to work with now.

Q. How many spaces do your data say you have got in southeast Denver schools? A. The memorandum that I have from Mr. McWilliams gave only totals, and it I think listed the schools but did not break down spaces by schools.

Q. That would be Defendants' Exhibit I? A. Yes.

[694] Q. Taking that exhibit, then, Mr. Koeppe, that exhibit states, does it not, the figures for spaces available under voluntary open enrollment? A. Right.

Q. In various high school areas? A. Right.

Q. Does that exhibit show that there are 34 elementary spaces in George Washington High School area? A. No, it doesn't. It really has two parts to it. Are you referring to this 35?

Q. Yes. A. Of course, the totals for this particular document total to the 1,081, and Mr. McWilliams indicates that in redoing this we have actually got 1,300 and he doesn't—and these are the schools in which the 1,300 exist, but he doesn't have any numbers attached to them, so I don't know for a fact how many exist.

Q. But there is a breakdown by schools, is there not? A. As of May, and I assume there is now, but it is not itemized here.

Q. As of May, how many spaces were there available in George Washington High School area? A. 34.

Q. How many were there in the South High School [695] area? A. 73.

Q. And how many in the Thomas Jefferson School area? A. 103.

Q. By quick arithmetic I get about 210 total for those spaces. Does that seem about right? A. Right.

Q. So that by the School District's own figures, there were at least 210 spaces available in southeast Denver schools in the elementary schools, were there not? A. In early May, yes.

Q. Right. Now, according to Defendants' Exhibit R, there were or there are 501 students being bused into University Park, is that correct? A. Yes.

Q. And 210 of those students could have been reassigned to spaces which you show are available under voluntary open enrollment, could they not? A. That's possible.

Q. So the parents have suggested to you that these spaces be made in a single target school made a fairly reasonable suggestion, did they not? A. Well, a couple of things have to be taken into account. One is the fact that spaces, the data that Mr. [696] McWilliams had, is broken down by grade and the totals on Exhibit R are exactly that, so that we might have youngsters who would come through University Park in theory to the South High area, yet, for example, if there are many that are third graders we have only four spaces for third graders and seven spaces for sixth graders, so it would have to be broken up in detail.

Another problem is simply the matter of transportation out, transportation out of the geographic areas. We might do this in one or two buses going from a given school to a given area, but if we transport from a given area to a larger number of schools it compounds the setting up of the transportation; but the total number of spaces you alluded to is accurate, but by grade level it may not be.

Q. Do I understand correctly that prior to January 1968 children were transported all the way from south-

west Denver in the Traylor School all the way across to University Park? A. Yes, I understand you.

Q. So that the distance involved in transportation would be hard to extend would it not? A. Right.

[697] Q. And we're talking about spaces available now in Southeast Denver to which children from the Southeast Denver annexed areas might be diverted, are we not? A. (Nods affirmatively.)

Q. So the transportation is not really the crux of that redistribution problem, is it? A. I really am not competent to comment on that. That's in Mr. Olander's area and I don't know what complication this would have caused.

Q. Based on your reflections just now on the requests of these parents to have these children rediverted and create this target school at University Park where Hallett parents could send their children, do you have any more detailed explanation of why those parents were turned down? A. No, I don't.

Q. As I understand it, the Hallett Elementary School is the only school area—the only area where the intensive recruiting is being done for participation in the voluntary program? A. That's correct.

Q. It's not being done in any other elementary school? A. Oh, it's being done in elementary schools of South, Central and Southeastern. You're talking about predominantly black elementary?

Q. Yes, but those are children who are being recruited [698] to go to Hallett? A. Right.

Q. It's not being done with regard to any other target school like Hallett? A. That's correct.

Q. Is it being done in any junior high school? A. Not at this time.

Q. Any senior high school? A. Not at this time.

Q. So that intensive recruiting effort which was described earlier is an effort confined to a single elementary school, is that correct? A. That's correct.

Q. Turning your attention to voluntary open enrollment programs in general, Dr. Koeppe, I believe that the Defendants' Exhibit I shows that there were 1,081 spaces in the senior high school areas when that exhibit was prepared? A. That 1,081 is the elementary spaces.

Q. Elementary spaces. You're right.

And, as I understand it, that cover letter now says that there are something like 1,300 such spaces? A. That's correct.

Q. How many children, Dr. Koeppe, are located in the mobile units at Smith Stedman and Phillips? Do you recall how many mobile units there are? [699] A. No.

Q. Would 22 sound about right? A. Recalling from yesterday's testimony, yes, I guess it would.

Q. There would be about 30 children in each mobil unit? A. Probably not that high. Probably more like 25.

Q. Or something less than 660 children in those mobile units, then, is that correct? A. That's close, I'm sure.

Q. And you have got something like 1,300 voluntary open enrollment spaces by your own figures in Southeast Denver? A. Some of these, of course, have been requested—we have requests at this time for 397 of those under the new voluntary open enrollment.

Q. Why don't you transfer the children who are in the mobile units and confined in this area of town to those spaces, Dr. Koeppe? A. To do this would—I really don't know. I hadn't thought of that strategy, first of all, and it would preclude, of course, any use of voluntary open enrollment. It would literally take the space. It could knock out Hallett's plan.

Q. Do you regard the mobile units in Northeast Denver as permanent? A. I personally don't, no.

Q. You have been made aware, have you not, by parents [700] in that area of their desire to have the mobile units closed? A. Some parents, yes.

Q. And it is the policy, is it not, of the Board to transport children for the purposes of relieving overcrowding? That's stated in 1533, is it not? A. Right, it is.

Q. Now, turning to the effects of voluntary open enrollment on the problems in Northeast Denver, one of the problems to which the integration resolutions addressed themselves is the problem of stabilization of schools in that area, isn't that correct? A. That's correct.

Q. Isn't it true that the voluntary open enrollment program has a random effect? A. In that it is voluntary.

Q. Right. A. Yes.

Q. In that each of the parents makes his own decision about to which school his child will be sent? A. That's true to an extent. It depends upon the recruiting procedure that is used. For example, if we intensively recruit door-to-door we might limit that to a given geographical area of a subdistrict which is in terms to our advantage in picking up children for busing.

Q. Now, on the policy it is stated children can be [701] moved to any school where it will improve the racial balance, isn't that correct? A. That's correct.

Q. So a parent may decide to go to Traylor, as well as Phillips, might he not? A. That's right.

Q. So as a result of the random choices of all the parents involved, there may be no concentrated effect in Northeast Denver, isn't that correct? A. That could happen.

Q. What does that do to your expectation to Northeast Denver to be stabilized? A. I don't see—

Q. Well, under the resolutions there was an attempt to stabilize the concentration in the Northeast Denver area. Will this have any predictable effect on that? A. You're talking about getting youngsters out of Northeast Denver; not getting youngsters into Northeast Denver.

Q. That effect is random, too, is it not? A. Right, but both have to occur for stabilization to take place.

Q. Right. Now, as I understand it, the voluntary open enrollment program has been made known to students through letters to the parents issued by principals, is that right? A. That was true at the beginning of the second [702] of that last year, yes.

Q. And program counselors have told the students about it? A. It's possible. I don't know that they have been.

Q. Have you not made any effort to counsel the students on the advantages or disadvantages of voluntary open enrollment? A. We haven't at the secondary level as I mentioned in my testimony this morning because of the existence of 1520. I also testified this morning that we have every intention of doing that exact thing during September and October in the secondary schools of Northeast Denver and teachers and so forth.

Q. Voluntary open enrollment was in effect, wasn't it, in the spring of this year? A. It was.

Q. And it was enacted last November? A. That's right.

Q. So there was plenty of opportunity to tell the counselors that the program was in effect and that children could take advantage of it. A. Right, but 1520 was passed in January, which made that effort unnecessary.

Q. As to those schools? A. That's right.

[703] Q. Did it make it unnecessary as to the rest of the school district, Dr. Koeppe? A. No.

Q. Well, has any thought been given to the problem of gearing up voluntary open enrollment programs each year? A. Well, I think there is—in essence, we're going to have to take a step at a time in our efforts and our efforts at this time are geared for doing what we can at Hallett this fall and doing what we can at the secondary schools for the second semester of 1969-70 and learning from these experiences.

Q. Would you not have to do the same each year—the same thing each year in order to get full participation? A. It's possible but, of course, it's our hope that as we get persons involved in these types of programs, if they prove to be beneficial and successful, that these persons will indeed join with us and help us sell the program rather than relying solely on ourselves. And we have gotten considerable assistance from the few that have volunteered up to this point. So it's a matter of selling in many ways.

I can recall a group of students from East, for example, putting on an assembly program, to another high school to encourage youngsters to come to East and this sort of thing. So when you talk about recruiting and selling, this has to be done in many, many ways and I think perhaps [704] Mr. Cruter outlined for you on Thursday, I think it was when he testified, that to use radio, television, and newspapers, and the youngsters and P-TA, and whatnot, and we simply haven't had time and we haven't had the right time of year to involve that number of people.

Q. Well, you did have all spring. A. For what?

Q. To recruit people for voluntary open enrollment. A. Right.

Q. What's the purpose, Dr. Koeppe, of voluntary open enrollment? A. I think it's indicated in the policy itself; to bring about integration in Denver Public Schools and better understanding between the races.

Q. Is there any educational purpose? A. I think this would be one of the objects of education, also. I don't see that these things are incompatible.

Q. Not necessarily incompatible, but they are consistent with the purposes of the school district, are they not? A. Yes, they are.

Q. Does not voluntary open enrollment transfer from the school district to the parents this educational decision? A. Perhaps that particular aspect of it does, but there are other programs that can supplement voluntary open [705] enrollment, such as the cultural arts and Balarat and secondary center.

Q. Is there any educational advantage to integration, that decision must be made entirely by the parents, is that correct? A. Under voluntary open enrollment, yes.

Q. So that you have abdicated any authority on that possibility? A. I have?

Q. The school district. A. It could be interpreted that way, I guess.

Q. Now, would it be fair to say that one of the problems in predominantly black schools is the problem of educational motive? A. Yes.

Q. Do those who lack motive to achieve in school have the motive to participate in voluntary open enrollment? A. I don't know. I would tend to think not.

Q. There's sort of a logical inconsistency there, isn't there, Dr. Koeppe? A. I didn't understand.

Q. Asking those who suffer from the problem to recognize it and perceive how to solve it. A. This could be.

Mr. Barnes: No further questions.

Preliminary Injunction

(Filed July 29, 1969)

This matter having come on for hearing on the motion of plaintiffs for a preliminary injunction, and the Court having heard the testimony of the witnesses, having reviewed and considered the exhibits in evidence herein, and having heard the statements of counsel:

The Court finds that:

1. The Court has jurisdiction over the subject matter of this action under 28 U.S.C. Sections 1343(3) and 1343(4). This is a civil action authorized by law and arising under Title 42 U.S.C. Section 1983 and the Fourteenth Amendment of the Constitution of the United States;

2. The Court has jurisdiction over the parties herein;

3. Plaintiffs and the classes which they represent have no adequate remedy at law;

4. Unless this preliminary injunction issues, plaintiffs and the classes which they represent will suffer irreparable injury;

5. Plaintiffs and their classes have demonstrated a reasonable probability that they will ultimately prevail upon the merits on a full trial herein.

Based on the Court's oral findings and conclusions of July 23, 1969, it is

ORDERED, ADJUDGED AND DECREED that the motion for a temporary injunction should be and the same is hereby granted. The defendants, their agents and servants are

enjoined and restrained, during the pendency of this action, from any conduct which would modify the status quo as it existed prior to June 9, 1969, in respect to acquisition of equipment, destruction or relocating of documents, writings and memoranda, and from any action which would seek to implement Resolution 1533 insofar as the said Resolution would rescind integration policies which existed on June 9, 1969, and prior thereto, and insofar as it would adopt policies which would have the effect of restoring the segregation which existed prior to the enactment of Resolutions 1520, 1524 and 1531.

This temporary injunction shall continue during the pendency of this suit and until the action is tried on its merits.

Defendants are granted ten days from and after July 23, 1969, for the purposes of seeking an appeal or review of this ruling.

DATED at Denver, Colorado, this 29th day of July, A.D. 1969.

BY THE COURT:

/s/ WILLIAM E. DOYLE
WILLIAM E. DOYLE, Judge
United States District Court

Memorandum Opinion and Order of District Court

(Dated July 31, 1969)

Reprinted in Appendix to Petition for Certiorari, pp. 1a-19a

See 303 F. Supp. 279

Opinion of Court of Appeals

(August 5, 1969)

JULY TERM, AUGUST 5TH, 1969

Before the Honorable Alfred P. Murrah, Chief Judge and Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges

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SCHOOL DISTRICT NUMBER ONE, DENVER, COLORADO, *et al.*,

Appellants,

404-69

vs.

WILFRED KEYES, *et al.*,

Appellees.

Appeal from the United States District Court for the District of Colorado.

This case is before the court on the motion of the appellants for a stay of a preliminary injunction. That injunction after ordering the Board of Education to refrain from conduct "in respect to acquisition of equipment, destruction or relocating of documents, writings and memoranda" prohibits any action

> "which would seek to implement Resolution 1533 insofar as the said Resolution would rescind integration policies which existed on June 9, 1969, and prior thereto, and insofar as it would adopt policies which would have the effect of restoring the segregation which

existed prior to the enactment of Resolutions 1520, 1524 and 1531."

We doubt that the order is sufficient to satisfy the requirements of Rule 65(c), F.R. Civ. P., that every injunctive order "shall be specific in terms." The reference to "policies" would seem to require definition.

We interpret the intent of the order to be that the Board of Education must comply with, and operate under, the policies expressed in Resolutions 1520, 1524 and 1531. This interpretation conforms to that of the counsel who have briefed and argued the matter. If this interpretation is correct, we are presented with a problem that was neither presented to nor considered by the district court. If the interpretation is not correct, the injunctive order lacks the required specificity.

The problem is that Resolutions 1520, 1524 and 1531, as we understand them and as counsel present them, seeks to achieve racial balance by requiring the transportation of pupils or students from one school to another. Title IV, §407(a), 42 U.S.C. §2000c(6)(a), of the 1964 Civil Rights Act, contains the following proviso:

> "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

The quoted language is on its face a limitation on the power of a federal court to achieve racial balance by trans-

portation of children from one school to another. Nothing to which our attention has been called in the record shows that this statute was either called to the attention of, or considered by, the trial court.

The question of the applicability and effect of the statute should be considered, in the first instance, by the trial court. We express no opinion in regard thereto. We decline to consider and determine a question of such importance on this application for a stay and on the basis of the record presented to us.

The procedural aspects of the case concern us. We credit all parties with a good faith desire to reach a wise solution of the problem posed by the desirability of achieving the requisite racial balance in the schools. A simple grant of the stay would prolong the litigation because then we would have to consider the appeal on its merits. The remand of the case at this time will enable the trial court to consider and act on the problem which is presented by the record before us.

Accordingly, the order granting the preliminary injunction is vacated and held for naught. The case is remanded to the district court for further proceedings.

WILLIAM L. WHITTAKER, Clerk

By: /s/ ANNE M. CAHST
Deputy Clerk

Supplemental Findings, Conclusions and Temporary Injunction by District Court

(August 14, 1969)

Reprinted in Appendix to Petition for Certiorari, pp. 20a-43a

See 303 F. Supp. 289

Opinion of Court of Appeals

(August 27, 1969)

Before Honorable Alfred P. Murrah, Chief Judge and Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges

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SCHOOL DISTRICT NUMBER ONE, DENVER, COLORADO, *et al.*,

Appellants,

No. 432-69

v.

WILFRED KEYES, *et al.*,

Appellees.

This matter is before the court on the motion of the defendants-appellants for a stay of the preliminary injunction issued by the district court on August 14, 1969. The injunction changes the attendance areas of various Denver schools to alleviate the racial segregation which the district court found to exist. It will require, indirectly if not directly, the transportation of students over greatly varying distances to and from contiguous and non-contiguous attendance districts.

The district court conducted an extensive hearing and entered carefully prepared findings of fact and conclusions of law. Although the findings of fact are contested by the appellants, we accept them for the purpose of our consideration of the case at this time. They represent a painstaking analysis of the evidence presented. They establish a racial imbalance in certain named schools. From the facts found, the district court either made a conclusion or drew

an inference, that the jure segregation exists in named schools. Its grant of the temporary injunction is grounded on the premise that there is de jure segregation. In the time permitted, we are unable to make an examination of the record and the law to determine whether the inference is reasonable or the conclusion legally justifiable.

The case presents the questions of (1) whether the neighborhood school concept shall yield to compulsory integration which will be achieved by the transportation of students to and from contiguous and non-contiguous attendance districts, and (2) whether such transportation may be ordered by a federal court in the light of the provisions of § 407(6)(a) of the Civil Rights Act of 1964, 11 U.S.C. § 2000c-6(a). The same questions are presented in Nos. 433-69, 434-69, and 435-69. An opinion in those cases is filed concurrently with this opinion.

The questions are important and difficult of resolution. This was recognized by the trial court. Its decision may be correct. We are in doubt. The parties impress upon us the need for prompt action. The Denver schools are scheduled to open on September 2. In the time permitted, we are unable to come to a conclusion whether the plaintiffs-appellees will prevail on the merits or are likely to prevail on the merits.

We are oath to disturb a preliminary action taken by an experienced trial judge. We must decide whether the public interest is best served by the maintenance of the status quo or by the acceptance of the injunctive order.

We note that the hearing did not encompass all of the issues tendered by the complaint; that the defendants-appellants have not answered but have a motion to dismiss pending; and that the trial court specifically reserved certain matters "pending consideration of this action at the

trial on the merits." We are impressed with the idea that the important and difficult questions presented should not be determined on an application for a preliminary injunction or in a manner which affects some but not all of the Denver schools. We question the piece-meal consideration of a city-wide problem. See the opinion filed today in Dowell v. Board of Education.

The United States Supreme Court has forbidden racial segregation in the schools and has demanded that desegregation be accomplished with all convenient speed. This mandate must be followed. In a metropolitan area like Denver, the attainment of the objective is closely allied to sociological and economic problems which do not lend themselves to judicial solution. Any plan of desegregation or integregation which is devised either by a court or by an administrative agency must depend for its success on the understanding cooperation of the people of the area. Such understanding and cooperation is perhaps more likely to result from actions taken after a full trial on the merits than on action which of necessity is hurried because taken on an application for a preliminary injunction.

On balance we believe that the public interest is best served by a maintenance of the conditions existing before the action was brought until the trial of the case on the merits and the entry by the district court of such final judgment as it deems appropriate. In recognition of the seriousness of the problem and the desirability of prompt action, we assure the parties that an appeal from a final judgment herein will be expedited and will be heard by the full court. See also Dowell v. Board of Education, supra.

The maintenance of the status quo requires the continuation of that portion of the preliminary injunction

which restrains the defendants-appellants from actions with respect to "acquisition of equipment, destruction or relocation of documents, writings and memoranda" related to the School Board Resolutions mentioned therein. Otherwise, the preliminary injunction issued by the United States District Court in its cause No. C-1499 entitled Wilfred Keyes, et al., v. School District Number One, Denver, Colorado, et al., is stayed and shall be of no force and effect until the further order of this court.

A true copy

Teste

William L. Whittaker
Clerk, U. S. Court of Appeals,
Tenth Circuit

By: /s/ ..... ! ! .....
Deputy Clerk

Dated: August 27, 1969

Order

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1969

WILFRED KEYES, *et al.*,

Applicants,

vs.

SCHOOL DISTRICT NUMBER ONE,
DENVER, COLORADO, *et al.*

UPON CONSIDERATION of a motion submitted by the applicants to vacate an order of the United States Court of Appeals for the Tenth Circuit issued in this case on August 29, and to reinstate the order of the United States District Court for the District of Colorado issued on August 14,

IT IS HEREBY ORDERED that the motion is granted, the order of the Court of Appeals is vacated and the order of the United States District Court is reinstated.

/s/ WILLIAM J. BRENNAN
Acting Circuit Justice

Dated this 29th day of August, 1969.

Opinion by Brennan, J. on Application for Vacation of Stay

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

WILFRED KEYES, *et al.*,

Applicants,

v.

SCHOOL DISTRICT NUMBER ONE,
DENVER, COLORADO, *et al.*

[August 29, 1969]

MR. JUSTICE BRENNAN, Acting Circuit Justice.

In this school desegregation case I am asked to vacate a stay by the Court of Appeals for the Tenth Circuit of a preliminary injunction entered by the District Court for the District of Colorado. The preliminary injunction has the effect of requiring partial implementation of a school desegregation plan prepared by School District No. 1, Denver, Colorado and then rescinded by that Board after changes in membership followed a school board election.

The Court of Appeals issued the stay pending decision of an appeal taken by the School Board from the preliminary injunction. I have concluded that the stay was improvidently granted and must be vacated. An order of a District Court granting or denying a preliminary injunction should not be disturbed by a reviewing court unless it appears that the grant of the injunction was an abuse of discretion. *Alabama* v. *United States*, 279 U. S.

229 (1929). Where a preliminary injunction has issued to vindicate constitutional rights, the presumption in favor of the District Court's action applies with particular force. The Court of Appeals did not suggest that the District Court abused its discretion. On the contrary, the Court of Appeals expressly stated that the District Court's finding of fact "represent a painstaking analysis of the evidence presented. They establish a racial imbalance in certain named schools. From the facts found, the District Court either made a conclusion or drew an inference, that de jure segregation exists in named schools. Its grant of the temporary injunction is grounded on the premise that there is de jure segregation."

The Court of Appeals nevertheless stated that it "must decide whether the public interest is best served by the maintenance of the status quo or by the acceptance of the injunctive order," since the time before the Denver schools open on September 2 was insufficient to permit an examination of the record to determine whether the District Court correctly held that this was a case of *de jure* segregation. It may be that this inquiry was appropriate notwithstanding the presumption in favor of continuing the preliminary injunction in force. But the reasons given by the Court of Appeals for striking the balance in favor of the stay clearly supplied no support in law for its action. It was not correct to justify the stay on the ground that constitutional principles demanded only "that desegregation be accomplished with all convenient speed." "The time for mere 'deliberate speed' has run out. . . ." *Griffin* v. *County School Board*, 377 U. S. 218, 234 (1964). "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green* v. *County School Board*, 391 U. S.

430, 439 (1968). The obligations of the District Court was to assess the effectiveness of the School Board's plans in light of that standard. *Id.*, at 439. Since the Court of Appeals not only was unable to say that the District Court's assessment was an abuse of discretion, but agreed that it "may be correct," the stay of the preliminary injunction was improvident.

The Court of Appeals also seems to have based its action on the premise that public support for the plan might be developed if any order awaited final hearing; the Court of Appeals stated that a plan of desegregation "must depend for its success on the understanding cooperation of the people of the area." But the desirability of developing public support for a plan designed to redress *de jure* segregation cannot be justification for delay in the implementation of the plan. *Cooper* v. *Aaron*, 358 U. S. 1 (1958).

I therefore grant the application, vacate the Order of the Court of Appeals, and direct the reinstatement of the Order of the District Court.

Opinion of Court of Appeals

(September 15, 1969)

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges

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SCHOOL DISTRICT NUMBER ONE, DENVER, COLORADO, *et al.*,

Appellants,

No. 432-69

v.

WILFRED KEYES, *et al.*,

Appellees.

This matter is before the court on the motion of the defendants-appellants that the court amend its August 27, 1969, order by specifically holding that the district court abused its discretion in the grant of its August 14, 1969, preliminary injunction.

The record before us at the time of our order showed that Colorado has not, and never has had, any state imposed school or residential segregation. No discrimination in school transfers was either shown or claimed. No gerrymandering was shown or claimed. The district court's findings of de jure segregation, or a dual system, were confined to a small number of schools and were based on the failure or refusal of the School Board to anticipate population migration and to adjust school attendance districts to alleviate the imbalance resulting from such pop-

ulation shifts. We believed that in the circumstances public policy favored a maintenance of the status quo until the problem could be considered and determined on a city-wide basis.

The situation has now changed. Our stay was vacated and the preliminary injunction restored. The schools have opened in compliance, so far as we know, with the requirements of the preliminary injunction. Any change now ordered would have a disruptive effect on the students, the teachers, and the general school administration. Again looking at the problem from the standpoint of public policy, we are convinced that, for the present, we should not disturb the preliminary injunction.

The resolution of the issues is of great public importance. All persons in interest are entitled to be heard. We direct the attention of the district court and of counsel to the fact that in the litigation concerning the Oklahoma City schools we permitted the intervention of persons having a litigible interest. During the argument of the motion under consideration, we were told that the case in the district court is going forward expeditiously and that a trial date in November of this year has been set tentatively. In the circumstances we believe that further proceedings on this appeal should await the disposition of the case on its merits. We hope that the case may be promptly tried on the merits and decided. We renew the statement that the court of appeals will expedite any appeal. Nothing contained herein, or in the August 27, 1969, order, shall be taken as an expression of opinion by this court on any issue that may be presented in the trial and determination of the merits of the case.

The motion is denied and further proceedings on the appeal are held in abeyance until the further order of the court.

Dated: September 15, 1969

A true copy

Teste

William L. Whittaker
Clerk, U. S. Court of Appeals,
Tenth Circuit

By: /s/ Joyce R. Struck
Deputy Clerk

Answer

(Filed October 6, 1969)

In the United States District Court
For the District of Colorado

Civil Action No. C-1499

Now Come all Defendants herein, except Rachel B. Noel, John H. Amesse and James D. Voorhees, Jr., by their attorneys, Henry, Cockrell, Quinn & Creighton, and Kenneth Wormwood, and for their answer to the complaint allege:

First Defense

The complaint fails to state a claim against said Defendants upon which relief can be granted.

Second Defense

Defendants expressly deny any allegation of the complaint which charges or implies that they discriminate against Plaintiffs or any other child within Defendants' jurisdiction on the basis of race, color or ethnicity; Defendants expressly deny any allegation of the complaint which charges or implies that educational opportunity afforded to the children within Defendants' jurisdiction is based upon race, color or ethnicity; Defendants expressly and categorically deny that any of their actions referred to in the complaint have deprived Plaintiffs or any other person within Defendants' jurisdiction of equal protection of the law.

Answer

THIRD DEFENSE

Defendants deny each and every allegation contained in the complaint except as follows:

I. *Jurisdiction*

As to those allegations hereunder which describe what is sought by Plaintiffs by their complaint, Defendants are without knowledge or information sufficient to form a belief as to the truth thereof; and Defendants expressly deny that this Court has jurisdiction over the Defendants and the subject matter of this action.

II. *Parties*

1. Defendants admit, based upon the records of Defendant School District: that the minor Plaintiffs are citizens of the United States of America and are, except for Plaintiff Gregory L. Wade, as to whom Defendants have no current information indicating that said Plaintiff is presently enrolled in school in this school district, citizens of the State of Colorado and residents within School District No. 1; that, except for Plaintiffs Gregory L. Wade and Rhonda O. Jennings, the places of residence of the minor Plaintiffs are at the addresses of their respective parents and aunt stated at the foot of the complaint; and that the minor Plaintiffs, except Plaintiff Gregory L. Wade, are now (October, 1969) attending schools as follows:

Christi Keyes	Hallett Elementary
Kris M. Colley	Hill Junior High
Mark A. Williams	East High
Rhonda O. Jennings	Kepner Junior High
Denise Michelle Starks	Palmer Elementary

Carlos A. Perez	West High
Sheila R. Perez	Baker Junior High
Terry J. Perez	Greenlee Elementary
Dinah L. Becker	Merrill Junior High
Sarah S. Weiner	Hallett Elementary

Defendants admit the allegations contained in paragraphs 2, 3 and 4 of Part B under this heading. As to Defendant School District, its full corporate title is School District No. 1 in the City and County of Denver and State of Colorado, it is created pursuant to Articlie XX, §7, of the Colorado Constitution and operates pursuant thereto and to the general school laws of the State of Colorado.

2. Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of those allegations in paragraphs 1 and 2 of Part A under this heading, except those admitted in the preceding paragraph, and therefore deny the same.

III. *First Cause of Action*

Defendants admit that Defendant Board of Education passed and enacted Resolutions Nos. 1520, 1524 and 1531 on the dates alleged; that the minor Plaintiffs, on the date of the commencement of this action, resided within the attendance areas alleged; that Defendant Board of Education has, prior to the commencement of this action, initiated the purchase of 27 school buses; and Defendants admit the allegations contained in the first two sentences of Part L and all of Part M under this heading.

Answer

IV. *Second Cause of Action*

1. As to the allegations contained in the complaint under the Second Cause of Action, to the extent that such allegations incorporate by reference allegations of the First Cause of Action, Defendants incorporate herein by reference their answer to such allegations hereinabove set forth.

2. As to the other allegations in the complaint under said Second Cause of Action, Defendants allege that Defendant School District has established school attendance area boundaries on the basis of nonracial criteria which result in the assignment of pupils to schools generally nearest their places of residence, but expressly deny that any attendance boundaries have ever been created or altered with the intent of segregating pupils because of race or with that effect.

3. Defendants admit that in some schools in the School District pupils are grouped, in some courses, according to ability in those courses and irrespective of race or ethnicity, but Defendants deny that any such ability grouping segregates or separates pupils on the basis of race or ethnicity or denies to any pupil an equal educational opportunity, and deny that such grouping constitutes a "track system" as alleged.

WHEREFORE, Defendants pray that the complaint be dismissed, that the preliminary injunction heretofore entered herein be dissolved, that judgment be entered herein in favor of Defendants and against the Plaintiffs, that De-

fendants recover their costs herein, and for such other and further relief as may to the Court appear proper.

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Attorneys for all Defendants except John H. Amesse, Rachel B. Noel and James D. Voorhees, Jr., in their individual capacities.

[CERTIFICATE OF MAILING OMITTED]

Memorandum Opinion and Order

(Filed October 17, 1969)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1499

THIS MATTER having come on to be heard on September 11, 1969, upon the motions of certain of the defendants herein, and the Court, having considered the briefs filed herein, and having heard the statements of counsel, hereby finds and orders as follows:

Nature of the Action

This is a civil action brought under 42 U.S.C. § 1983 wherein jurisdiction of the subject matter is founded upon 28 U.S.C. § 1343(3). Plaintiffs bring this suit as a class action to redress the alleged deprivation of their rights under the equal protection clause of the Fourteenth Amendment, maintaining that defendants have unlawfully segregated minority Negro and Hispano children in the public schools of the Defendant District. The relief sought is solely equitable in nature, being an injunction against the continuation of the allegedly segregated schools through the requirement of a plan for desegregation of said schools.

Moving Defendants

The moving defendants are:

School District No. One, Denver, Colorado;

The Board of Education of School District No. One, Denver, Colorado;

Memorandum Opinion and Order

William C. Berge, Stephen J. Knight, Jr., James C. Perrill, Frank K. Southworth, John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, in their official representative capacities as members of The Board of Education of School District No. One, Denver, Colorado; William C. Berge, Stephen J. Knight, Jr., James C. Perrill and Frank K. Southworth, in their individual capacities; and

Robert D. Gilberts, individually and as Superintendent of Schools of the District.

Motions Presented

The movants premised their motion upon two major points: (1) that § 1983 does not create a cause of action against either (a) the District, because it is a "municipality" and under the holding of *Monroe* v. *Pape*, 365 U.S. 167 (1961) not a "person" as that term is used in § 1983;[1] (b) the individual defendants in their official representative capacities, because such a claim would be the equivalent to a suit against the School District itself,[2] and (c) the defendants as individuals, because, as such they are powerless to grant the relief requested. Secondly, defendants asserted that since there was no cause of action there was no subject matter jurisdiction under 28 U.S.C.

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[1] 42 U.S.C. § 1983 provides:

"Every *person*, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added).

[2] *See Harkless* v. *Sweeny*, 38 Law Week 2007 (S.D. Tex. 1969) discussed *infra*.

§ 1343(3). However, defendants have abandoned this latter point, and properly so.[1]

For the reasons set forth below, this Court concludes that the contentions are without merit and that the motions should be denied.

School District No. One was created by Article XX, § 7 of the Colorado Constitution, and is governed by the general school laws of the State as to its operation, the election of members of its Board of Education, etc. However, the District has cited no authority for the proposition that it is a "municipality"; it is simply a governmental agency of the State.

In *Monroe* v. *Pape, supra,* relied upon by defendants, the Court had before it a claim for *damages* under § 1983 against the City of Chicago for the actions of city police officers which abridged plaintiffs' constitutional rights. The Court, after carefully reviewing the legislative history of the Act of 1871 concluded that Congress did not intend to bring municipal corporations within the ambit of § 1983.

Several factors lead this Court to the conclusion that the holding of *Monroe* should not be extended to exclude the School District or the defendants in their official capacity from § 1983. Since the *Monroe* decision the Supreme Court has considered numerous cases under § 1983 which involved governmental agencies and officers, without questioning whether there was a cause of action: *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *Baker* v. *Carr,* 369 U.S. 186 (1962); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *WMCA* v. *Lomenzo,* 377 U.S. 633 (1964); *Tinker* v. *Des Moines Indep. Community School District,* 393 U.S. 503 (1969); *Lucas* v. *44th General Assembly,* 377 U.S. 713 (1964); *Raney* v.

[1] *Bell* v. *Hood,* 327 U.S. 678 (1946).

Board of Education of Gould School District, 391 U.S. 443 (1968).

Secondly the legislative history relied upon by the Court in *Monroe* shows that the concern of Congres was about the imposition of vicarious liability for *damages* upon a city, county or parish. There is nothing in that history which supports the contention that every other type of state or local governmental agency was also to be excluded. In fact such an exclusion would practically render § 1983 meaningless as a means to afford affirmative relief, particularly equitable relief, for the deprivation of Constitutional rights. In *Monroe* it was recognized that the creation of such affirmative relief was one of the objectives of the Act. *Id.* at 196-98, concurring opinion of Justices Harlan and Stewart.

Thirdly at least two Courts of Appeals which have considered this question have held that *Monroe* does not apply except where damages are being sought against a defendant such as a city, county or other municipal corporation. In *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (7th Cir. 1969) newsmen brought suit under §1983 for injunctive relief against the City, the superintendent of police and unidentified police officers to prevent interference with the plaintiffs' rights to gather and report news. Relying on *Monroe* the trial court dismissed the suit for failure to state a claim. The Court of Appeals reversed, holding that since the suit only sought equitable relief, *Monroe* did not apply. See also *Adams* v. *City of Park Ridge*, 293 F. 2d 585 (7th Cir. 1961). The Fifth Circuit reached the same result in *United States* v. *City of Jackson, Miss.*, 318 F. 2d 1 (5th Cir. 1963), as did the District Court for the Southern District of Alabama in *United States* v. *Clark*, 249 F. Supp. 720 (S.D. Ala. 1965).

Harkless v. *Sweeny, supra,* involved a suit for damages and reinstatement brought by Negro school teachers under §1983 against the school district, the superintendent of schools and the members of the school board, both individually and in their official capacities. The trial court dismissed the suit for failure to state a claim as to the district and the individual defendants in their official capacities relying primarily upon the *Monroe* case and several trial court opinions.[1] This Court has considered the *Harkless* case and the cases therein relied upon, and has concluded that insofar as it pertained to equitable relief, that case gave too broad an application to *Monroe.* We believe the better authority to be such cases as *Adams* v. *City of Park Ridge,* and *United States* v. *City of Jackson, Miss., supra.*

Since we have held *Monroe* inapplicable to an entity such as the School District, there is similarly no compulsion to exclude these defendants either in their official or individual capacities from the meaning of "persons" under §1983. Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED that the motions to dismiss for failure to state a claim upon which relief can be granted be and hereby are denied.

Defendants shall have 15 days from September 11, 1969, to file an answer herein.

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[1] *Johnson* v. *Hackett,* 284 F. Supp. 933 (E.D. Pa. 1968); *Baxter* v. *Parker,* 281 F. Supp. 115 (N.D. Fla. 1968); *Glaney* v. *Parole Board,* 287 F. Supp. 34 (W.D. Mich. 1968).

Memorandum Opinion and Order

Dated this 16 day of October, 1969.

BY THE COURT

/s/ .....
William E. Doyle
United States District Judge

APPROVED AS TO FORM:

/s/ .....
Gordon G. Greiner
Attorneys for Plaintiffs

HENRY, COCKRELL, QUINN & CREIGHTON

By .....
Attorneys for Defendants

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[40] * * *

Mr. Greiner: Our first witness will be Dr. Paul Klite.

PAUL KLITE, a witness called by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Greiner:

The Court: Please state your name and address.

The Witness, Paul Klite, 1434 Birch Street in Denver.

By Mr. Greiner:

Q. You're the same Paul Klite who testified at the preliminary injunction hearing in the summer of 1969? A. I am.

Q. Dr. Klite, first turning your attention to old Manual High School, have you had occasion in the course of [41] preparing to testify here to examine maps, student enrollment and capacity utilization data for old Manual and East High Schools for the period 1926 through 1952? A. Yes.

Q. And with respect to new Manual High School, which opened, as I recall, in 1953, have you also studied school district data regarding student enrollment and capacity utilization on the boundaries of new Manual High School? A. Yes, I have.

[42] Q. What was the source of this data that you examined? A. The data was obtained from several sources. For the most part, official boundary maps were not available prior to the year 1959. Information on the boundaries was obtained from school board minutes, from newspaper clippings, from reviews of various documents at the school

district, at the public libraries, and review of PTA membership lists, to establish location of students, and from these types of sources the enrollment data and the boundary data was put together.

Q. Now, with respect to the school boundaries, Dr. Klite, of old Manual High School, you have before you what has been marked for identification as Plaintiffs' Exhibit 200, purporting to be a map showing the boundaries of Manual High School in 1962. Would you kindly tell the Court what the source of Exhibit 200 is? A. Yes, the map is a map from the 1960s, from which boundaries have been erased. The superimposition of boundaries is taken from the superintendent's circulars at 1926, in which the boundaries of Manual were verbally indicated.

Q. How were they indicated? A. They were indicated by elementary school area, occasionally by street. Some of the limitations of the [43] boundaries are not indicated, because they extended to places like the city limits, for which no specific street locations were given.

* * * * *

[51] * * *

By Mr. Greiner:

Q. Dr. Klite, does Exhibit 200 purport to depict all of the boundaries of Manual? No.

Q. Why not? [52] A. As I have just stated, this is the first of a series of exhibits focusing on the Manual-East boundary, so that portion of the boundary between those schools is what is listed.

Mr. Greiner: Well, Your Honor, we again offer Exhibit 200 solely for the purpose of showing that in 1926 the attendance area boundary between East

and Manual, which is all the exhibit purports to depict, were as shown on Exhibit 200.

Mr. Ris: Still object. He says he didn't even check what all the elementary school boundaries were, and this is what it is based on.

The Court: Overruled, it can be explained by either side to a certain degree. We will receive it for whatever value it may have in establishing the locations and boundaries of that area.

(Plaintiffs' Exhibit 200 was received in evidence.)

Q. Dr. Klite, with reference to Exhibit 200, where was the eastern boundary for the attendance area of Manual High School in 1926? A. This was the Adams Street and Columbine Elementary School area, which would be approximately Colorado Boulevard.

Q. Now what about the attendance area for Manual with respect to the area north of City Park? [53] A. This was in the Manual district.

Mr. Ris: Just a moment, if the Court please, this witness is not an expert. He merely says that he went to certain records and made a map.

Now, if he made the map, it is going to speak for itself, and we object to any interpretation or any construction or any opinion by this witness pertaining to that map or things not shown thereon.

The Court: Well, he can express himself as to what appears in a map and comment on it.

Mr. Greiner: That's all the question goes to, Your Honor, is what does the exhibit itself depict.

The Court: Very well.

Q. Does Exhibit 200 depict an attendance area for Manual north of City Park, Doctor? A. Yes.

Q. What are the bounds of that attendance area for Manual? A. Southern boundary is 26th Avenue. The eastern boundary is Colorado Boulevard. No northern boundary is shown.

Q. East of Colorado Boulevard, is there depicted on Exhibit 200 an attendance area which was purportedly optional between both East and Manual? A. Yes, sir.

[54] The Court: That's east of Colorado?

The Witness: Yes, sir.

Q. Calling your attention to Exhibit 356, Doctor—

The Court: He has already testified to that, hasn't he?

Mr. Greiner: Your Honor, the authenticity of Exhibit 356 has been stipulated to by counsel, the nature of the stipulation being that no formal foundation is required for its introduction.

Dr. Klite, I am handing you what has been marked for identification as Exhibit 356, and, Your Honor, at this time we would like to offer into evidence Exhibit 356, being a book concerning the new Manual High School. We are offering it for the purpose of putting in the record the racial and ethnic statistical data which appears in the exhibit at Page 5 on Chart 1.

The Court: Do you object to it?

Mr. Ris: Well, there are other things in that that I think may be germane to this case and I presume you are offering the entire pamphlet, even though you may refer to the one chart.

Mr. Greiner: That's correct.

Mr. Ris: All right, we have no objection to the entire pamphlet being in.

The Court: All right, it will be received.

* * * * *

[56] * * *

By Mr. Greiner:

Q. Dr. Klite, referring to Exhibit 356, page 5, Chart 1, what does Chart 1 depict? A. Chart 1 is a table showing the racial distribution of Manual students from 1926 to 1950.

Q. From what are the categories reported in Chart 1? A. For each year, the number and percentage of white, colored, Spanish and Oriental students is listed.

Q. Now again referring to Chart 1, what happened to the racial composition of old Manual between the years of 1930 and 1950?

Mr. Ris: If the Court please, it speaks for itself.

The Court: We will let him comment on it. It may save some time.

A. In 1926 Manual was 87.2 percent white, 10 percent Negro. Over the period of the next 24 years the Anglo population gradually declined to a point where by 1945 it was 47½ percent Anglo, 20 percent Negro, about 16 percent Hispano and 15 percent Oriental.

Q. Dr. Klite, do you recall when the new Manual High School was opened? A. 1953.

Q. Handing you what's been identified as Plaintiffs' Exhibit 203, Dr. Klite, can you identify that for us? A. Yes, this is a reconstruction of the boundaries of [57] Manual High School in 1955.

Q. That would then be the boundaries for new Manual High School? A. That is correct.

Q. And what is the source of the boundary data depicted on Exhibit 203? A. There are several sources; one of these superintendent's circulars for 1936. The other is a map in a 1955 site study report which shows that boundary.

Mr. Greiner: Your Honor, at this time we would offer Plaintiffs' Exhibit 203.

* * * * *

[61] * * *

The Court: We will receive it for whatever value it may have, bearing in mind that it may change as time goes on; as the trial progresses.

(Whereupon, Plaintiffs' Exhibit 203 was received in evidence.)

Direct Examination by Mr. Greiner (Cont'd):

Q. Referring then to Exhibit 203, Doctor, what was the eastern boundary line for Manual? A. The eastern boundary line was an irregular line that ran up York Street south to 34th Avenue, and then over about three and a half blocks to the alley between Race and High, then south to 28th Avenue, then over one more block to the alley—in the alley between Williams and High, which was one-half block from Manual; then south to 22nd Avenue and then westward down a stair-step line.

The Court: This is as of 1953?

The Witness: This boundary was probably created in 1936. In 1953 when new Manual was built, that was the boundary, yes, sir.

Paul D. Klite—for Plaintiffs—Direct

Q. Dr. Klite, next calling your attention to what's [62] been marked for identification as Plaintiffs' Exhibit 210, will you please identify Exhibit 210. A. Exhibit 210 lists the number of students and the percent capacity utilization at Manual and East Highs for the years 1951 through 1961 as derived from the statistical reports of the Denver Public Schools, several years for which the statistics are not available, are missing.

Q. What are these statistical reports which you describe? A. These are bound volumes which listed statistical indicia of membership and attendance at all of the schools and were published yearly up until the sixties.

Q. By whom is this data published? A. By the Denver Public Schools.

Mr. Greiner: Your Honor, at this time we would offer Exhibit 210.

Mr. Ris: I am going to object, Your Honor. I just want the record to reflect that it is incomplete and some of the columns are absent. It omits 1955 completely. But, we will have an exhibit that will fill in all the gaps as well.

The Court: Mr. Brega?

Mr. Brega: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 210 was received in evidence.)

[63] *By Mr. Greiner:*

Q. Dr. Klite, referring to Exhibit 210, in 1953 when new Manual was opened, what was the capacity utilization? A. There were 1,003 students for capacity utilization of 64 percent.

Q. And is the capacity utilization of East High School also depicted on Exhibit 210? A. Yes. East was at 100 percent capacity.

The Court: What was the percentage of utilization at Manual?

The Witness: Sixty-four percent.

Q. How many students did East have at that time? A. East had 2426 pupils.

Q. Now with respect to Manual in 1953, were there any empty seats in Manual? A. The capacity of Manual was 1560. There were approximately 550 empty seats.

Q. Next, Doctor, I would like to call your attention to Plaintiffs' Exhibit 401. Would you please identify Exhibit 401. A. Exhibit 401 shows the number and percent Negro enrollment at selected schools for the years 1949 to 1956.

Q. What is the source of the data reflected in Exhibit 401? A. These were taken from the principals' reports that [64] were made available to us by the defendants a few weeks ago.

Mr. Greiner: Your Honor, at this time we would offer Exhibit 401.

The Court: May I see it, please.

Mr. Ris: No objection.

Mr. Brega: No objection, Your Honor.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 401 was received in evidence.)

Q. Dr. Klite, referring to Exhibit 401, does it depict the percentage of Negro enrollment at Manual High School in 1953? A. Yes, it does.

Q. What is shown there? A. It shows that the Negro percentage was 35.

Q. And what was the Negro percentage enrollment at East High School in 1953? A. Two.

Q. Pardon? A. Two percent.

Q. Now, in January of 1956, Dr. Klite, was there a proposal made by the school administration for a change in the boundary lines between Manual and East? A. Yes, there was.

Q. Calling your attention to what's been marked as [65] Exhibit 332, can you identify Exhibit 332 for us? A. Yes, this is a copy of the School Board minutes of January 11, 1956, dealing with the proposed boundary changes.

Q. Does Exhibit 332 describe the proposed change? A. Yes, it does.

Q. What is the source of Exhibit 332? A. These are the School Board minutes.

Mr. Greiner: Your Honor, we would offer 332 at this time.

Mr. Ris: May I see it, please? May I ask counsel, this indicates proposed boundaries and does not show enactment or adoption as of January 11, 1967? You are not purporting to show the adoption or enactment?

Mr. Greiner: That's correct, Exhibit 333 will describe when they were actually effected.

Mr. Ris: All right, no objection to Exhibit 322 as merely showing a proposal.

The Court: It is received.

(Whereupon, Plaintiffs' Exhibit 322 was received in evidence.)

Q. Dr. Klite, with reference to Exhibit 401, you stated that in 1953 Manual was 35 percent Negro? A. Yes, sir.

Q. Would you refer again to, please, Chart 1 in Exhibit 356? What's the last year reported in Chart 1? [66] A. 1949-50.

Q. In 1949, what was the percent Anglo enrollment? A. 40.7.

Q. What was the percent Hispano? A. 23.5.

Q. Do we know, Dr. Klite, whether or not when Manual opened in 1953 it was predominantly a minority school? A. We do not have figures that show the Hispano enrollment in 1953.

Q. But we do know what it was in 1949 and '50? A. Yes, sir.

Q. Calling your attention, Dr. Klite, to Exhibit 332, would you please describe the boundary change which was proposed as reflected in Exhibit 332 between Manual and East High School? A. Yes, this is listed on page 15 of the Board minutes, which says: "A. The area from York Street to Franklin, between 21st and 17th, will remain optional between East and Manual. The remainder of the area west of York Street and north of 17th, which is presently optional between East and Manual High Schools will become Manual District."

Q. Dr. Klite, have you had occasion to study the census data from 1950 with respect to the racial composition of the neighborhood which was to be affected by the proposed boundary change which you have just described? [67] A. Yes.

Q. What census data did you use or inspect? A. The 1950 census enumeration district data for that part of Denver in the area of the Manual School District.

Paul D. Klite—for Plaintiffs—Voir Dire

Q. These were the enumeration districts? A. Yes, sir.

Q. What are the sizes of enumeration districts? A. They vary considerably, depending upon the population. In this area, the average size was about six square blocks.

Q. And how might the population within a single enumeration district vary? A. In these districts, the population varied from about 100 to 1,000 people.

Q. Now, Dr. Klite, based upon your examination of the 1950 census data, have you prepared an exhibit which depicts the racial composition of the neighborhood and the area to be affected by the boundary change? A. Yes, I have.

Q. And which exhibit is that? A. 211-A.

Mr. Greiner: Your Honor, at this time we would offer Exhibit 211-A into evidence.

The Court: Is this related to 332?

Mr. Greiner: At the moment, 211-A is being overlaid [68] on Exhibit 203, and it simply shows the census data for the area described in Exhibit 332, Your Honor.

The Court: Any objection to Exhibit 211-A?

Voir Dire Examination by Mr. Ris:

Q. Do I understand, Dr. Klite, that you used 1950 data, to which you are now referring, to conditions in 1956? A. No, the census data is 1950 data.

Q. And you are relating that to boundary changes made in 1956? A. I am going to relate it to population in 1950.

Q. Was there a boundary change in 1950? A. No, sir.

Q. Your testimony is with reference to boundary change in 1956, is it not? A. It will be, yes, sir.

Q. Are you testifying with respect to this overlay then with respect to the 1956 boundary change? A. Well, counsel has phrased it in those terms. I am testifying to the 1950 population data.

Q. Now, do you have any statistics to show what relation that has to the 1956 population data for the same area? A. We will have data to show for that, yes, sir.

Q. Do you have it? A. It is in Exhibit 401.

[69] Mr. Greiner: Your Honor, all 211-A is is a reference point in 1950, and we will then offer to update to 1956 the racial characteristics of the affected neighborhood. We have to start somewhere.

Mr. Ris: Well, Exhibit 401 relates to what he has already testified to, the percentage of Negro enrollment at Manual and East in 1953, and has all other years, also, but we object as to a matter of relevancy of a census taken in 1950 and attempting to show that it's accurate in 1956.

Mr. Greiner: Your Honor, if there is any doubt, we are not saying that Exhibit 211-A reflects the racial composition of the affected neighborhood in 1956. It is not offered for that purpose. It is offered to show what the racial composition was in 1950.

The Court: I don't suppose there was a census in 1956.

Mr. Greiner: No, it was taken in '50.

The Court: Well, we will receive it for whatever value it may have.

(Whereupon, Plaintiffs' Exhibit 211-A was received in evidence.)

Direct Examination by Mr. Greiner (Cont'd):

Q. Dr. Klite, referring to Exhibit 211-A, what is the blue area depicted on the exhibit? [70] A. These are groups of enumeration districts, each one having a Negro population of greater than 50 percent and having an average of 82 percent Negro in 1950.

Q. Looking to the east on Exhibit 211-A, what does the yellow area represent? A. These are groups of enumeration districts, each having a population of less than 4 percent and having an average population of 0.4 percent.

Q. Finally, with respect to the red area, what does the red area on Exhibit 211-A depict? A. These are enumeration districts having Negro populations between 4 and 50 percent. The percent Negro population of each enumeration district is listed on the district.

Q. Well, according then to Exhibit 211-A, Doctor, was there any discernible residential racial line disclosed by the 1950 census?

Mr. Ris: If the Court please, that's calling for a conclusion now, and this is not within this man's expertise. We will object to his interpretations and conclusions.

The Court: I think you are going to have to establish him as an expert witness.

Mr. Greiner: Well, Your Honor, the exhibit itself I think shows the great variance.

The Court: Well, if it does, then we don't need any expert testimony on it.

[71] Mr. Greiner: I don't believe it is expert testimony.

The Court: Well, it is a conclusion. Conclusions, the general rule is they are inadmissible, because the

average lay mind can draw the inference that is apparent. When it gets into a field of expertise, why, we call on the experts.

If you say that the lay mind can fathom this, why, it is not necessary really to have any conclusory testimony on it.

Mr. Greiner: Very well, Your Honor.

Q. Dr. Klite, referring to Exhibit 211-A, is there any relationship between the census data reflected in 211-A and first of all, the eastern boundary for old Manual?

Mr. Ris: If the Court please, this again is either an expert matter or it is a conclusion by a layman. The exhibits are in, and they will speak for themselves without conclusions or editorializing. We object to it.

The Court: Well, I think it will be helpful if he would describe the kind of preparation that he has made for this, what kind of studies he has done and what analysis he has carried out as a foundation for this.

Mr. Greiner: I thought we had already done that, Your Honor, the fact that he had studied the 1950 census data that 211-A depicts, the census data within the area with which we are concerned.

Now, we are simply relating the census data to [72] something already in evidence, namely, the boundary line in 1950 for old Manual.

The Court: Well, you are asking him to give an analysis and to draw a conclusion, I assume.

Mr. Greiner: No, I am simply asking him if as a matter of objective fact disclosed by Exhibit 211-A

overlaid on Exhibit 203 there is any relationship between the census data and the boundary line for old Manual.

The Court: Well, you are asking him to make a deduction which is exactly the same thing. Do you feel that this is a deduction that wouldn't occur to the average man?

Mr. Greiner: No, Your Honor, I think any average man who overlaid 211-A on 203 can see that the relationship exists. I am merely pointing it out, wishing to point it out, through the witness.

The Court: All right, go ahead, see what he says, hear what he says.

Q. Dr. Klite, was there any relationship between the racial composition of the neighborhood as depicted in Exhibit 211-A and, first of all, the boundary for old Manual? A. The general area indicated in blue on 211-A in which each enumeration district is over 50 percent Negro is eastern boundary as approximately Race and High Streets.

Q. Pardon me, where was the eastern boundary for old Manual? [73] A. The eastern boundary ran between the alley of Race and High north of 28th and High and Williams south of 28th.

The Court: You mean the old Manual?

The Witness: Yes, sir.

Q. Now, Dr. Klite, with respect to Exhibit 203, was there any change between the boundary for old Manual, which you have just described, and the boundary for new Manual, which is depicted on Exhibit 203? A. Not that I am aware of.

Q. Dr. Klite, between 1950 and 1956, referring your attention to Exhibit 401 again, does that exhibit reflect a change in Negro enrollment at certain of the elementary schools in this area which we are now discussing? A. Yes, it does.

Q. Referring to Exhibit 401, what does the exhibit show as to the change in the racial composition at Columbine Elementary School? A. It shows that Columbine in 1949 was 13 percent Negro, that the Negro percentage increased yearly until by 1954 Columbine was 54 percent Negro.

Q. Where was the Columbine district located? A. It was located approximately half east of York Street and half west of York Street.

Q. Now, with respect to Harrington Elementary School as depicted on Exhibit 401, what was the racial composition [74] of Harrington Elementary School? A. Harrington had no Negro pupils until 1952, when it had one Negro pupil. The Negro population of Harrington then began to increase to by 1956 it was 20 percent Negro.

Q. Where was the Harrington district located? A. It was entirely east of York Street.

Q. All right, and what does Exhibit 401 show as to the racial composition of Whittier Elementary School? A. Whittier School was 96 percent Negro in 1949 and remained predominantly Negro throughout the entire period of 1949 to 1956.

Q. Where was the attendance area for Whittier Elementary School? A. The eastern border of Whittier is exactly the same as the eastern border of Manual.

Q. All right. A. And the southern portion.

Q. Finally, what does Exhibit 401 show with respect to the racial composition of Wyman Elementary School?

A. Wyman, which had been 20 percent in 1949, increased its Negro population to where by 1956 it was 45 percent Negro.

Q. Where was the Wyman attendance area located? A. Just east of City Park and approximately south of—I am sorry, just west of City Park and south of 23rd Avenue.

Q. Doctor, calling your attention to what's been marked for identification as Exhibit 333, would you identify [75] that exhibit for us, please? A. Yes, sir, these are copies of the School Board minutes of the night of June 20, 1956, a letter from Superintendent Oberholtzer.

Q. You will recall that Exhibit 332 was the boundary proposal. Was the boundary proposal as reflected in Exhibit 332 actually implemented or passed? A. Yes, it was.

Q. Does Exhibit 333 describe the boundary change as effected? A. No, it does not.

Q. And in what manner does it not? A. It is a letter from Superintendent Oberholtzer to the Board of Education, recommending that the boundary changes be enacted.

Q. Do you know, Doctor, whether or not they actually were inacted? A. Yes, they were.

Mr. Greiner: Your Honor, we at this time would offer Exhibit 333.

The Court: Do you have a copy of it?

Mr. Ris: Well, we saw two pages of it, I believe, and they would add a couple more. Do you have those pages, 14 and 15?

Mr. Greiner: Your Honor, there are two more pages [76] to be attached to this exhibit, and we

can add them. They will have to be added at the recess.

Mr. Ris: We have no objection if they are completed.

The Court: Very well, it will be received.

(Whereupon, Plaintiff's Exhibit 333 was received in evidence.)

Q. Dr. Klite, calling your attention to what has been marked for identification as Exhibit 204, being a boundary map showing the boundaries between Manual and East, could you identify Exhibit 204? A. Yes, Exhibit 204 shows the boundaries of Manual after the boundary change of 1956 that I quoted before with the small optional zone west of York remaining, in the area north of City Park between York and Colorado Boulevard remaining optional, the rest of the area west of York being ceded to Manual.

Mr. Greiner: Your Honor, we would offer 204 at this time.

Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 204 was received in evidence.)

The Court: What is No. 333? Does it carry out the proposals in 332?

[77] The Witness: Yes, sir, the boundary changes reflected in 333 are identical for the senior high schools to those in 332.

Q. Dr. Klite, referring again to Exhibit 210, which I believe you have in front of you, in 1956 what was the capacity utilization shown in Exhibit 210 for Manual High School? A. One hundred seven percent.

Q. And what was the capacity utilization for East High School? One hundred seven percent.

Q. Were there any empty seats at Manual in 1956? A. Slightly less than 500.

Q. Referring then to Exhibit 401, Doctor, what was the percentage Negro enrollment in 1956 at Manual? A. In 1956, Manual was 42 percent Negro.

Q. And what was the situation at East as to its Negro enrollment? A. It was 1 percent Negro.

Q. Referring to Exhibit 210, what was the capacity of new Manual when it opened in 1953? A. 1560.

Q. Was the capacity the same in 1956? A. As far as I know, yes.

Q. Is that capacity shown on Exhibit 210 or 401? A. It is shown on Exhibit 210.

[78] Q. Again, referring to Exhibit 401, does that exhibit depict for the year 1949 what percentage of all Negro senior high school students in Denver were enrolled in Manual? A. It shows the numbers. It shows that 275 of the city's 363 Negroes, or approximately 75 percent, were enrolled in Manual in 1949.

Q. By 1956, what percentage of Negro senior high school students were enrolled in Manual? A. It shows that 541 of the city's 641, or roughly 85 percent, were enrolled in Manual.

Q. Again referring to Exhibit 401, between 1949 and 1956, is the Negro enrollment at East depicted in Exhibit 401? A. Yes, it is.

Q. What does the exhibit show happening to the Negro

enrollment at East? A. East had 3 percent Negro students in 1949, decreased to 2 percent in 1950 and 1 percent in 1956.

Q. Referring then again to Exhibit 210, Doctor, when new Manual opened in 1953, what was its capacity? A. 1560.

Q. And what was its enrollment? A. 1,003.

Q. And referring to Exhibit 401, what was new Manual's racial composition when it opened? A. It was 35 percent—I am sorry, 35 percent Negro. [79] We do not know the Hispano population.

Q. In 1953 when new Manual opened, at East High School what was East's capacity? A. Approximately 2,430.

Q. And what was East's enrollment? A. 2,426.

Q. And again referring to Exhibit 210, what was the capacity utilization at East? A. 100 percent.

Q. What was its racial composition? A. It was 2 percent Negro. We do not know the Hispano population.

Q. Doctor, I would like to next call your attention to what's been marked for identification, what is in evidence as Exhibit 200. Was there any relationship, Doctor, between the attendance area for Manual and East High Schools and the attendance areas for Cole and Smiley Junior High Schools? A. In 1926?

Q. Yes. A. The Cole boundaries were identical to the Manual boundaries in 1926.

Q. How do you know that? A. It was stated in the Superintendent's circular.

Q. So then Exhibit 200 also depicts the attendance areas for Cole and Smiley Junior High Schools? [80] A. I think more fairly it depicts the attendance for Cole and Gove. Smiley opened in 1928.

Q. All right, referring then to Exhibit 336, can you identify Exhibit 336? A. Exhibit 336 is the racial ethnic data of the Denver Public Schools by school in school year 1946.

Q. What is the source of Exhibit 336? A. This was obtained from the Urban League of Colorado in their files.

The Court: This is for what year?

The Witness: 1946.

Mr. Greiner: Your Honor, the authenticity of Exhibit 336 has been stipulated to, and we would offer it at this time.

Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 336 was received in evidence.)

Q. Referring to Exhibit 336, Doctor, by 1946 what is reflected in that exhibit as to the racial composition of Cole Junior High School? A. Cole had 1663 students, of whom 1,717 were Anglo, 345 were Negro, 118 were listed as Mongolian, and 483 were listed as Spanish, Spanish-American and Mexican.

[81] Q. Is the percentage racial composition disclosed there? A. No, it is not.

Q. Can you determine approximately what percent Anglo Cole was in 1946? A. Approximately 40 percent.

Q. Then, Doctor, if you would refer to Exhibit 211, what does 211 purport to depict? A. This depicts the Cole and Smiley boundary lines in the areas where they intersect.

Q. For which year? A. For 1952.

Q. Doctor, what's the source of this boundary information depicted on Exhibit 211? A. Well, there are several corroborating sources. One is a newspaper map from the Rocky Mountain News in 1952. The others are maps obtained by the defendants, showing the junior high areas in 1952.

Q. And does Exhibit 211 accurately depict the boundaries shown in those sources? A. Yes, for the areas shown. It does not depict the entire boundaries of either Cole or Smiley, just the areas where they intersect.

Mr. Greiner: Your Honor, we offer Exhibit 211 at this time.

[82] Mr. Ris: No objection.

Mr. Brega: May I ask a question?

The Court: Surely.

Voir Dire Examination by Mr. Brega:

Q. Dr. Klite, on the western boundary with the hash mark on the western side of the optional area, are these estimates by you? A. The indication that this was an optional zone has been corroborated since my deposition by the 1936 Superintendent's reports, which depict this as the Columbine area, being optional between Cole and Smiley.

[83] Q. Do you find that your corroboration shows that the original areas you depicted are the correct demarcation lines? A. Yes, sir.

Mr. Brega: No objection.

The Court: 211 is received.

(Whereupon, Plaintiffs' Exhibit 211 was received in evidence.)

Direct Examinaion by Mr. Greiner (Continued):

Q. Referring, Doctor, to Exhibit 211, by 1952 where does the exhibit depict the eastern boundary of Cole Junior High School? A. It is at an identical location to that of

Manual, between the alleys of High and Race Streets from 34th to 28th and between Williams and High from 23rd to 28th.

Q. Does Exhibit 211 depict an optional zone between Cole and Smiley? A. Yes.

Q. Could you describe that optional zone, please? A. Yes, the area between the boundary I have just described and Colorado Boulevard is all optional.

Q. Next, Doctor, if you would refer to Exhibit 215 and 215-A. First, could you identify Exhibit 215? A. Exhibit 215 is a similar exhibit to 210. This time [84] listing for Cole, Smiley and Morey the average daily memberships from 1951 to 1963. Similar sources as were used for Exhibit 210.

Q. And referring to what has been marked for identification as Exhibit 215-A, what does 215-A purport to be? A. These are the percentage calculations based on 215.

Mr. Greiner: Your Honor, at this time we would offer Exhibits 215 and 215-A.

Mr. Ris: May I check them, please?

Mr. Creighton: There has been a change recently, Mr. Greiner, since we saw an earlier version.

Mr. Greiner: This has gone through several revisions.

Mr. Ris: If the Court please, we do object to this on the grounds of insufficient foundation. On the basis of the figures supplied to the plaintiffs by the defendants—

The Court: Are you referring to 215-A?

Mr. Ris: 215-A and 215. One is the numbers and the other is percentage, but for the same schools and the same period. And they are—they have from some

other source apparently arrived at some contrary figure. For example, one year for one school—there's a difference of—a difference from 74 to 86 percent. So, it is [85] substantial and we object on the grounds of insufficient foundation.

The Court: May I see those, please?

Which school are you referring to, Mr. Ris?

Mr. Ris: I'm going to ask Mr. Creighton to cover this. He has the details in mind.

Mr. Creighton: Your Honor, I believe you have the only copy of that particular version of it available, but, taking Cole for 1956, let's just say 1955, we will offer an exhibit—it will be Exhibit CC when it's offered—which will show that the capacity utilization at Cole that year was 90 percent—86 percent. That was based on a capacity of 1,770, which in turn was based upon a room count from files and sources made available to the plaintiffs. The membership that we used for our exhibit is consistently the end-of-September principal's report, which in turn is always used by the school district in any planning function.

And so we get for 1955 an 86-percent capacity utilization and we believe it to be based upon more proper sources. In 1956 our capacity would be 90 percent for Cole.

The Court: I will say this, that there is no guarantee that the plaintiffs' exhibits and the defendants' will be the same. I mean, they may reach different results. At the same time, I suppose the truth is of the type that—it's immutable. And, if you have the right sources, if you [86] convince me, why that's the thing. That will straighten this out. But, I don't

see any reason for rejecting that because you believe you are going to be able to prove one part of it is wrong.

Mr. Creighton: By way of foundation, I think the witness ought to at least put in the record the source for each year for his capacity figures, because—then the Court will be able to measure his source against the ones we're going to use.

The Court: I will surely look forward to having you cross-examine him thoroughly on that subject. We will receive these.

(Whereupon, Plaintiffs' Exhibits 215 and 215-A were received in evidence.)

By Mr. Greiner:

Q. Dr. Klite, referring to Exhibits 215 and 215-A, in 1951 as to Cole, what was the capacity? A. May I have the exhibits, please?

Q. Yes. I'm sorry.

The Court: 1951?

Mr. Greiner: Yes, Your Honor.

The Court: As shown by this?

Mr. Greiner: As shown by the exhibit.

The Witness: What was its capacity? Is that the question, Mr. Greiner?

[87] Q. Yes, in 1951. A. 1,908.

Q. And what was its enrollment in 1951 according to Exhibit 215? A. 1,338.

Q. And what was the capacity utilization then, referring to Exhibit 215-A, in 1951? A. 71 percent.

Q. Again referring to Exhibit 215 and 215-A, in 1951 is

the capacity for Smiley Junior High School depicted there? A. Yes, 890.

Q. And in 1951 what is the enrollment shown at Smiley? A. 1,224.

Q. What then is the capacity utilization, referring to Exhibit 215-A? A. 126 percent.

Q. In 1952, referring to Exhibit 396—

The Court: Are we going to go through each year here?

Mr. Greiner: No, Your Honor. We're leading up to some material concerning a boundary change which took place in 1952. This is before.

The Court: All right. Go ahead.

Q. Referring to Exhibit 396, Doctor, have you [88] identified that exhibit for us? A. Yes, this is the 1955 school building and site needs study for the East High area.

Mr. Greiner: Your Honor, the authenticity of 396 has been stipulated to by the original defendants. We would offer it at this time.

Mr. Ris: We have no objection.

Mr. Brega: No objection.

The Court: 396 will be received.

(Whereupon, Plaintiffs' Exhibit 396 was received in evidence.)

Q. With respect to Smiley Junior High School, Doctor, and referring to Exhibit 396, does that exhibit disclose any change in the capacity at Smiley in 1952? A. Yes, it shows that an addition was built in January of 1952 that added 556 seats to the school.

Q. Now, referring to Exhibit 215-C, at Cole Junior High School at that same time in 1952, were there any empty seats in Cole? A. Cole was 63 percent of capacity with a capacity of 1,908, and a membership of 1,208. There were 700 empty seats.

Q. In 1952, Doctor, at Cole Junior High School, there were then how many empty seats? A. In 1952?

[89] Q. Yes. A. 700.

Q. And in 1952 at Smiley what was the capacity according to Exhibit 215? A. What was the capacity?

Q. Yes? A. After the addition was built?

Q. Yes. A. 1,446.

Q. What was the enrollment? A. 1,367.

Q. And what then, according to Exhibit 215-A, was the capacity utilization at Smiley? A. 94 percent.

Q. Now, as shown by Exhibit 215-A, Doctor, between 1952 and 1956 what was the utilization first at Cole and then at Smiley? A. Cole remained undercapacity through that period. Smiley became filled and slightly overcapacity in 1954.

Q. Now, Doctor, do we have any information with respect to what was happening during this period to the racial compositions of Cole and Smiley? A. Yes, Exhibit 401.

Q. What does 401 show happening to the racial compositions?

[90] Pardon me. I think we'd better identify 401.

Mr. Greiner: 401 is in evidence.

A. Exhibit 401 shows that Cole, which was 25-percent Negro in 1950 was 40-percent Negro in 1956. Smiley, which was one-percent Negro in 1950 was five-percent Negro in 1956.

Q. Now, between 1952 and January of 1956 what, if any, changes were made in the Cole-Smiley attendance area?

The Court: Between what years?

Mr. Greiner: Between calendar year 1952 and prior to January of 1956.

A. The western tip of the Smiley-Cole boundary was apparently changed to Race Street, a change of one-half to one and a half blocks.

Q. Referring your attention, Doctor, to what's been marked as Plaintiffs' Exhibit 211-B, would you describe—identify 211-B for us? A. 211-B depicts two facts: one is this change in boundary that I have just mentioned, and a second is a—an approximate eastern border of the Negro population in 1950 obtained from Exhibit 211-A.

Q. Doctor, referring first to the apparent boundary change which you referred to, what is the source of the information concerning that boundary change? A. The source is the board minutes of January, 1956, Exhibit 332, I believe, which is in evidence.

[91] Q. Do you still have that exhibit in front of you, Doctor? A. Yes, I do.

Q. What does Exhibit 332 say with respect to this apparent boundary change? A. On Page 14, under 3, change from boundary line between Cole, Morey and Smiley, it says the present optional area between Cole and Smiley Junior High Schools from York Street to Race Street, 34th to 23rd, will become Cole district. (b) The present optional zone between Morey and Cole Junior High Schools, from York Street to Race Street, 21st to 23rd Avenues, will become Cole district.

Q. Referring next, Doctor, to what's been identified as Exhibit 211, purporting to be a boundary map, can you identify Exhibit 211? A. Yes, this is the 1952 Cole-Smiley boundary map.

Q. With respect to the 1950 census data, Doctor, which you have identified as being reflected in Exhibit 211-A—

The Court: May I see the minutes of the board?

The Witness: I do not have 211-A, Mr. Greiner.

Q. Dr. Klite, what is the source of the boundary depicted on the Exhibit 211? A. I believe I have already discussed that, Mr. Greiner.

Q. The source? [92] A. Yes, sir.

Q. Being the minutes? A. No. The source is the superintendent's circulars in 1936. That exhibit is in evidence.

Q. Now, with respect to—

Mr. Greiner: Well, first of all, Your Honor, we'd like to offer into evidence Exhibit 211-B.

The Court: What is it? The overlay?

Mr. Greiner: This is the overlay, Your Honor, which goes on Exhibit 211.

The Court: Do you object to this?

Mr. Creighton: Let's look at it. There have been some changes from time to time.

Mr. Ris: If the Court please, this seems inconsistent on its face. This purports to be a boundary change, 1953 to 1955, with the overlay. It pertains to "approximate eastern border of Negro population in 1950." Now, we're mixing apples and oranges here and I don't think it's proper to do this. So we're going to object for that purpose.

Q. Doctor, with respect to the racial composition data depicted on 211-B, what was the source of that data? A. That's Exhibit 211-A.

Q. Or 211-A. A. The source of 211-B for the racial and ethnic data [93] is 211-A.

Q. Which is, in turn, the source of what? A. The 1950 census.

The Court: 211 is in evidence now?

Mr. Greiner: Yes, Your Honor.

The Court: What is the net effect of all this change?

The Witness: The net effect?

The Court: Of this boundary change. In 1953—from 1953 to 1955?

The Witness: Well, the 1956 board minutes indicate that at that time the western border of the optional zone was Race Street. It's clear that in 1952 the western border was between Williams and High Street; the implication being that sometime in that period the small area between Williams and High and Race was ceded to Cole.

Mr. Greiner: Your Honor, 211-B also depicts what the racial composition of that neighborhood was at least in 1950.

The Court: Very well. We will receive it for whatever value it may have. And we will take a recess until two o'clock.

(Whereupon, Plaintiffs' Exhibit 211-B was received in evidence.)

* * * * * * *

[94] • • •

By Mr. Greiner:

Q. Dr. Klite, just before the noon recess, we were discussing Plaintiffs' Exhibit 211-B. One of the facts depicted on that exhibit concerns the census data from 1950, is that right? A. Yes.

Q. Referring to 211-B, what does 211-B show was the racial composition of the neighborhood which was ceded to Cole from that optional area? A. I don't have the exhibit before me, Mr. Greiner.

The Court: Here it is.

A. (Continuing) It shows that the area ceded to Cole falls at approximately the line of demarcation between the heavily Negro area and the transitional area indicated in Exhibit 211-B.

Q. What was the percentage of Negro population in that area? A. Well, we do not have a specific fix of the Negro population in the exact area of boundary change, but in general the population—

[95] Mr. Ris: Object now. The witness wasn't even a resident here at that time.

Mr. Greiner: We are talking about the census data, Your Honor, as depicted on Exhibit 211.

The Court: Well, how did he compute it? How did he arrive at this conclusion he is about to give us?

The Witness: Your Honor, if you overlay the census data on the map, one can see in which terms of Negro population the area of boundary change occurred.

The Court: Yes.

The Witness: And it shows that it occurred right at the border of the heavily Negro area.

Q. On the east side of what you have referred to as the border, can you tell from Exhibit 211-A what the Negro population was? A. Well, it shows that in 1950—

Q. Yes. A. —that the area ceded was partly in the 32 percent Negro enumeration district and partly in an area that's included among the greater than 50 percent, which as I recall happened to be 64 percent Negro.

Q. Referring your attention again to Exhibit 332, Dr. Klite, after the boundary change that took place sometime—

The Court: Now, where is this boundary that you are now describing?

[96] Mr. Greiner: It is on the western portion of the optional attendance area between Cole and Smiley.

The Court: What street would this be?

The Witness: Race Street on the eastern boundary, 23rd on the southern boundary, 34th Avenue to the north, and then an irregular area westward as far as the alley between Williams and High Street.

The Court: All right.

Q. Now, that boundary change occurred sometime between when? A. It appeared that it occurred sometime between 1953 and 1955.

Q. Now, subsequent to 1955, Dr. Klite, was there another boundary change proposed with respect to the Cole-Smiley attendance area? A. Yes, there was.

Q. Referring to Exhibit 332, would you please describe the change? A. Exhibit 332, which is a copy of the Board minutes—

The Court: Do you have that? I have got the original. You don't have a copy?

The Witness: No, I don't. Thank you.

A. (Continuing)—indicated that the present optional area between Cole and Smiley Junior High Schools from York to Race, 34th Avenue to 23rd, would become Cole District, and [97] that the present optional area between Morey and Cole from York to Race, 21st to 23rd, would become Cole.

Q. Now, Dr. Klite, referring your attention to Exhibit 212, can you identify Exhibit 212 for us? A. Yes, Exhibit 212 depicts what the boundaries would have been in 1955 prior to boundary change recommended in the Board minutes.

Q. And what is the source of the boundary lines depicted on Exhibit 212? A. Several sources, partly from the Board minutes, partly from newspaper maps, and partly from the defendants' exhibits dealing with the same subject.

Mr. Greiner: Your Honor, at this time we would offer Exhibit 212 into evidence.

The Court: Do the intervenors have a copy of this?

Mr. Brega: I can't seem to locate a 212, Your Honor.

The Court: Well, show them the original then.

Mr. Brega: Oh, I found it; thank you.

Mr. Creighton: Your Honor, the defendants object to this exhibit on the ground that an insufficient foundation has been made, specifically that this depiction of the optional area for Cole, Smiley, and Morey west of York depends upon an interpretation of the January proposal to the Board, which is inconsistent with the June action of the Board, both [98] of which is Exhibit 333.

In June, the Board canceled all of that optional area west of York with no mention of its eastern limit.

It is our position, Your Honor, that that block and a half sliver remained there throughout this period and that there was not a two-stage, piecemeal—

The Court: What block and a half sliver?

Mr. Creighton: Speaking of from the alley between I believe it is Williams and High, running up a ways north, and then shifting over to the alley between High and Race. Now, it varied from a half block to a block and a half.

It is our position that this does not accurately represent the situation in 1955 because that sliver remained.

The Court: Well, what does 332 show?

Mr. Creighton: Exhibit 332 is the proposal made to the Board in January, Your Honor.

The Court: And it was never adopted?

Mr. Creighton: It was not adopted. The actual Board action on this matter was taken in June, and it simply says all of that optional area west of Yok, which by I think equal inferential methods means that there was no change from 1936, as this

witness testified, down to 1956, when a somewhat different portion of the optional area was canceled.

Mr. Greiner: Well, Your Honor I think counsel has made my point for me. Exhibit 332 can support either of two [99] inferences, and what we are urging here is one inference, and I assume counsel will urge the opposite inference, either in cross-examination or in the presentation of their case. There is no better evidence than Exhibit 332 as to what the situation had been prior to the change which actually took place.

Mr. Creighton: Well, there is better evidence. There is the Board's action.

The Court: We have taken 332 in evidence already, haven't we?

Mr. Greiner: Yes, Your Honor.

The Court: And this is 212?

Mr. Greiner: What we're talking about now is 212, Your Honor, that's correct.

The Court: And for what purpose are you offering 212?

Mr. Greiner: 212 is offered, Your Honor, to show what the boundaries were in fact immediately prior to the change in 1956. 212 shows the boundaries in 1955.

The Court: Do you object to it for that limited purpose?

Mr. Creighton: The objection is that an insufficient foundation has been laid. These changes are made by Board action and Board action alone, and there is no showing that there was any Board action between 1952 and 1955. There would have to

be Board action to have made these piecemeal changes in the boundaries.

[100] Mr. Greiner: Your Honor, it seems to me what counsel is objecting to is 211-B rather than 212. 211-B is already in evidence.

The Court: True. Let me see it, would you please, Exhibit 212, I mean.

Well, I will withhold a ruling on it until it's clarified a little more. I don't know.

Mr. Brega: Your Honor, we offer an additional objection—

The Court: I am not going to receive it now.

By Mr. Greiner:

Q. Dr. Klite, have you prepared an exhibit which reflects the change which was actually implemented in June of 1956? A. Yes.

Q. And is that Exhibit 212-A? A. Yes, 212-A shows the difference in the boundaries between 212 and I believe 213.

Q. And what is the basis of 212-A?

The Court: Which exhibit is he identifying now?

Mr. Greiner: It's the overlay, Your Honor.

A. 212-A is an overlay which shows the area that was apparently ceded to Cole in 1956.

Q. And what is the basis of 212-A? A. Exhibit 332 and 333.

Q. And Exhibit 333 depicts the action actually taken by [101] the Board? A. That's correct.

Q. And does Exhibit 212-A accurately depict the change described in 337? A. It depicts the change described in 332.

Q. What is the difference in the change described in 332 and that actually enacted in 333? A. In defining the area to be ceded to Cole in Exhibit 332, the proposal in January—it was specifically stated that the western boundary was Race Street. In the final action, the western boundary is not indicated. It is just stated that the area west of York will be ceded.

Mr. Greiner: Well, Your Honor, we would again then offer Exhibits 212 and 212-A as depicting the boundary change that was actually made in 1956.

Mr. Creighton: Same objection, same basis.

The Court: Well, do you deny that Exhibit 333 does show the rest of the picture? It seems to me that there is a derivation here that may have some value from their standpoint.

Mr. Creighton: 333 is what the Board did. It was the minutes of the Board action.

The Court: All right. Then you can argue your inference and they can argue theirs. We will receive these. If you say it's a false conclusion, why, you're free to urge [102] it. But, I don't see why they can't offer it for the purpose for which they are arguing in any event.

So, we will receive it.

(Whereupon, Plaintiffs' Exhibits 212 and 212-A were received in evidence.)

Q. Dr. Klite, referring to Exhibit 212-A, would you please describe the changes as they were proposed pertain-

ing to Cole and Smiley? A. Yes, the area from 34th to 23rd, York to Race, which had been optional Cole-Smiley, would be ceded to Cole. The area 21st to 23rd, York to Race, which had been optional Morey-Cole, would be ceded to Cole.

Q. Now, would you refer to Exhibit 215, and in 1955, Doctor, first, as to Cole Junior High School, what was the capacity of Cole?

The Court: Haven't we had that before?

Mr. Greiner: No, Your Honor, I don't believe so.

A. 1955, capacity was 1908.

Q. And what was the enrollment at Cole? A. 1401.

Q. And what was the capacity utilization at Cole? A. 74 percent.

Q. Referring to Exhibit 401, what was the racial composition? A. Cole was 36 percent Negro. The Hispano percentage [103] is not known.

Q. Now as to Cole and Smiley in 1956, Doctor, after the change was implemented, as to Cole what was the capacity? Had it changed? A. I have no indication that it had.

Q. So referring to Exhibit 215, the capacity of Cole then was what? A. Still 1908.

Q. And what was the enrollment at Cole after the boundary change? A. 1540.

Q. And what was its capacity utilization? A. 81 percent.

Q. And what was its racial composition? A. It was 40 percent Negro.

Q. Did any empty seats remain at Cole after the boundary change in 1956? A. Yes, the difference between the capacity of 1908 and enrollment of 1540 is approximately 375 seats.

Q. Now with regard to the other school affected, Smiley Junior High School, in 1956 what was the capacity of Smiley? A. 1446.

Q. And what was its enrollment? A. 1479.

Q. And what was its capacity utilization then? [104] A. 102 percent.

Q. Doctor, referring to Exhibit 215, in 1958 was there another addition built at Smiley? A. Yes, there was.

Q. How many spaces were added?

The Court: What year is this now?

Mr. Greiner: 1958.

A. We have the addition of about 85 spaces.

Q. Now, at the time those spaces were added to Smiley, were there any empty spaces still available at Cole, referring to Exhibit 215? A. Yes.

Q. How many empty spaces? A. Approximately 250.

Q. Again referring to Exhibit 401, Doctor, in 1958, can you give us the Negro composition at Cole? A. I'm sorry, Mr. Greiner. Exhibit 401 does not list 1958 data.

Q. Do you have it for 1959? A. No, sir.

Q. So we don't know then what the racial composition was at Cole and Smiley in 1958? A. No, we do not.

Q. I'd like next, Doctor, to have you identify what's been marked in evidence as Plaintiff's Exhibit 402. [105] A. Exhibit 402 is a small blueprint copy of a 1951 elementary school boundary map of the district.

Q. And does Exhibit 402 depict the boundary lines for Columbine Elementary School in 1952? A. It depicts the boundaries after January 1952, yes.

Q. And what is the source of Exhibit 402? A. This was obtained from the defendant.

Mr. Greiner: Your Honor, I believe the authenticity of 402 has been stipulated and we would offer it into evidence at this time.

Mr. Ris: We have so stipulated, yes, sir.

Mr. Brega: No objection.

The Court: Very well, it will be received.

(Whereupon, Plaintiffs' Exhibit 402 was received in evidence.)

Q. Next, Dr. Klite, will you please refer to Exhibit 371. Can you identify Exhibit 371 for us? A. Yes, this is a copy of the official School Board minutes, January 16, 1952.

Mr. Greiner: Your Honor, we offer Exhibit 371 at this time.

Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: It will be received.

[106] (Whereupon, Plaintiffs' Exhibit 371 was received in evidence.)

The Court: This is 1952, January?

The Witness: 1952.

Q. Referring to Exhibit 371, Doctor, does that exhibit purport to show the establishment of optional attendance areas around Columbine? A. Yes, it does.

Q. Will you please describe those optional attendance areas? A. The Board minutes state that "In order to eliminate eight double sessions and alleviate crowded conditions at Columbine, the principals of Columbine, Harrington, and Stedman recommended the following boundary changes: Creation of an optional zone between Columbine

and Stedman, between East 26th and East 32nd, between Colorado Boulevard and Steele, and an estimate then of the 100 boys and girls to be transferred to Stedman by use of this option."

Q. Those were to come out of the optional area? A. Yes.

"2. That an optional district be established between Columbine and Harrington and then a description of the boundary between that optional zone," which is also depicted on Exhibit 402, the map. It is an area bordering both schools. And then the statement: "It is felt approximately [107] forty-five children will be transferred to Harrington by use of this option." Then a summary of the effect of the boundary changes that will "1. Eliminate eight double sessions from Columbine, changing the membership from 660 to 500. 2. Harrington School will absorb approximately 40 boys and girls resulting in school membership of 509. 3. Stedman School will absorb approximately 100 boys and girls from Columbine, resulting in a school membership of approximately 700. Stedman School will thus be filled to capacity with no double sessions."

And then a statement that the Board passed the motion.

Q. Now, referring to Exhibit 406, Doctor, is 406—what is the source of 406? Can you identify it for us? A. Yes, Exhibit 406 shows the capacity utilization and the Negro percent enrollment at Columbine, Harrington and Stedman, through the years 1949 through 1953. They were taken from the principal's reports, the same data from which Exhibit 401 was taken. The capacity data was based on the membership data in those exhibits.

Q. In the principal's reports? A. Yes.

Q. What are the principal's reports again that you have reference to? A. These are ledger sheets of each school

recorded the [108] first semester and second semester listing the membership and attendance at the school, the Negro percent, white percent, foreign-born white percent, Oriental percent that were calculated up until 1956.

Mr. Greiner: Your Honor, we offer Exhibit 406.

Mr. Creighton: I believe there is a last-minute change in that exhibit. May we look at it?

Mr. Greiner: Certainly.

Mr. Ris: May I voir dire for a moment?

The Court: You may.

Voir Dire Examination by Mr. Ris:

Q. Dr. Klite, with regard to Harrington School, prior to 1950, isn't it true that the capacity of that school was 240 and not 300? A. The 300 figure is based on the following calculation, Mr. Ris. The 1955 site study which I believe is in evidence for the East High area, Exhibit 396, shows an addition to Harrington in 1950 of 150 spaces. In addition, Superintendent Oberholtzer's notes of 1952 show at that time a capacity of Harrington of 450. Simple subtraction then would indicate that the capacity of Harrington was 300 prior to the addition.

Q. I understood you got your capacities directly from the principal's reports for each of these years? [109] A. No, the capacities are not listed on the principal's reports.

Q. Well, then, you have arrived at the 300 capacity rather than 240 for 1949 and '50 by comparing later documents and doing mathematical comparisons? A. Yes, that's correct.

Mr. Ris: If the Court please, we object to this on the ground of incompleteness and inaccuracy, lack of foundation.

The Court: Would you say that these figures are just guesses?

The Witness: If I might say something, there are several figures published each year for enrollment, membership, capacity. These vary on the basis of a lot of different formulas, and one can find examples of many different schools or the same school in a given year. I think this is the source of a lot of differences in figures we have had. This is, I think, a reasonable calculation based on the site study need, which shows the size of the addition to Harrington in 1950 of 150 pupils and Superintendent Oberholtzer's notes which I believe is also numbered as an exhibit which show that the capacity in 1952 was 450. Therefore, a guess would be that the capacity prior to that addition was 300.

[110] *Direct Examination by Mr. Greiner* (Continued):

Q. What year was the addition constructed? A. 1950.

Q. Was there any indication of the publications of the School District that there was a further addition after 1950, before 1952? A. Not to my knowledge.

The Court: This capacity utilization figure, this is the same figure?

The Witness: That is correct, the same tables from which the racial and ethnic data were obtained also list the average membership at that time. That over the capacity of the building is the percent capacity.

The Court: Do you have reason to believe these are inaccurate projections or estimates?

Mr. Bis: Yes, we have every reason to believe that the first two for those first two years are in-

accurate. May I ask another thing here? Referring to Plaintiffs' Exhibit 24—

The Court: Is there any other source of information that will give you the exact figures?

Mr. Ris: Well, what I am referring to here are some additional construction dates in one of their exhibits that I would just like to ask about.

[111] The Court: All right. I mean, do you have the source of information that would furnish these answers?

Mr. Ris: Yes, our own figures from the defendants' records are that it was 240 until 1952.

Mr. Greiner: I think the problem is there is a discrepancy. We are all working with the defendants' records and they say two different things.

The Court: Are yours projections also?

Mr. Creighton: Your Honor, we have had this exhibit in its present form for several days and we have checked it carefully—

The Court: That isn't what I asked you. Are yours projections also? These particular figures apparently were not kept contemporaneously, so you have had to reconstruct them, too.

Mr. Creighton: We go back to the room counts made year by year.

The Court: You have had to reconstruct them also?

Mr. Creighton: Yes.

The Court: All right, well, we will take this and we will take yours also.

Mr. Creighton: Fair enough.

(Exhibit 406 was received in evidence.)

[112] Q. Dr. Klite, referring to Exhibit 406, in the year 1951, what does 406 state as to Columbine Elementary School, its capacity utilization? A. Columbine was at 114 percent capacity.

Q. What was its percent Negro composition? A. Twenty-four.

Q. And as I recall the board minutes indicated that it was on double sessions? A. Yes, they did.

Q. Now, referring to Harrington Elementary School, one of the other schools affected by the establishment of the optional zones, in 1951 what was its capacity utilization? A. 104 percent.

Q. And what was its percent Negro? A. Zero.

Q. And was it on double sessions according to the minutes? A. The minutes made no record that it was.

Q. Now, again, in 1951, prior to the establishment of the optional zones, what was the capacity utilization at Stedman, according to Exhibit 406? A. 95 percent.

Q. What was its percent Negro composition? A. Zero.

Q. Do the minutes indicate it was on double sessions? [113] A. There is no indication.

Q. Now, Stedman was to receive approximately 100 students under this change? A. That was the estimate in the board minutes.

Q. Now, again referring to Exhibit 406, after the optional zones were put into effect, what was the capacity utilization at Stedman? A. It was 116 percent capacity.

Q. How many students did Stedman actually receive? A. Approximately 120.

Q. Did the board minutes, Exhibit 371, indicate whether or not Stedman could absorb a given number of students without going on double sessions? A. I believe, as I read

it, the statement was that 100 students would fill Stedman to capacity with no double sessions.

Q. All right, and they got 20 more than they counted on? A. That's correct.

Q. Do we know whether or not that caused Stedman to go on double sessions? A. No, we don't.

Q. Now, what was the percent Negro at Stedman after the receipt of these additional 120 students? A. Zero.

Q. And what had it been prior to the change? A. Also zero.

[114] Q. And at Harrington, what happened to the capacity utilization at Harrington after the boundary change? A. It was at 120 percent capacity.

Q. And it had been what? A. 104.

Q. What happened at Columbine? A. It went from 114 prior to the boundary change to 109 the year after.

Q. Do you know whether or not the double sessions were in fact eliminated at Columbine? A. No, I do not know.

Q. Now, after the implementation of these optional zones, Doctor, what was the percentage enrollment of Negroes at Columbine? A. Thirty-one percent in 1952.

Q. And what had it been just prior to the change? A. Twenty-four percent.

Q. And did you give us the figures for Harrington before and after the change? A. No, Harrington remained zero percent Negro after the change.

Q. So that neither Stedman or Harrington then received any Negroes from these optional zones? A. There was one Negro enrolled at Harrington in 1952.

Q. Whereas there had been none prior? [115] A. Correct.

Q. Doctor, I would like to call your attention to Exhibit 408, which purports to be a boundary map. Can you identify

that for us? A. Yes, this is the northwest section of Denver, the elementary school boundaries in 1961, specifically outlining the Brown, Boulevard and Ashland Schools.

Q. What was the source of Exhibit 408? A. This is the official 1961 boundary map with the changes, with the embellishments described.

Q. The embellishments simply being the outlining of attachments? A. That's right.

Mr. Greiner: At this time, Your Honor, we would offer Exhibit 408.

The Court: Any objection to 408?

Mr. Ris: No, sir.

Mr. Brega: No objection.

The Court: It will be received.

Mr. Greiner: Thank you.

(Plaintiffs' Exhibit No. 408 was received in evidence.)

Q. Initially, Dr. Klite, I would like to call your attention to Exhibit 404. Please identify 404. A. Exhibit 404 lists for Boulevard, Brown and Ashland [116] in the 1961 school year and the 1962 school year the Anglo and Hispano number and percent enrollment, the total enrollment and the capacity of those schools.

Q. And what is the source of that data? A. The source of the racial and ethnic data are the 1961 and 1962 school-by-school breakdown provided us by the defendants. The total enrollments are also obtained from the same sheets and the capacity data is from the 1962 planning report.

Mr. Greiner: Your Honor, we will offer Exhibit 404.

Paul D. Klite—for Plaintiffs—Voir Dire

The Court: Do you object?

Mr. Ris: May I voir dire briefly?

The Court: Very well.

Voir Dire Examination by Mr. Ris:

Q. Your capacity data, Doctor Klite, you relied on the '62 planning report, right? A. Yes.

Q. But you don't use the racial enrollment shown in that report? You use some other figures? A. There is no racial enrollment shown in that figure.

Q. Does it show any figures at all? A. Yes, it does.

Q. Did you use those figures? A. No.

[117] Q. So, you used the report for one purpose and not the other? A. That's correct.

Q. Where did you get the other figures? A. The figures for enrollment were taken from the same sheets as the ethnic and racial data.

Q. Where did you get those? A. Obtained from you.

Q. What source? A. I think they are marked as exhibits. They are May 1962, I think.

Q. I am not being facetious— A. Right, these are the racial and ethnic composition by school for 1961 and 1962.

Mr. Greiner: He has reference to 398 and 399.

Mr. Ris: May we check those for a minute?

The Court: These are the principal's estimates?

The Witness: No, sir, these are—these are published—

The Court: They didn't count them in those days?

Mr. Greiner: They started counting again, Your Honor.

Mr. Ris: Now, just a minute, we don't know that they counted. These were estimates, all of these

principal's things. There has never been a census per se and counsel is volunteering [118] that. I don't think it is evidence.

The Court: Well, I think the administration itself indicated that these are pretty accurate counts, these informal counts of the principals, at the other hearing. That was the testimony.

Mr. Greiner: Your Honor, I might add that the authencity of 398 and 399 have been stipulated.

Mr. Ris: We granted the authenticity of 405, too. We only object to them taking figures that prove their point from one document and other figures from another document, instead of taking them all from the same document.

The Court: That's a familiar process in the law.

Mr. Ris: Well, I know it is.

The Court: You take depositions of parties by adverse parties and they take a portion of it as an admission. The rest of it they leave it to the other side to introduce. It is self-serving data. They are not bound by it. That's the advantage of being an adverse party. You don't have to take the works, you know. As I say, it is very familiar. It is everyday practice. You do it all the time.

Mr. Ris: I want to make a record, though, is all, as to what he has done and the reason for it, that's all.

The Court: All right, we will note your objection, but I don't see any reason why they can't use this source for one purpose and perhaps use another source, unless you think— [119] unless the other source is wholly untrustworthy. Are there differences in the numbers there?

Mr. Ris: They run as much as about 7 percent.

The Court: Very well, you can point those out. We will have that in evidence, 404.

(Plaintiff's Exhibit No. 404 was received in evidence.)

Direct Examination by Mr. Greiner (Continued):

Q. With reference to Exhibit 404, Dr. Klite, in 1961, what does it show being the racial composition for Boulevard Elementary School? A. Boulevard is 59 percent Anglo, 40 percent Hispano.

Q. And what was its capacity utilization in 1961? A. Eighty-five percent.

Q. Now, with respect to Brown Elementary School, what was its racial composition in 1961? A. It was 98 percent Anglo, 1 percent Hispano.

[1120] Q. What was its capacity utilization? A. 95 percent.

Q. And with respect to Ashland Elementary School in 1961, what was its racial composition according to 404? A. 61 percent Anglo, 37 percent Hispano.

Q. And what was its capacity utilization? A. 99 percent.

Q. Were any of these three schools then at overcapacity in 1961? A. No.

Q. Now referring to Plaintiffs' Exhibit 20, Dr. Klite, which is in evidence from the preliminary injunction hearing, there is census tract data, is there not, set forth in the map in the back of Exhibit 20? A. Yes.

Q. Would you find that, please, and identify the map that you're speaking from? A. The Map Number 4 in the appendix identifies the Spanish surnamed population on the basis of 1960 census tracts.

Q. What does it show as to the Spanish surnamed population in this area? A. You mean the area of Ashland, Boulevard and Brown?

Q. Yes, sir. A. It shows that census tract 6 falls roughly within [121] the Boulevard Elementary area and it is ten to twenty-five percent Hispano.

Q. What about Census Tract 4B? A. That is very roughly within the Ashland area and that is also the same percentage Hispano.

Q. What about Census Tract 5? A. That's very roughly within the Brown Elementary area and that is 0.1 to ten percent Hispano.

Q. Now, was there an administration proposal to effect a change in the attendance areas of Brown, Boulevard and Ashland? A. Yes.

Q. Referring to Exhibit 405, would you identify 405 for us, please? A. 405 is the 1962 study on pupil populations, school boundaries, pupil transportation and school building.

Mr. Greiner: Your Honor, the authenticity of 405 has been stipulated and we would offer it in evidence at this time.

Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 405 was received in evidence.)

Q. Can you find in Exhibit 405, Doctor, a reference [122] to the proposed change at Brown, Boulevard and Ashland? A. This exhibit on Page 7 of the elementary school section indicates proposed building change at Boulevard to close and demolish the north section of the school. It does not specifically list the boundary changes.

Paul D. Klite—for Plaintiffs—Voir Dire

Q. And what was the effect of the razing of a portion of Boulevard to be upon its capacity? Is this reflected in 405? A. Yes, it is shown that the adjusted building capacity will be 375, a decrease of 240 spaces.

Q. Now, were there also boundary changes proposed with respect to adjustments in the boundaries for those three schools? A. Yes.

Q. Where do they appear? A. Well, they appear in two sources that would be quoted: one is Plaintiffs' Exhibit 52 and the other is 62, official boundary map of the Denver Public Schools, which shows the area of change.

Q. Now, have you prepared an exhibit, Doctor, which reflects the boundary changes? A. Yes, I prepared an Exhibit 408-A which shows the areas taken from and ceded to Boulevard School.

The Court: What's the number of this, now?
The Witness: 408-A.

[123] Q. What's the source of that data? A. It is a comparison of the 1962 and 1961 official school boundary maps.

Mr. Greiner: Your Honor, we would offer 408-A at this time. That's the overlay.
Mr. Ris: May I voir dire, please?
The Court: Yes.

Voir Dire Examination by Mr. Ris:

Q. Dr. Klite, this 1962 change was a change involving all three schools, Ashland, Boulevard and Brown, was it not? A. That's right.

Q. And you merely show the portion pertaining to Boulevard and Brown? A. That is correct.

Mr. Ris: No objection to what it shows. It just doesn't show the whole picture.

The Court: 408-A will be received.

(Whereupon, Plaintiffs' Exhibit 408-A was received in evidence.)

Direct Examination by Mr. Greiner (Continued):

Q. Would you describe, please, Dr. Klite, from Exhibit 408-A the areas affecting Brown and Boulevard and Ashland Schools as depicted on the exhibit? [124] A. A one-block wide area on the western edge of Boulevard and approximately a three-block-wide area on the northern area were ceded to Brown. A triangular-shaped area between the Valley Highway and the Platte River that had been in the Ashland area was ceded to Boulevard.

Q. Now, as to the capacity at Boulevard, what was the effect of razing a portion of the school? A. The capacity for the school was lowered by 240 students.

Q. And what was the capacity utilization at Boulevard at that point? A. In 1962?

Q. Yes. A. There were 387 students or 103-percent capacity.

Q. Now, again, after the boundary changes which we have reference to, what was the capacity utilization of Brown? A. It also was 103-percent capacity.

Q. And what was it at Ashland? A. 91 percent.

Q. Now, with reference to the racial composition, what was the racial composition at Brown before and after the change? A. Brown was 98-percent Anglo in 1961 and 88-percent Anglo in 1962.

[125] Q. And what was the racial composition at Ashland before and after the change? A. It did not significantly change.

Q. It remained approximately what? A. 60 percent.

Q. And what was the racial composition then of Boulevard before and after the change? A. It went from a 59-percent Anglo school in 1961 to a 39-percent Anglo school in 1962.

Mr. Greiner: Pardon us for a moment, Your Honor. We have a new series of exhibits.

The Court: Wouldn't it be well to submit all of the proposed exhibits to counsel so that they can read them ahead of time?

Mr. Greiner: Oh, we have, Your Honor. They have had them for weeks. I just want to get these out of the way.

The Court: These are all marked?

Mr. Greiner: Yes.

Q. Dr. Klite, next I'd like to call your attention to what's been marked for identification as Plaintiffs' Exhibit 34, which is in evidence from the preliminary injunction hearing. That's the Policy 1226A. A. Yes, it is.

Q. Having to do with the assignment and transfer of [126] pupils? A. Correct.

Q. In 1226A the—does it define the administration policy of limited open enrollment? A. Yes, it does.

Q. Is there any integration requirement or condition stated in 1226-A, the limited open enrollment policy? A. No, there is not.

Q. Next, Doctor, I'd like to call your attention to Exhibit 99. Can you identify 99, please? A. Yes, Exhibit 99 is from the Division of Personnel Services of the Denver Public Schools and shows the school transfer data for the limited open enrollment, LOE, policy as of September 16,

1966. It lists the receiving schools and the number of transfers from the sending schools.

Mr. Greiner: Your Honor, I believe 99 is in evidence from the summer hearing, but in any event, if it's not, we would offer it at this time.

Mr. Creighton: It has been received, Your Honor.

The Court: Very well.

Q. Doctor, next I'd like to call your attention to Exhibit 100, which was put in evidence at the summer hearing. Would you please tell us what Exhibit 100 depicts? A. Yes, also for the limited open enrollment policy on September 16, 1966, it shows the ethnic groups of each [127] of the students who transferred.

Q. Was this by receiving school? A. Yes.

Q. Doctor, have you prepared an exhibit which is an interpolation of the data received in the exhibits—and the data depicted in Exhibit 99 and Exhibit 100 which purports to show the integrating effects or the nonintegrating effects of transfers under LOE in September, 1966, school year? A. Yes, I have. Exhibit 359.

Q. Would you explain, please, how 359 was constructed? A. Yes. From Exhibit 99, for example, it shows that Swansea received one child from Stedman; Exhibit 100 shows that Swansea received one Negro child. Obviously, the child that had transferred from Stedman to Swansea was Negro. For other schools that received multiple students from multiple schools, one can establish a range of transfers. For example, Stevens School received two children from Columbine, three children from Ebert, one from Montclair, one from Stedman, and four from Teller. Of these eleven students, then, six transfers from schools less than 50-percent Anglo in 1966 and five from schools more

than 50-percent Anglo. Exhibit 100 shows that of the eleven students who transferred to Stevens, ten were Anglo, one was Negro. To construct, then, the maximal and minimal integrating effect [128] of those transfers, on Table 1 of Exhibit 359, it is assumed that the one Negro who transferred to Stevens was integrated by this process, that is, he transferred from a minority school to an Anglo school. And that leaves then five places from Anglo schools that Anglos would have transferred from and, finally then, five Anglos would have transferred from minority schools.

Q. Those would have been non-integrating transfers? A. Yes, those would have been.

Now, assuming in Table 2 of the least possible integration, one would assume that the most possible Anglo students transferred from minority schools; in other words, six. And that would leave four who then transferred from one Anglo school to another Anglo school. And you would assume that the Negro child had already been integrated. So, using these figures in Exhibit 99 and 100, one can establish the range of transfers by racial and ethnic data, sometimes with pinpoint clarity and other times estimates.

Mr. Greiner: Your Honor, we offer Exhibit 359 at this time.

Mr. Jackson: May I voir dire, Your Honor?

The Court: Yes.

Voir Dire Examination by Mr. Jackson:

Q. Dr. Klite, on Exhibit 359 you have a heading, [129] "Anglo Schools" and "Minority Schools." Would you tell us what those mean? A. Yes, these were 1966 data. The school that was over 50-percent Anglo in 1966 was considered an Anglo school. A school that was less than 50-percent Anglo was considered a minority school.

Q. And that is the sole determining factor as to whether you would call it an Anglo school or a minority school? A. For the purpose of this exhibit, yes.

Q. In terms of minority transfers, did you treat the Hispano and Negro children the same? A. Yes.

Q. You made no distinction between a Hispano child transferring into a school that had less than 50-percent Anglo as opposed to a Negro child transferring into the same kind of school? A. That's correct. There are eight columns on this chart when you consider only two groups. To consider three groups would have caused too many columns to make it meaningful.

Q. And you don't, as I believe you have testified, have any figures as to the exact racial composition of these transfers, in some cases where there was only a single child transferring, you felt you could determine the racial or [130] ethnic composition, but otherwise it was guesswork and you were making estimates? A. A range of estimates, that's correct.

Mr. Jackson: We object, Your Honor, on lack of foundation and also as to the classification admittedly utilized by the witness for which there is no other foundation.

(Whereupon, Plaintiffs' Exhibit 359 was received in evidence.)

Direct Examination by Mr. Greiner (Continued):

Q. Dr. Klite, referring then to Exhibit 359, can you tell us what the range of Anglo transfers from minority schools to Anglo schools was as depicted in Table 1 and Table 2 of that exhibit? A. Yes, between 58 and 77 Anglo elemen-

tary students transferred from a minority school to an Anglo school.

Q. Between 58 and 77 out of a total of how many Anglo transfers? A. Approximately 125.

Q. How many Anglos transferred to minority schools? What is the range? A. The range is from 1 to 2.

[131] Q. Out of, again, 128 Anglos? A. Yes, 127, I believe.

Q. Out of 149 minority transfers, depicted on the exhibit, what was the range of transfers to Anglo schools by minority students? A. 14 to 27.

Q. And that is approximately what percent? A. Ten to 20 percent.

Q. And with respect to transfers of minority students to minority schools under limited open enrollment that school year, what is the range of the number of such transfers? A. Minority students transferring from one minority school to another?

Q. Yes, sir. A. About 70 percent of the students, 110 or 111.

Q. Now, what does Exhibit 359 show for the total participation at the elementary level in this limited open enrollment that year? A. I think those figures show better on Exhibit 99 and 100. It would show that there were a total of 267 elementary participants in the limited open enrollment policy.

Q. Approximately how many elementary school students were in the district at that time? A. Approximately 50,000.

[132] Q. Now, considering, Doctor, the range of the integrating transfers which you have described, on the basis of Exhibit 359, what is the maximum number of students who participated in an integrating transfer either Anglo or minority students under LOE that year? A. 29.

Q. Next, Doctor, I'd like to call your attention to what's been marked as Exhibit 87. Will you identify that for us, please? A. Yes, that is a document from the office of the Assistant Superintendent for Personnel Services, Denver Public Schools, and it lists the eligible open enrollment elementary schools, junior high schools, and senior high schools for the school year, 1968.

Mr. Greiner: Your Honor, Exhibit 87—the authenticity of Exhibit 87 has been stipulated to by counsel. And we would offer it into evidence at this time.

[133] Mr. Ris: We did so stipulate.

The Court: Very well, it will be received.

Mr. Brega: No objection.

(Plaintiffs' Exhibit No. 87 was received in evidence.)

By Mr. Greiner:

Q. Directing your attention then to Exhibit 87, Doctor, how was this report by the school organized? A. The eligible open enrollment spaces for the elementary schools are organized by high school area. They show that there were no spaces in the Abraham Lincoln area. They show that there were no spaces in the John F. Kennedy area. There were 10 spaces in the George Washington area. There were no spaces in the Thomas Jefferson area.

Q. Now, is that at all levels or is that only at the elementary levels? A. That's elementary.

Q. Now, where does Exhibit 87 show that there were spaces at the elementary level that year? A. There were spaces in four elementary schools in the East High area, four elementary schools in the Manual area, five elementary

schools in the North area and three elementary schools in the West area.

Q. Now, at the elementary school level, what were the total number of spaces open for limited open enrollment that year? [134] A. 365.

Q. And what was the total number of openings at the junior high school level? A. 635.

Q. And do you have a figure there for the senior high school? A. 120.

Q. What was the total number of openings then that were available for limited open enrollment in September of '68? A. 1120.

Q. Next, I would like to call your attention to Exhibit 89, Doctor, which is in evidence from the summer hearing. Just for reference, could you identify it for us? A. Exhibit 89 is a list of ten schools who have several things in common.

Q. What are these common characteristics? A. They have no limited open enrollment openings announced. They were under capacity. They were predominantly Anglo and they were receiving students by bus.

Q. Now, this is at what point in time, Doctor? A. September 1968.

Q. Does the Exhibit 89 show how many children were being bussed into these ten schools? A. Yes.

Q. Could you give us those figures, please? [135] A. 1,071 Anglos, 121 Negroes.

Q. Does Exhibit 89 reflect the total amount by which these schools were under capacity? A. 482 spaces.

Q. And how many spaces did they announce were available for limited open enrollment? A. Zero.

Q. And what was the average Anglo enrollment at these schools? A. 93 percent.

Paul D. Klite—for Plaintiffs—Direct

Q. Now, calling your attention, Doctor, to Exhibit 90, which is also in evidence from the summer hearing, what does Exhibit 90 depict? A. Exhibit 90 lists seven elementary schools who have also certain things in common. Number one, they have limited open enrollment spaces. Number two, they were for the most part under capacity. Number three, they were predominantly minority enrollment and Number four, they were not receiving children on the bus.

Q. Now, what does Exhibit 90 show the schools to be under capacity by, what total number of spaces? A. 270.

Q. And how many limited open enrollment openings were announced for those schools? A. 203.

[136] Q. And how many—what was the total number of limited open enrollment openings at the elementary level for the whole district? A. I believe I testified 365.

Q. So, 203 of the 365 openings were in the schools depicted on Exhibit 90? A. Yes.

Q. What was the average Anglo enrollment at those minority schools? A. Twelve percent.

Q. Could you list those for us, please? A. Crawford, Ebert, Gilpin, Wyatt, Harrington, Smedley, Elmwood.

Q. Dr. Klite, I would like now to ask you a series of questions regarding achievement in the Denver Public Schools. Would you first refer, please, to Exhibit 82, and would you identify the exhibit for us, please? A. This is a 1968 study entitled, "The Denver Public Schools Look at Themselves," from the Division of Instructional Services.

Mr. Greiner: Your Honor, the authenticity of the exhibit has been stipulated by counsel and we would offer it in evidence at this time.

[137] Mr. Ris: It is so stipulated.

The Court: It will be received.

(Exhibit No. 82 was received in evidence.)

Q. Dr. Klite, Exhibit 82 is a report of what? A. The results of the city-wide testing, achievement tests, in 1968.

Q. Now, how were those tests reported, test results reported?

Mr. Ris: If the Court please, I am going to continue to object. All he has been doing is reciting from these exhibits. They either speak for themselves or else this witness has no expertise on them at all. It is just going on and on, his own discussion concerning these. Either they are in and in for all purposes—

The Court: Well, I suppose he could read them and interpolate some.

Mr. Greiner: Your Honor, the purpose—

The Court: Do they really show the conclusions to be drawn from them from the mere reading?

Mr. Ris: Well, either they do or this witness is not qualified as an expert to interpret them, that's the point.

The Court: Well, he has studied them, at least, and I suppose counsel could do it in argument, you know.

Mr. Ris: Well, that's—

[138] The Court: We often do this, I think. We receive the exhibit, but we let—particularly, if it is a narrative report, we permit comment on some portions of it.

Mr. Ris: I am sure that's true with respect to the person that prepared it, but here is something this man never even prepared.

Mr. Greiner: Your Honor—

The Court: I don't know if it would be any better

if he had summarized his old testimony as an expert. Undoubtedly, he could have.

Mr. Ris: He is not an expert.

The Court: Put in a summary report.

Mr. Ris: He was a doctor of medicine, not a mathematician or statistician or anything.

Mr. Greiner: Your Honor, if I might speak to the objection, the purpose of a series of questions, this being the first of which, is simply to familiarize the Court with the methods used, the terminology used, in these reports, and what the witness is going to testify to are the meanings of such terms as median, the first quartile, the third quartile, and so forth. These all appear in the exhibit.

The Court: Well, is he peculiarly well fitted to study these achievement tests and reach these conclusions? What is his background?

Mr. Greiner: We are not asking him to reach any [139] conclusions with regard to these test results, merely to state what these exhibits show.

Now, these exhibits are hundreds of pages long and we thought that it might be more convenient if we could simply highlight certain facets of what these reports, which are prepared by the District itself, state and how they state it. We are not in an area of expert testimony.

The Court: Well, it is quasi-expert, I would say.

Mr. Ris: If the Court please, may I answer the Court's question as to this man's background? He is a doctor of medicine and expert in virusology and playing the cello, not in mathematics or statistics.

Mr. Greiner: May I ask a preliminary question of the witness, Your Honor?

The Court: Well, we might inquire as to the extent of his study of this.

Q. Dr. Klite, in the course of preparing for your testimony here for the trial, have you studied the reports of the Denver Public Schools on the achievement test results as published by the school system? A. Yes, I have.

Q. And have you studied those reports from the standpoint of familiarizing yourself with the terminology used in those reports, for example? A. Yes.

[140] Q. Now, with respect to the terminology used in Exhibit 82, could you tell us, please, the terms used to describe the means of reporting the achievement test results? For example, are the achievement tests results reported as a median score?

* * * * *

[144] * * *

By Mr. Greiner:

Q. Dr. Klite, again referring to Exhibit 82, does that exhibit report achievement test results? A. Yes, it does.

Q. Now, what are the methods used for reporting of those results? Is there, for example, a median test score reported? A. Yes, the school district has published every three years the results of their city-wide testing in quite similar form.

[145] Q. That's the triennial testing program? A. Yes, the results are reported both citywide and by school, showing the results of the test of each individual achievement test given, for example, spelling or language, and marking the four quarters of achievement. That is, the point up to which 25 percent of the children achieve is called Q-1.

Q. That's the first quartile? A. That's right. From that point to the point at which half the children have scored, that next point is called the median. Proceeding upward to the point at which 75 percent of the children are performing is Q-3, and then there is the upper 25 percent. These are reported in two forms consistently. One is a tabular form listing the Q-1, median, Q-3, et cetera, for each test, and the other is a bar graph, which depicts these three values and also shows the range of expectancy of achievement for the group tested. There are two ways of showing this data, the bar graph, either on the basis of grade level—that is, in the third month of the third year, one would expect or one would be at grade 3.3—or in a percentile basis, in which these quartiles are based on national ranging of students and schools.

Q. You mentioned the question of expectancy, Doctor. Do you know how these expectancies are determined? A. Yes, according to page 17 of Exhibit 82, the red [146] expectancy background, I am quoting from the chart, was determined by the inner quartile distribution of IQ scores of over 472 students tested in the 1968 survey.

Q. Exhibit 82 predicts the test results on a citywide basis? A. That is correct.

Q. There is no individual school data predicted in Exhibit 82 by school? A. No.

Q. Next, Dr. Klite, referring to Exhibit 372, tell us please what 372 depicts? A. Yes, for the 1968 achievement testing, the average of the nine tests administered to the fifth grade students at each school have been constructed. Those schools whose average median achievement was below the 20th percentile have been plotted on a map of School District No. 1. There are eleven schools indicated on the map.

Mr. Greiner: Your Honor, the authenticity of Exhibit 372 has been stipulated to and we would offer it into evidence at this time.

Mr. Ris: That's correct, 372 to 375 inclusive.

The Court: Very well, it will be received.

(Plaintiffs' Exhibit No. 372 was received in evidence.)

[147] Q. Dr. Klite, you said that these were schools achieving below the 20th percentile. What does that mean? A. That means that the 20th percentile is that level at which 80 percent of the children nationally score above, and 20 percent below.

Q. Now, with reference to Exhibit 372, Dr. Klite,—or, pardon me, if you will refer to Exhibit 376, did you prepare Exhibit 376? A. Yes, I did.

Q. What does it purport to show? A. It shows the percentage of the district's Anglo, Negro and Hispano children who attended the schools depicted in Exhibits 372 to 375.

Q. And what is the source of the data of 376? A. The racial and ethnic data for the 1968 school year.

Q. That was in evidence at the summer hearing as Exhibit S, is that correct? A. Yes.

Mr. Greiner: Your Honor, we would offer Exhibit 376 at this point.

Mr. Jackson: If the Court please, this is one of those exhibits I indicated earlier we would not have a definite reading on until this evening. The preliminary examination indicates we are going to have some difficulty with the figures represented on

this exhibit, so at this time [148] I would have to object on the basis of its inaccuracy.

The Court: Well, we can postpone ruling until you have had an opportunity to study it carefully.

Mr. Jackson: We will be ready to advise the Court in the morning on Exhibits 376, -77, -78, -79, -80, -81, and -82, which I believe then finish the achievement area.

Mr. Greiner: Your Honor, I do have one question of counsel. Exhibit 372 identifies certain schools that are a certain percentile of achievement. The accuracy of that has already been admitted, and all that 376 does it take those schools that are identified in 372 and on the basis of district-wide racial compositions depicts the percentage of Anglos, Negroes, and Hispanos who are in those schools. I don't see that it really has anything to do with achievement per se.

I wondered if we couldn't get through at least 376.

Mr. Jackson: If the Court please, the exhibit does not purport to show the racial or ethnic composition of each of those schools, but, rather attempts to relate the percentage of the Anglo, Negro or Hispano population in that school as a part of the school district as a whole.

Our difficulty with this exhibit is that our initial inquiry into this field brings us up with different figures and it is merely a mathematical computation which has not yet been made. It is related to achievement, as the title of the [149] exhibit shows, correlation with achievement scores.

The Court: Well, we will postpone a ruling on this until you have had an opportunity to study it.

Mr. Greiner: All right. Well, Your Honor, we are going to have the same problem. I think we can go ahead and put in 373, 374, and 375.

The Court: They have no objection to those.

Mr. Jackson: No objection to those, Your Honor.

The Court: They will be received.

(Plaintiffs' Exhibits Nos. 373, 374, and 375 were received in evidence.)

Q. And also 375—yes, 375, and at that point until we can utilize 376 I think we are going to have some problems, so I will go now then to Exhibit 373, Dr. Klite, and ask you what does that exhibit depict? A. This is a similar computation that was made for Exhibit 372. It shows the elementary schools whose average median achievement in the fifth grade in 1968 was below the 30th percentile.

Q. How many such elementary schools are there shown on Exhibit 373? A. I believe there are thirty.

Q. That's out of a total of how many elementary schools in the District? A. Ninety-two.

[150] Q. That's approximately a third then of the elementary schools? A. Approximately.

Q. All right, then, calling your attention to Exhibit 374, Doctor, what does 374 depict? A. This is a similar computation showing the schools below the 40th percentile level, the elementary schools.

Q. How many such schools are there of the elementary schools of the district? A. Approximately 45.

Q. So, that's approximately half of the elementary schools? A. Yes.

Q. Finally, Doctor, Exhibit 375, which is also a map, depicts what? A. This is a similar plot of those elemen-

tary schools whose fifth grade median acievement was above the 60th percentile.

Q. Above the 60th percentile means what? A. It means that level below which 60 percent of the students nationally tested.

Q. And how many such schools are there? A. Twenty-two.

Q. Twenty-two out of the ninety? A. Yes.

[151] Q. All right, now, I would like to call your attention to Exhibit 380, and, Your Honor, before going on, I would like to advise the Court that tomorrow we would go back to Exhtbit 376 and complete that portion of the witness' testimony.

The Court: All right.

Q. (Continued) With regard to Exhibit 380, Doctor, would you identify Exhibit 380, please? A. Yes, Exhibit 380 lists the mean achievement level at the 20 schools with the lowest Anglo population in the district in April of 1969, for the achievement test on paragraph meanings, which was administered to the second, third, fourth, fifth and sixth grades at those schools.

Q. Paragraph meanings is one of the subjects which were tested? A. That is the only test that appeared on the data sheets that we had, yes.

Mrs. Greiner: Your Honor, we offer 380, and as I understand it, counsel has a similar problem with 380.

Mr. Jackson: With 381, 382, and 380, yes, sir. The problem is not necessarily similar to the extent it is a mathematical problem. The question is the actual

source of the mean scores as they are shown on the exhibit.

I have been advised by the witness that the source data for 380 and 381, and, of course, by the same token, 382, [152] the package is available and may be examined, but it is not anything which we furnished to the plaintiffs and have not had a chance to examine, but will have it examined by this evening.

The Court: Well, what is the source of this data?

The Witness: These are reports on single sheets listing by school, by grade level, the results of this achievement test in 1969. The purpose of each of these—

The Court: Reports by the schools?

The Witness: Yes.

The Court: To whom?

The Witness: I don't know who they are addressed to. They were obtained from a member of the school administration. They are depicted to show the percentage of students who were more than two years behind at each level in this test, but they show the mean achievement score in that test.

* * * * *

[161] * * *

Q. Dr. Klite, you have previously testified today with respect to the location of new Manual High School, and would you tell us again, please, where new Manual is located in relationship to its school attendance area? A. It was in the eastern corner of this attendance area, one-half block from its boundary.

Q. Now, what was the situation with respect to Cole Junior High School, which you have testified to? A. Cole

was approximately four blocks from its eastern boundary.

[162] Q. And with respect to the location of Barrett Elementary School, which was in evidence from the summer hearing, where was Barrett located in relation to its school attendance area? A. I believe that its playground was on its eastern border.

Q. Referring to Plaintiffs' Exhibit 20, which is in evidence with respect to Gove Junior High School, was Gove located in the middle of its attendance area? A. This Map Number 6 is from a reproduction of the 1962 boundaries and shows that the Gove attendance area was an irregular one with a long arm extending from approximately Forest Street east of Colorado Boulevard to the city limits.

Q. What about the location of West High School in respect to its attendance area? A. I believe Exhibit 396, which is in evidence,—

The Court: That's Forest Street and what, for Gove?

The Witness: It's difficult to describe, Your Honor. I think, if you look at the map, it's much easier seen. It's a long arm that extends—approximately two blocks wide that extends towards the city limits and then enlarges.

The Court: Now, when did this occur? When does [163] it? Or when did it?

The Witness: It existed, we know, in 1960. It ceased to exist in 1964.

Q. Do we know how far prior to 1960 it existed? A. I'm not sure it was formed when Hill was built or not, in—

Q. When was Hill opened? A. —1956. I'm not sure.

Q. Doctor, with respect to the location of West High School and its attendance area, was there a time when West was located in the upper northeast corner of its attendance area? A. It is so depicted on the base map in Exhibit 396, the 1950 site needs study.

* * * * *

[181] * * *

By Mr. Greiner:

Q. Dr. Klite, I'd like to first call your attention to what are now in evidence as Plaintiffs' Exhibit 372. 372, as I recall it, depicts a group of schools whose achievement level is at the 20th percentile, is that correct? A. That's correct.

Q. Now, would you refer, please, to Exhibit 376, and this has now been designated as 376-R. And it indicates that it has been revised from Exhibit 376, which was just received in evidence.

And would you, first of all, explain to the Court and counsel what the nature of the revision is in Exhibit 376-R? A. The percentage of Anglo, Negro and Hispano has been rounded off.

Q. And what process did you use in rounding it off? [182] A. All values of .5 percent below on even numbers, were rounded off to a lower number, and above that, to the higher number.

Q. Now, was there also an additional source listed for Exhibit 376-R? A. Yes, Plaintiffs' Exhibit 242.

Q. And what is the source of the data reflected in Exhibit 376-R? A. These are the estimates of racial and ethnic composition of each school as indicated in Defendants' Exhibit S, with the alteration that the small number

of Indian, Oriental and, quote, Other, unquote, categories have been included with the Hispano, a practice which the school district from time to time practices.

Mr. Greiner: Your Honor, at this time we would tender 376-R and offer it in evidence.

Mr. Jackson: I have just one question, Your Honor. My copy of 376-R shows as the source Plaintiffs' Exhibit 241, I believe.

The Witness: That's incorrect, Mr. Jackson. It should be 242.

Mr. Jackson: I would make the same objection to this, Your Honor, as I previously made to 376.

The Court: Very well. We will receive it.

(Whereupon, Plaintiffs' Exhibit 376-R was received in evidence.)

[183] Q. Doctor, referring to Plaintiffs' Exhibit 376-R, with respect to the schools depicted on Exhibit 372, what does Exhibit 376-R show as to the racial composition of those schools? A. It shows that those eleven schools contain 3 percent of the city's Anglo children; 36 percent of the city's Negro elementary children; and 28 percent of the city's Hispano elementary children.

Q. Now, calling your attention to Exhibit 373, the map which portrays the schools achieving below the 30th percentile, how many such schools were there? A. I believe there were 30.

Q. Now, referring again to Exhibit 376-R, what does that exhibit reflect with respect to the racial composition of those 30th percentile schools? A. It shows that attending those 30 schools are 13 percent of the city's Anglo elementary children; 61 percent of the city's Negro chil-

dren, and 64 percent of the city's Hispano elementary children.

Q. Now, with respect to Exhibit 374, Dr. Klite, which portrayed schools achieving below the 40th percentile, how many such schools are there? A. I believe there were 45.

Q. Calling your attention to Exhibit 376-R, what does Exhibit 376-R show as to the number of students attending [184] those schools below the 40th percentile in achievement? A. 26 percent of the city's Anglo students attend those schools; that 87 percent of the city's Negro students and—

The Court: How many?

The Witness: 87 percent of the city's Negro students and 78 percent of the city's Hispano students attend those 45 schools.

Q. An achievement below the 40th percentile means what? A. To the level below which 60 percent of the children nationally score.

Q. Then, finally, Doctor, with respect to Exhibit 375, which depicts schools achieving at above the 60th percentile, how many such schools were there? A. 22, I believe.

Q. And referring then to 376-R, what percentage of the elementary school population by race or ethnicity attend those 60th percentile achieving schools? A. 42 percent of the city's Anglo children and 4 percent each of the city's Negro and Hispano children.

The Court: May I have those percentages again.

The Witness: 42 percent of the Anglo children, 4 percent of the Negro children and 4 percent of the Hispano children.

[185] Q. Doctor, I would next like to call your attention to Exhibit 380—which has been marked now in evidence as Exhibit 380. What does Exhibit 380 depict? A. I do not have 380 here, Mr. Greiner.

Exhibit 380 shows the paragraph-meaning mean score in April.

The Court: What mean score?

The Witness: The mean score in the paragraph-meaning test.

The Court: We started on that yesterday.

The Witness: Yes, that's correct. I think I already indicated what this shows. During Grades 2, 3, 4, 5 and 6 for 20 schools.

Q. And then Exhibit 381 depicts what Dr. Klite? A. The score—the mean scores on the same test for 21 predominantly Anglo schools.

Q. Then, calling your attention to Exhibit 382, which is now in evidence, what does Exhibit 382 depict? A. 382 is a graph that depicts the average of the scores at each grade level of the schools listed in 380 and 381.

Q. How do these two groups of schools compare as reflected on Exhibit 382? A. There's a difference in the average of their achievement during the second grade test, which was [186] administered in the sixth month of the second grade of approximately one grade level. That gap widens to—At the fifth grade the difference is slightly more than two grade levels.

Q. This is the difference in what? A. This is the difference in the averages of the mean achievement score in one achievement test administered during the 1969 school year.

Q. Referring again to Exhibit 382, Doctor, at grade level 4.6, what is the average in the Anglo schools? A. In these Anglo schools it is 5.44.

Q. And what's the average in the minority schools? A. In these minority schools it is 3.58.

Q. Which is a difference of what? A. Looks like about 1.9 grades.

Q. Now, according to Exhibit 380, are there any of the minority schools achieving a grade level on this particular exam? A. Stedman School in the second grade is achieving at grade level. I think that's the only example.

[187] Q. And referring to the next grade level at Stedman, what does Exhibit 381 reflect? A. It shows that the students one year at—one year ahead at grade 3.6, different students, were achieving .18 grade levels higher.

Q. Referring to Exhibit 381, at the sixth grade level, what is the highest achieving Anglo school? A. The mean achievement in this test at Fallis Elementary School to the sixth graders was graded 9.

Q. And at the sixth grade level, what was the lowest grade in the minority schools? A. Grade 4.2 at Mitchell.

Q. That was a difference of how many grade levels, Doctor? A. 4.78.

Q. Now, Doctor, as I understand it, the triennial testing program administered by the district has been going on since the year 1950, is that correct? A. Yes, sir.

Q. Were the results of that testing program reported differently at any given time? A. Are you referring to the normalizing scores in the fifth grade in 1965?

Q. Yes. A. Yes.

[188] Q. And what was the difference? A. In the fifth grade in 1965, the expected score was adjusted to a na-

tional norm. If you would like, I could quote to you from an exhibit how this was conducted.

Q. Yes, would you, please? What exhibit do you have reference to? A. 379.

The Court: Which exhibit are you referring to now?

The Witness: This is Exhibit 379, Your Honor. I am reading from—

Q. Pardon me, Dr. Klite, would you please identify Exhibit 379? A. Yes, these are Xeroxed copies of the achievement records from the triennial testing of Wyatt, Cole, Merrill, Morey, and Fairview Schools in the years 1956, '59, '62, '65 and '68.

Q. Would you then continue, please, Doctor. A. Yes, I am quoting now from the Wyatt School Fifth Grade Achievement in 1965, and it says:

"Your grade placement chart—the authors of the Stanford Achievement Test Battery have developed a 'norm adjuster' designed to enable a school to adjust the total group norms of the various subject tests in terms of the mental ability of the pupils tested. This adjuster is used for Grade 5 pupils and applies only in relation to the national [189] norm expectancy. Consequently, the reports on all Grade 5 pupils are prepared by establishing a national norm for Grade 5 at Grade 5.7 grade placement and adjusting to grade placement achievement in the various subjects tested by use of the deviations provided in the 'norm adjuster'. The red expectancy background for the grade placement chart for your school is at the underlined national norm for fifth grade pupils. All Q-3 median and Q-1 levels of achievement have been adjusted up or down according to the median IQ of the group tested."

Q. Doctor, have you prepared an exhibit which reflects the effect of the adjustment referred to in quotation which you have just made? A. Yes, I have.

Q. And that is Exhibit 378? A. Yes, it is.

Q. And would you tell us, please, what 378, which is now in evidence depicts? A. 378 lists the individual test results in eight tests for twenty predominantly Anglo schools and twenty predominantly minority schools in the years 1962, 1965, and 1968.

Q. And 1965 was the only year in which this normalizing process was used? A. That is correct.

Q. Then, what was the effect of this normalizing process as reflected in Exhibit 378? For example, what happened at [190] Wyatt School? A. Well, Wyatt School on the paragraph meaning test, for example, had a grade placement of 4.8 in the 1962 testing, a grade placement of 3.2 in the 1968 testing. In 1965, when the median was normalized, the recorded result was grade 6.4.

Q. So then there was an increase in 1965's report as to Wyatt? A. Well, the published median scores for Wyatt in paragraph meaning was almost two grades higher in 1965 than it had been in '62 and two and a half grades higher than it was in '68.

Q. Now, referring to the 1965 report for Wyatt contained in Exhibit 378, Doctor, what did the school district say about the achievement at Wyatt in 1965? A. The summary for the fifth grade states:

"The grade placement chart shows achievement well above the national norm by pupils at all levels of ability. Most scores reflect the success with which the staff is imparting basically academic skills. When comparison is made with the national norm, the fifth graders at Wyatt School appear to be well prepared to meet the academic challenge

of the sixth grade. The total results reflect a carefully planned program for all levels of ability. The staff and community may be well pleased with these results."

Q. Now, Doctor, three years later, when no normalizing [191] was used at Wyatt, what was the achievement level in that particular test? A. Grade 3.9. That's the fourteenth percentile.

Q. Doctor, we have mentioned briefly the question of expectancy yesterday. Referring to Exhibit 379, and in particular I have in mind Baker Junior High School and Merrill Junior High School, with respect to expectancy, does it vary by school? A. Yes, it does.

Q. And the two schools which I have just mentioned, what are the expected levels of achievement? A. Well, they vary from year to year.

Q. In 1956? A. In 1956 at Merrill, the expected achievement was the 72 percentile. The same year at Baker, the expected achievement was 23 percentile.

Q. Now, what did the school district say about Baker's performance in 1956? A. The composite score at Baker was 23 percentile at expectancy. The summary states:

"The total score summarizes the good situation indicated in the two sections and their sub tests."

I am sorry, I am quoting from the wrong page.

"The summary indicates comparisons with 1953 results are not possible, as Baker did not have a ninth grade [192] then. These 1965 results reveal that a good, well-balanced program has been established. All ability levels are doing well. The sub test results might indicate that the composite scores, particularly at the median and Q-1 should be higher, but this column is affected by all scores of all tests. The uses of sources of information results show that the pupils have learned how to study, and this

together with their achievement in subject matter should help them at the senior high school level. The faculty should be pleased with this evidence of its good work."

Q. This was a school in 1956 that was achieving at what percentile? A. Twenty-three.

Q. Now, in 1956, what were the actual test results as reported for Merrill Junior High School? A. Eighty-two percentile. That was the median.

Q. What did the School District say about performance at Merrill? A. "The composite score summarized the favorable situation presented in the sub tests. All exceeded expectancy, the median by about 10 percentile points, Q-1 by about 15. The faculty should be well pleased with these attainments. A very high standard has been established by this new school, which it should strive to equal in the future."

Q. Calling your attention to the 1956 report for Cole [193] in Exhibit 379, what was the level of expected achievement at Cole, and what were the results? A. The expectancy mean was 23. The composite mean was 21.

Q. And what did the School District say about the achievement levels at Cole? A. "All scores and all subject matter tests are combined in the composite scores. The general situation here is good with the median and Q-3 at expectancy and Q-1 only slightly below it. The general picture of this group is very similar to that of the group tested in 1953. In both years, pupils at all levels experienced satisfactory achievements in the subject matter areas. The faculty should be pleased with these accomplishments."

Q. This was a school achieving at what percentile? A. Composite score was 21.

Q. Referring to the 1962 report as contained in Exhibit 379, Doctor, what was the result of the achievement testing

at Cole in 1962? A. The expectancy median was 29. The achievement was 27, median.

Q. What did the School District report with respect to the achievement at Cole? A. "This chart displays a very consistent representation of ability. The pupils at Cole have performed about as [194] expected in most of the tests at all three levels. There is no unusual display of strength, and with the possible exception of the Q-3 score in general vocabulary and scores on Test 1, Concepts of Basic Social Studies, there is no significant weakness. The red area on this chart is considerably higher than it was in 1959, and since the bars occupy positions almost totally within the expectancy areas, parents and teachers should consider educational achievement to be satisfactory. However, a general picture may indicate that many of Cole's pupils will have difficulty achieving high school graduation unless some decided improvement takes place in their learning."

Q. That was in what year, 1962? A. I have lost my place here. I believe that was, yes.

Q. Now, again referring to Exhibit 379, Doctor, what were the achievement test results reported for Cole Junior High School in 1965? A. The expected median was approximately 28. The median achievement was 23.

Q. How does that 23 compare with the 1962 results at Cole? A. It is lower.

Q. What did the School District say in 1965 as to these achievement test results at Cole Junior High School? A. "The general picture at Cole is satisfactory. The [195] composite scores imply that some small lack of strength exists, which is discussed above. The red expectancy background on the 1965 chart is somewhat wider than it was in 1962, which would seem to suggest that the ability pat-

tern of the student body at Cole is changing. If such a change is true, a limited amount of adjustment within the instructional program may be advisable. It must be re-emphasized, however, that the overall accomplishment as shown on the chart is very acceptable and the pupils should be proud of their showing on these tests. The parents and teachers should be pleased with the result."

Q. There is no reference in the 1965 report then to graduating from senior high school? A. No, sir.

Q. Is the achievement level in '65 lower or higher than it was in '62 when that comment was made? A. I believe I just said it was lower.

Q. Dr. Klite, I have handed you what has been marked for identification as Plaintiffs' Exhibit 242, 243, 244, 245, 246, 248, 273, 274, 275, 276, 277, 278, 279, 302, 303, 304, 305, 306, 307 and finally 308. Doctor, what common characteristics do these identified exhibits have? A. Excuse me, Mr. Greiner, did you mention 247?

Mr. Greiner: No, I did not. Is 247 there?

A. I have that here.

Q. All right. [196] A. These lists—these are computer print-outs which show pupil numbers by race and ethnicity, numbers and percentages faculty experience and building facilities at all of the schools in District No. 1. The elementary schools, junior highs and senior highs are on different exhibits.

Q. Is teacher experience data also reflected in those exhibits? A. Yes, it is.

Mr. Greiner: Your Honor, the authenticity of each of the listed exhibits has been agreed to by counsel, and at this time we would offer those exhibits into evidence as listed.

Mr. Ris: You started reading those numbers so fast—

Mr. Greiner: Here's a list.

Mr. Ris: All right, thank you.

The Court: This is what might be termed a wholesale offer, so you are entitled to more time.

Mr. Creighton: Your Honor, there is a stipulation regarding all this list now being offered, setting forth that we agreed that the basic data accurately reflects data in School District records. That it has been run through a computer, what they show, and with the understanding that they have the entire data run through the computer and display it in a somewhat different way, we have no objection.

Mr. Brega: No objection.

[197] The Court: Very well.

Mr. Greiner: They will be received then, Your Honor?

The Court: They will be received.

(Whereupon, Plaintiffs' Exhibits 242, 243, 244, 245, 246, 247, 248, 273, 274, 275, 276, 277, 278, 279, 302, 303, 304, 305, 306, 307 and 308 were received in evidence.)

Mr. Greiner: Your Honor, then that concludes our examination of Dr. Klite.

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[197] * * *

The Court: All right.

Cross-Examination by Mr. Ris:

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[213] * * *

Q. Now, did you search the minutes of the Board of Education for the period between 1950 and 1955 for boundary changes, action taken to boundary changes? A. I perused the minutes. I did not search them intensively.

Q. Now, with respect to the one change that you inferred that there may have been a change between the Cole and Smiley boundaries in 1952 or 1953, you actually found no record either in the superintendent's records or the board minutes of such a change? Correct? A. Just as stated in the board minutes, yes, with the Race Street boundary—you're right, I'm sorry. Let me retract that. No.

Q. So that actually you have drawn an inference from several—from a couple of documents that you have examined and because of variances between those that there may have been a change? A. Yes.

Q. But other than such an inference, you found no evidence in an actual change during that period of time? [214] A. That's right.

Q. And actually the change you're referring to was a change of an optional area to a mandatory area? A. It would have been, yes.

Q. And it involved a half a block for a few blocks and then a block and a half in width for another couple of blocks, is that right? A. That's right.

Q. And that's the only change you inferred for that period of time? A. That's correct.

* * * * *

[219] Q. You have studied, I presume, Exhibit 356, entitled "The New Manual"? A. Yes.

Q. And from your study of this, you know that a great amount of time and effort was devoted by many, many people to determine the characteristics that the new Manual should have? A. Yes.

Q. This was a very comprehensive study, and the reports were in this exhibit from the administrative staff, central administrative staff, right? A. Yes.

Q. From the school principals and teachers? A. Yes, sir.

Q. Students? A. Yes.

Q. Parents? A. Yes.

Q. And the community at large? A. Right.

Q. And very substantial studies were made as to vocational interests and what the students and the people in that community wanted in their new high school? A. Yes, sir.

Q. Not only physically but by way of curriculum, right? A. Yes.

[220] Q. And the new Manual then was constructed and curriculum then adopted based upon this exhibit, as far as you know? A. I am sure this exhibit was important in what they added up to, yes.

Q. Did you make any study of the curriculum after the new Manual was built, as compared to East High School, for example? A. No, I did not.

Q. Are you aware that there was a substantial difference in the curriculum between the two? A. I have heard it alleged.

Q. Would that be an element in considering subsequent boundary changes? A. I don't know why it would.

Q. You don't, after all the studies that went into the new Manual? A. Unless the type of curriculum at Manual was not offered any other place in the city, you would have to make provisions for students all over the city to

be able to come there or students who lived in the Manual district who didn't want that type of curriculum to go some place else. That's how it could affect it.

Q. This is your present theory? A. Yes, sir.

Q. This is not anything you obtained from anybody in [221] the school district? A. No.

Q. All right. Now, in 1956 there was a major event that occurred that had a very substantial influence on redrawing of boundaries in east and northeast Denver, was there not? A. Are you referring to the opening of Hill Junior High School?

Q. Yes. Did that occur in 1956? A. Yes, it did.

Q. You didn't mention that yesterday, I don't believe, did you? A. That Hill opened? No, I did not.

Q. Now, it was the opening of Hill in 1956 that required the establishment of new boundaries for Hill? A. Correct.

Q. Dr. Klite, certainly your study reflects that when a new school is opened, particularly a secondary school, in a city such as Denver, and new boundaries are established, that it affects the boundaries of every other school at the same level surrounding it? A. Yes, it may.

Q. In turn, that may indirectly affect boundaries of schools beyond that first tier? A. That's correct.

[222] Q. So that actually in your reviewing of the minutes of the Board and the action taken, it all centers around the opening of Hill and spreads out from that point, right? A. I don't know if I could make that statement, Mr. Ris.

Q. You wouldn't go that far? Would you say it had any effect at all, the opening of Hill, on the boundaries of Smiley? A. It might have. If you let me digress, perhaps, for one second, the amount of area ceded to Cole, for example, was very small. It didn't seem to me to make any difference whether it was ceded or not in terms of its

capacity utilization, so I don't know if you could say that Hill was the reason for that.

Q. If you are talking about the area ceded to Cole in 1956, you are talking about the area west of City Park and west of York Street about four blocks wide? A. That's right.

Q. And when you say that was ceded—that had not been part of the Smiley area that had been optional Smiley or Cole, isn't that correct? A. That's correct.

Q. So, it was nothing new? Any child, even prior to that, could go to either Cole or Smiley? A. Living in that area, Yes.

Q. And, now, it merely made it mandatory for them in [223] that small area to go to Cole? A. That's right.

Q. And that's what you mean by ceding? A. Yes.

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[245] • • •

Further Cross-Examination by Mr. Jackson:

Q. Dr. Klite, if you would, would you get before you the maps identified as 372, 373, 374 and 375, please? Now, [246] would you explain to us again, Dr. Klite, the basis upon which you selected the schools appearing in the map designated Exhibit 372 as being below the twentieth percentile? A. Yes, from Exhibit 83, the median percentile score of each individual's achievement test was averaged.

Q. And was this procedure followed also in 373, 374 and 375? A. Yes, sir.

Q. And this was purely a mathematical computation of averaging the median scores? A. That is correct.

Q. And was that for all tests given? A. Yes.

Q. That year? A. Yes.

Q. Do you have a copy of Exhibit 83 in front of you, Doctor? A. Yes.

Q. What is the median score that you averaged, Dr. Klite? What is a median? A. It is a score above which and below which half the students have scored.

Q. So, on Exhibit 372, which shows schools whose medians fell below the twentieth percentile, there were a number of students in each of those schools scoring well above the [247] twentieth percentile? A. Scoring above it, yes.

[248] Q. And depending upon the specific average attained for any one school, it could be as high as 49.9 percent, is that correct? A. For any individual student?

Q. No, for the school. It could be 49.9 percent of the students achieving above the 20th percentile? A. Yes.

Q. So what that exhibit, in reality, shows is that at least 50 percent of the students in those schools were achieving at those levels? A. That is correct.

Q. And was this for the entire school, Dr. Klite? Does this map purport to show the achievement level of all the children in the school? A. This map is based on fifth grade source.

Q. So we're talking now of only fifth grade students? A. That's correct. I might add, Mr. Jackson, that the third grade scores are available and they are quite similar.

Q. But you have not prepared any maps on that basis? A. That's correct.

Q. Do the schools that scored below the 20th percentile in the fifth grade also score below the 20th percentile in the third grade? A. Some of them do. Many of them don't. Many of [249] them scored higher in the third grade. For example, Wyatt's median was 42 percentile in the third grade and 15 percentile in the fifth grade.

Q. But you have not shown the third grade achievements on any of these exhibits? A. That's correct.

Q. Now, in Exhibit 373, Dr. Klite— Let's skip to Exhibit

375, if you will. Do you find Gust Elementary School shown up on that exhibit? A. Yes, I do.

Q. Would you, Dr. Klite, turn to the portion of Exhibit 83 which shows the median percentile ranking for the fifth grade at Gust and you might tell your counsel where that appears. A. No page numbers.

Mr. Jackson: Did you find it?

Mr. Greiner: (Shakes head negatively.)

A. (Continuing) I have the place.

Q. Now, Exhibit 375 indicates that the median percentile at Gust Elementary in the fifth grade was 60th percentile and above, does it not? A. Yes, it does.

Q. Would you, Dr. Klite, take your time and compute the average of the median as shown on Exhibit 83 for Gust, the percentile? [250] A. I have just done that, Mr. Jackson.

Q. What do you come up with? A. I come up with a median of 59, point, something. I can't do the division in my head.

Q. But in any event it is less than 60? A. I think it will round off to 60, Mr. Jackson.

Q. That—is that the reason it was included? A. Yes.

Q. Then if you would back up in the same series to Denison School, again fifth grade percentile ranking, and if you would compute the average of the median there? A. You have caught me, Mr. Jackson. It's 56.

Q. 56, point, something, not 59, point, something? A. No, sir. 56.

Q. On which now? A. Denison.

Q. Now, Dr. Klite, Exhibit 376 and Exhibit 376-R, ha[illegible] as their source the Exhibit 83 as well as, I believe it's

Defendants' Exhibit F, does it not? A. And Plaintiffs' Exhibit 242 is listed on 376-R.

Q. Yes. So these figures then are taken from the grouping of schools which you achieved on your map, is that correct? A. Yes.

Q. So if the grouping of schools on the maps are [251] incorrect, then this exhibit is incorrect, is that true? A. That is correct.

Q. Now, Dr. Klite, Exhibit 376 was changed from yesterday to today. Would you indicate to the Court, please, the reason for that change? A. Yes, the final percentage of students was computed with a slide rule and after checking and finding it impossible to be extremely consistent on some of the tenths of these percentages, the figures were rounded off.

Q. Now, the Hispano grouping on 376-R includes all students within the Denver Public Schools who are not otherwise identified as Anglo and Negro, does it not? A. Correct.

Q. And they are placed with the grouping with the Hispano rather than either of the other two groupings? A. That is correct.

Q. Now, move if you will, Dr. Klite, to Exhibit 377. There is a note contained at the bottom of that exhibit, is there not, Dr. Klite? A. Yes.

Q. And that note indicates that the test given in 1956 and 1968 were not the same test, is that correct? A. That's correct.

Q. And yet the exhibit purports to compare the scores achieved in 1956 with those achieved in 1968 at the [252] respective schools? A. The district has used literally hundreds of different tests during that period, Mr. Jackson.

Q. But the exhibit purports to compare the results from different tests, does it not, for those two years? A. The

exhibit shows the results of the tests in those two years, yes.

Q. And they are different tests? A. Well, there are, I'm sure, different questions. They are the same general type of test, I am sure.

Q. Do they contain the same number of subtests? A. I don't know.

Q. Doesn't your exhibit show? A. My exhibit does not mention subtests. I'm sorry. Yes, it does. There were a different number of subtests.

Q. In two years? A. That is correct.

Q. Do you know, Dr. Klite, whether or not conversion tables are available for the 1956 test in order to correlate the results with the 1968 test? A. I don't know.

Q. Do you know whether these tests were alternate forms of the same test? A. No, I do not.

Q. Do you know when the 1956 test was standardized? [253] A. No, I do not.

Q. Do you know when the 1968 test was standardized? A. No.

Q. What do you know about these tests? A. I know that these were the tests given by the Denver Public Schools upon which they relied to publish the achievement scores of the grades indicated and the years indicated.

Q. For those specific tests? A. That is correct.

Q. But you don't know how they compare it at all? A. No, I don't.

Q. And did you prepare this exhibit? A. Yes.

Q. Now, Doctor, if you will, one other question on Exhibit 377. The title is "Average Mean Achievement Score, Third Grade." Were the scores ever reported in 1956 or 1968 as mean scores? A. No, they were median scores.

Q. So that should also be changed? A. Yes, that should be changed.

Q. Now, on Exhibit 378, Dr. Klite, the title of the exhibit is "Effects of 'Normalizing' Achievement Scores." And you read from—I believe it was Exhibit 379 regarding the normal adjustment process, is that correct? [254] A. Yes.

Q. Does the word normalizing appear in Exhibit 379? A. No.

Q. This is your word? A. That's why it's in quotes.

Q. All right, now, Dr. Klite, on Exhibit 378, are tables showing achievement scores by grade level for 1962, 1965 and 1968, and then there is a percentile ranking for 1968, also, for certain schools. Can you tell us which test these represent in 1962, in 1965 and in 1968? A. Paragraph meaning.

Q. Are these the same tests or is this like Exhibit 377 where we had different tests given in these years? A. I do not recall. They could very well be different versions of paragraph-meaning achievement tests, yes.

Q. And the paragraph meaning would be one portion of the larger test? A. Correct.

Q. And there was paragraph meaning in the tests identified in Exhibit 377, was there not? A. I believe there was.

Q. And in that instance it was a part of either six tests or of eight tests? A. That's correct.

Q. So this would be one.

[255] Now, was the normal adjustment process which you read to us a design of the Denver Public Schools? A. No.

Q. Whose design was it? A. I believe, as I quoted, it was available from the Stanford Testing Bureau.

Q. This was a national process? A. This was a process that was available, yes.

Q. And were the instructions given by the test publisher as to how the grades would be adjusted for norms? A. I believe, as I read the paragraph, it said that they have a

conversion table, or they have the means of converting the scores.

Q. Do you know how these conversion tables work? A. No. I know generally how it works. A school with—

Q. Well, you either know or you don't know how it works, Dr. Klite. Which is it? A. I know how it works in general, Mr. Jackson.

Q. Do you know how it worked in regard to Greenlee School in 1965? A. I don't know the specific process that was followed for Greenlee. The general process would have been to take the average score of Greenlee, change its expectancy, which might be a grade below grade level to grade level, and report [256] the grade achievement score on the basis of the new calculation.

Q. Wasn't the expectancy absolutely the same for every school in 1965 on this norm adjustment process? A. That's what norm adjustment was all about.

Q. In other words, every single school in the fifth grade had an expectancy of 5.7 grade level? A. That's correct.

Q. So the expectancy was not changed at all, was it? A. Yes, it was. The expectancy previously had been all over the place; had varied tremendously among schools.

Q. Why is that, Dr. Klite? A. The expectancy calculations, as I read yesterday, apparently were based on the interquartile distribution of I.Q. scores.

Q. Do you know for certain how it's based? A. I have just told you, Mr. Jackson; on the interquartile distribution of I.Q. scores.

Q. I believe you indicated you thought generally this was the way. A. I was just trying to remember the exact quote in the pamphlet.

Q. Do all children achieve at the same level, Dr. Klite? A. No.

[257] Q. Would you expect them to? A. No.

Q. Dr. Klite, I wish you would examine for a moment Exhibit 379, that package, like this. A. Which part of it, Mr. Jackson?

Q. Well, I wish, if you would, first advise me and advise the Court the schools that are represented by the materials in Exhibit 379. A. Wyatt, Cole, Merrill, Baker, Morey, Fairview.

Q. So within that group then you have two elementary schools, Wyatt and Fairview, and four junior high schools, Cole, Merrill, Baker and Morey? A. That's correct.

Q. And I believe you testified, Dr. Klite, that in Baker, for example, in 1956, that you expected achievement at Baker—and I believe it was for the fifth grade—I mean for the 9th grade, but I could be mistaken—was 23 percentile. Do you recall that portion of your testimony? A. Yes, that's correct.

Q. And that expectancy is shown in the ninth grade section of Baker, April, 1956, as the heavy, dark line marked XA? A. Correct.

Q. And reflects a median? A. That's right.

[258] Q. Now, within that same exhibit do you find the median for the achievement scores actually received by the students at Baker? A. Yes.

Q. It's true, is it not, Dr. Klite, that in all of the nine subtests with one exception, that the achievement at Baker exceeded the expected achievement? A. That's correct.

Q. Now, in 1968 in Baker do you find that the achievement scores are reported at percentile scores? A. Yes.

Q. Directing your attention to Test 3, Dr. Klite, Correctness of Writing— A. Yes.

Q. —what is the highest percentile ranking achieved at Baker in 1968? A. By any individual student?

Q. Yes. A. 99.

Q. And what does that mean in terms of that student's relationship to the nation as a whole? A. That means that that student was among the top one percent in that test.

Q. That 99 percent of the other students tested throughout the country were at a lower level of achievement [259] that this? A. That's correct.

Q. In that same test, Dr. Klite, what is the Q-3 ranking, approximately? A. Approximately 58th percentile.

Q. Which means that the Q-3 ranking on that same test is above 58 percent of the students tested nationwide? A. Correct.

Q. Now, if you would, Dr. Klite, turn your attention to Merrill, again, in 1968, and again Test 3. What is the highest score achieved at Merrill? A. An individual score as high as 99 and as low as one.

Q. Now, how did those compare with the results at Baker in the same year on the same test? A. That means that at least one student at Merrill scored just as well as one student at Baker.

Q. And was the reverse true also? A. I believe it was.

Q. So there were students who were scoring just as poorly who attended Merrill as those that attended Baker? A. At least one student. We don't know if it was more than that from this table.

Q. We do know, for example, that at Baker in that year for the same test that at least 25 percent of the [260] students at Baker were above the 58th percentile on Test 3, do we not? A. Correct.

[261] Q. And I direct your attention to Cole for the same year, same test. Are the results exactly the same as for Merrill and for Baker? A. You mean in terms of what, at least one student—

Q. Of the extremes of the percentile. A. Yes, at least

one student has performed at the 99 percentile and at least one at 2 percentile.

Q. How many tests were given in 1968, Dr. Klite? A. Nine tests.

Q. In terms of Cole, out of those nine sub tests, there are 99 percentile ranking for— A. Five.

Q. Five, as well as the composite for one to eight? A. Right.

Q. So, in at least five of the nine sub tests areas, students at Cole scored as high or higher than 99 percent in the entire country that took the test? A. At least one student.

Q. And the same is true for Merrill? A. At least one, right.

Q. Now, Dr. Klite, in 1968, does Exhibit 379 also give the estimated ethnic distribution of pupils for the schools one year prior thereto, or within the test year, excuse me. A. Are you referring to this page?

Q. Right. [262] A. Yes, right.

Q. And what is the estimated ethnic distribution of pupils at Merrill? A. Ninety-nine percent white, Anglo.

Q. At Cole? A. Six percent Anglo, 65 percent Negro, 28 percent Hispano.

Q. And at Baker? A. Nine percent Anglo, 8 percent Negro, 83 percent Hispano.

Q. Now, Dr. Klite, referring back again to your Exhibit 376—I guess who should say 376-R—that purports to show the percentage of Anglo, Negro and Hispano students attending the schools, for example, scoring below the twentieth percentile in the fifth grade on the test as they relate to the estimated ethnic distribution of the district as a whole; is that correct? A. That's correct.

Q. It does not in any way purport to show the estimated

ethnic distribution of the schools themselves as contained within the various exhibits? A. Just the totals of the groups of schools.

Q. As they relate to the district as a whole? In other words, 2.7 percent of the Anglo students is not the average percentage of Anglo students in the schools scoring below the [263] twentieth percentile, is that wrong? A. No, that's correct, not on the individual schools. That's the total number in those eleven schools.

Q. In those eleven schools, you might find schools with as high as 45 or 30 percent Anglo? A. There is one school, Smedley, that has about 38 perecnt Anglo, yes.

Q. Dr. Klite, what is your experience in the field of testing? A. You mean testing achievement scores to public school students?

Q. Yes. A. I have no experience other than analyzing the data of the Denver Public Schools.

Q. I believe you testified that you are not famiilar with the tests themselves, the results of which you have been analyzing; is that correct? A. That's right.

Q. Have you had any experience in standardization of tests? A. Not formally.

Q. Have you had any experience in devising tests for public school students? A. No, just medical students.

Q. Have you compared the various tests given by the [264] Denver Public Schools during the period of time covered by your testimony? A. No, sir.

Q. You do not know, do you, Dr. Klite, whether they are comparable or relevant to one another at all? A. No, sir, I am relying upon the District's judgment in choosing them.

Q. Does the fact of the existence of a test in one year necessarily mean it relates to the test as given in other years? A. I am sure there are differences from year to year between the tests.

Q. And the scores would therefore be different, would they not? A. They might.

Q. And might represent different things? A. I don't know if I could answer that, Mr. Jackson. They are used by the District to test the same general principles each year. They are using different tests—there is a consistency among the data of the school score from year to year, and while the exact score might not be identical, you are testing different children. Testing might be different. I think in general, they are fairly consistent from year to year.

Q. Now, Exhibit 83, the 1968 listing by school test, [265] reported tests in two different fashions, did it not, Dr. Klite? A. Percentile and grade level.

Q. All right, your exhibits relate to the percentile level that we were discussing earlier in terms of your map, Exhibit 372? A. Correct.

Q. Now, Dr. Klite, in Exhibits 380, 381 and 382, there are certain notations at the bottom of both Exhibits 380 and 381, are there not? A. Yes.

Q. And those refer again to the fact that different tests were given at different schools in second grade? A. That's right, in the second grade only, there were two different tests administered in 1969 for paragraph meaning.

Q. And that applies not only to Exhibit 380 but also to Exhibit 381, does it not? A. Yes.

Q. And is the frequency with which the two tests were given at the two schools which you have selected the same in Exhibit 380 and 381? A. No, it is not.

Q. How does it differ? A. Of the twenty schools—twenty-one Anglo schools, three of those schools were given a Primary-2 level—let's [266] see—a Primary-1 level test, Form X. Among the schools where the predominantly minority population, listed in Exhibit 380, thirteen of them

were given that Primary-1 test and one school was given both tests.

Q. Were any schools in Exhibit 381 given both tests? A. No.

Q. Do you know how those tests compared, Dr. Klite? A. No.

Q. Now, this exhibit is for April of 1969, for one section of the test given that year, is that correct? A. The only test results that we had available for that year was this one test, Paragraph Meaning. We did not have any other scores.

Q. But, again, the Paragraph Meaning is but one part of the composite? A. Yes, it is.

Q. And this was given at the same time of year to grades 2, 3, 4, 5 and 6, was it not? A. Yes.

Q. As indicated by the .6 following the grade level each time? A. Correct.

Q. And these were given to different students, each test? A. That's correct, yes.

[267] Q. Do you know anything at all about the students? A. How they were selected, you mean? No, I do not.

Q. Do you know how long they have been in the Denver Public School system? A. No.

Q. You don't know how long they have been at their particular school? A. No, I do not.

Q. Do you know anything about their IQ's? A. No.

* * * * *

[273] * * *

LORENZO TRAYLOR, called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

The Court: Please take the witness chair. Give us your name and address and occupation

Lorenzo Traylor—for Plaintiffs—Direct

The Witness: My name is Lorenzo H. Traylor, T-r-a-y-l-o-r. My address is 2694 North Lincoln Avenue, Altadena, California. I am employed by the U. S. Equal Employment Opportunity Commission as Area Director for the office of Los Angeles, which covers Southern California, Nevada, Hawaii, Guam, Wake Island, and some more.

Direct Examination by Mr. Barnes:

Q. Did you ever reside in Denver, Mr. Traylor? A. Yes, I lived at 2128 Vine Street.

Q. From what— A. From 1952 until 1956. Early in 1952 I lived on Downing Street, but I moved to Vine in 1953, I believe.

Q. Early in 1952, you lived on Downing Street? A. Yes.

Q. Then you moved to Vine Street? A. Yes, sir.

[274] Q. In what month did you leave Denver? A. I left Denver in May of 1956.

Q. What is your race? A. Negro.

Q. When you lived in Denver, did you have children in the Denver Public Schools? A. Yes, I had a son, Howard Traylor, who attended Morey Junior High School, and a daughter who was at Wyman Elementary School.

Q. In what school subdistrict boundaries did you live in your residence on Vine Stree? A. I lived in the Wyman Elementary School District and the Morey-Cole optional district, and the East-Manual optional district.

Q. Do you recall any proposals by the School Board to change the boundaries of the district in which you lived? A. Yes, in late 1955, I had information that the proposed boundary changes that you have been discussing here for the last couple of days was to take effect early in January.

Q. Can you identify what those boundary changes—what those proposals were? A. Yes, the optional areas between East and Manual, which extended from 17th Street to 23rd Street and from York to Race, were to be changed from—with that part from Race to York eliminated and placed in the Manual district, and there [275] was a district between Smiley and Cole and between Morey and Cole, and that was to be reduced in size. That is the optional area was to be reduced in size and the new optional area would be an area that would eliminate—would place the district in which I lived in the Cole district rather than optional between Cole and Morey, and would place me in the Manual district rather than in the optional Manual-East district.

Q. Did you have occasion to discuss these proposed changes with any representative of the School District? A. Yes, I had several discussions with members of the School District on this, these discussions beginning in early 1956, I think the first week in January, and continuing through until later in the year, perhaps in February or March.

Q. With whom did you have the first of these discussions? A. The first discussion I had with school officials was Mr. Holm, who was the person that I had been told by Dr. Oberholtzer to be the person who was in charge of the planned boundary changes.

Q. Mr. Traylor, did you go there in any official capacity? What was your occupation when you were here in Denver? A. At that time I was an educational and vocational counselor with the Urban League of Denver, and I went to see them as a member of the Urban League staff but also as a parent of young people who were involved in the proposed [276] changes.

Q. When you went to see Mr. Peter Holm, what substances were discussed? A. Well, in my initial discussion with him I asked such questions as, "Why are you making boundary changes?" I asked to see in writing the proposed criteria that was being used and also had a chance to look at some maps that he had available in the Administration Building. I think generally I expressed my concern that my family was involved and also that from what I had been able to see from the —together from the information that I had at that particular point, that those boundaries may have been discriminatory.

Q. Did you make any—after that meeting, did you make any effort to gather any further information about these boundary changes? A. Yes, after my first meting with Mr. Holm, at which time he indicated that the criteria being used was, first, overcrowding in some schools, empty seats in other schools, and they were concerned about equal distance, equal distance between schools and also transportation, and I believe he mentioned the fact that they were making some of these changes because of the building of a new junior high school in the west part of town; I called several people, and I suppose several people called me—

Q. May I interrupt you, Mr. Traylor? [277] A. Yes.

Q. Could that junior high school have been Hill Junior High School in the east part of town? A. Yes, Hill.

Q. Excuse me, continue. A. I called several people, and we got together a small quote, citizen's committee of about five people, who decided that we would take a look at what was being proposed and to get more information about it.

Q. Did you testify that this was early in January, 1956? A. Yes, I first heard about the boundary changes in De-

cember of 1955, but the activity I have just talked about occurred in early 1956.

Q. Did you have occasion then to meet again with representatives of the school district? A. Yes, on January 9, 1956, a committee from the Urban League visited with Mr. Holm and with Dr. Oberholtzer to discuss the boundary changes and also to discuss some other matters relating to the integration of teachers in the public schools and the fact that many—all of the Negro teachers were still housed—teaching in the East Denver area and in schools considered to be Negro schools.

Q. Who was present at that meeting? A. At that meeting there was a Mrs. Dickerson—I believe she was the wife of a Dr. Dickerson—Mr. Owens, Mr. [278] Sebastian Owens, Mr. Caldwell, Councilman Caldwell, Mr. Vance Austin, and I believe Mr. Charles Cousins also attended that meeting.

Q. Who was present from the School District? A. Mr. Holm and Dr. Oberholtzer.

Q. What was the date of that meeting? A. That meeting was on January 9, 1956.

Q. And had the proposed boundary changes been adopted by that time? A. No, we had heard that the boundary changes were to be considered on or about the 18th of January.

Q. Had you completed your investigation of the facts by that time? A. No, actually, I was still trying to make some determination as to the criteria. I did not have enough information to be sure that they were discriminatory, and I felt that I needed more information. At the same time, I had received a copy of a letter to Mr. George Brown, who was in the State Legislature, that had been sent to him by Mr. Frank A. Traylor, who was on the

School Board, and this was a letter responding to a letter that Mr. Brown sent to Mr. Samuels on the School Board, requesting information about the school boundary changes.

Q. Handing you what's been identified as Plaintiffs' Exhibit 338, can you state what that is? [279] A. Yes, this is a letter addressed to Mr. George Brown, Member, House of Representatives, State of Colorado, and it is signed by Mr. Frank A. Traylor, Vice-President, Board of Education. This is the letter—

[280] Q. Before you go on, can you give us the date of the letter? A. The date of the letter is January 16, 1956.

Q. And from whom did you receive it? A. Mr. Brown sent me a copy on or about the 17th, 1956.

Q. Is this that copy? A. Yes.

Q. Where has that been kept since? A. I have kept that copy in my files.

Mr. Barnes: I'd like to offer Plaintiffs' Exhibit 338 into evidence.

The Witness: You will note that that letter also repeats the criteria—

Mr. Barnes: If you will wait a moment, Mr. Traylor, for counsel to decide whether to object.

Mr. Creighton: The defendants have no objection.

The Court: 338 is received unless the intervenors object.

Mr. Brega: No objection.

The Witness: You will note that this letter repeats—

Mr. Brega: I'll object to the witness stating a response until there has been a question asked.

The Court: Sustained.

By Mr. Barnes:

Q. Mr. Taylor, does that letter contain the criteria concerning which you conducted your [281] investigation? A. Yes, the letter indicates that the changes were being made because of the growth of schools in population, overcrowding in some schools, availability of rooms in other schools, distances to schools, and the opening of a new junior high school. And, it closes with a quote which says, "Made without thought of segregation."

Q. What did you do in the course of your investigation of the application of those criteria? A. Well, I first decided that I needed to check the criteria and to get information that would relate to this criteria. So I went into the community with an automobile and I measured the distances between the schools involved. I discovered that the distances between Cole and Smiley was approximately 41 blocks or about 3.2 miles. And the distance between Cole and Morey was about 19 blocks, and about 2.3 miles. And also I measured the distances between the other schools involved, that is, the schools in the predominantly Negro area, and also took a look at the distances from the school boundary—the Cole school boundary to the beginning of the new boundaries. And also a look at the old boundary to see how far they had moved the other boundaries. I was also concerned about the halfway point between Smiley and Cole, the halfway point between East and Manual, and the same thing between Morey and Cole. I also checked through the Urban [282] League files for the population of schools to find out how many Negro students we had in the schools outside of the Negro area, and I also checked this by going to the principals in these schools.

Q. Which schools are you referring? A. The schools at Smiley, at Cole, and at Morey. I was able to get infor-

mation on the number of Negroes in Smiley which indicated that there were 46 Negroes attending Smiley at that time. I was unable to get accurate information on the number at Morey but made an estimation that it was a very small number based on the optional area that was available to Morey between Cole and Morey. I also checked the number of families—Negro families living east of York Street because the new boundaries were to begin at York Street. And I went to three of the realty companies and tried to get some estimation of the number of Negro families that had moved across York Street at that time.

Q. Why did you go to the three realty companies? A. These companies were quite active in attemtping to sell, to get Caucasians to sell homes in the area on the other side of York and also with large numbers of listings that were beginning to develop at that time.

Q. To sell homes to whom? A. Homes to Negroes in that area. I need to clarify the fact that up until this time there were very few Negro [283] families on the other side of York.

Q. Were you able by this procedure to determine how many Negro families there were between York and Colorado Boulevard?

Mr. Ris: Just a moment.

The Witness: It was difficult.

Mr. Ris: All right. Go ahead. I am sorry. He may answer. He said it was difficult. Move to the next question.

Mr. Barnes: I don't think it was finished.

The Witnes: It was difficult, but we estimated based on information we had—

Mr. Ris: Well now, at this point I am going to object to any estimate based on such information and information obtained from the realty companies. It's not credible.

The Court: Sustained.

Q. Did you make any other investigations? A. Yes, we took a look at the map that was being presented by the School District, and we noted that the map was in the form of an L, which gave the impression that the Cole District went as far east as Holly and Smith Road, and that it also extended as far north as 54th Street. And this looked somewhat strange, because the people who would have been living in the Smith Road-Holly area were closer to Smiley, and we wondered why they were being placed in the Cole [284] district. And so I drove into that area to find out, only to learn that there were no human beings in that area and that the School District in drawing the map had given the impression that the Stockyards and all of the industrial area to the north of 43rd Street had been included as part of the Cole district, to give the—I suppose give the impression of a large geographic area.

I also checked the bus routes and learned that there were buses going down 32nd Street in the direction of the Airport, and also down 28th Street. There was direct transportation coming near Cole from the area out and near the Airport on the north of 26th.

Q. How far west did those bus routes go, on 28th and 32nd Streets? A. I am not sure, but they went past both Manual and Cole, and where they terminated, I don't know.

Q. Did you find any similar bus routes from the area above 28th Street that went down to East High School? A. There were buses that could be used, but you would have

to transfer. In other words, children who were attending—who had lived in the area north of 28th Street all the way to the Airport could come down one of these streets and transfer to York Street and come up 16th Street and be at East. I also checked the distances from the area which is north of 28th Street all the way to the Airport and discovered that all of [285] the students or all of the families living in that area north of 28th Street actually lived closer to Manual than they did to Cole.

Q. Than they did to— A. East. I am sorry. —than they did to East. And, the type of measurement was the—any route they would have to walk, the shortest possible walking route or driving route by automobile or by bus.

Q. Did you conduct any further investigation? A. Yes, I went to the Board of Education building to see what I could find out about the criteria in terms of some written document, and I secured a written document which spelled out what the boundary changes would be. And I also copied from a document that was on the board near the maps the capacity for all of the schools involved, including enrollment. And it showed the following: Manual, with a capacity of 1600; enrollment, 1,066. East, with a capacity of 2462, with enrollment of 2558. Gove, with a capacity of 936; enrollment of 883. Smiley, with a capacity of 1446; enrollment, 1688. Morey, capacity 1478; enrollment of 1582. I was told by Mr. Holme that this information was being released to the Denver Post on the 16th of January, and on the 16th of January a copy of that appeared in the Denver Post as he had said.

Q. Did you make any further investigation? [286] A. Well, at this particular point I began to analyze the data, to make some determination as to whether the criteria that they had spelled out, if they were really utilizing this cri-

teria. It seemed to me that at that particular point we were not in a position to say to the School Board or to the School Administration that, "You cannot make boundary changes." We agreed, at least I felt, that they had every right to do this. But, it semed to me that if they were going to make these and had good criteria, they should be followed. We at that point scheduled a meeting at the Glenarm YMCA.

Q. What was the approximate—the date of that meeting? A. That meeting was scheduled, I believe, for the 17th of January.

Q. 1956? A. 1956, yes.

Q. And— A. And we invited to that meeting persons from the School Administration and by telephone we called Dr. Oberholtzer and Mr. Holme and invited them to attend, indicating that we felt that the community had a right to know what the criteria was and to raise questions about the changes being proposed.

Q. Did you extend any other invitations? A. Yes, invitations went to members of the School Board, also, and particularly to Mr. Traylor who had up to [287] that point, had shown, I think, the most interest, based on having met with some of the people who had been involved.

Q. Did you personally invite a Mr. Ketchem? A. Yes, Mr. Ketchem, who was in the Personnel Department, was also invited by me in person. I telephoned him and invited him to come to the meeting.

Q. And Mr. Bennett? A. No, Mr. Bennett was, I believe, invited to a second meeting that we had later.

Q. When this meeting was held—

Was this meeting held? A. Yes. The meeting was held on the 17th of January at the YMCA.

Q. And were representatives from the community there? A. Yes, approximately 125 people from the community attended.

Q. And who was there from the School District? A. No one attended from the School District.

Q. What else occurred at that meeting? A. At that meeting I made a presentation indicating that I had checked some of the criteria and that it seemed that the School District could be moving the boundaries only as far as the movement of Negro population at that time. Because the actions they had taken were not consistent with carrying out the criteria. Many of the people there raised [288] questions about it, and also they signed a petition—many of the people there signed a petition requesting that the School Board reconsider this and also hold more meetings.

Q. What was done with this petition? A. This petition was delivered by Mr. Lajean Clark, who was the chairman of our committee, to the Board president and was discussed, I believe, on the following day at the School Board meeting on the 18th.

Q. Were you present at the School Board meeting on the 18th? A. Yes.

Q. And you heard these discussions? A. Yes.

Q. What, if any, action did the School Board take that night on the proposed boundary changes? A. They agreed to postpone any action, and some of them—at least two or three, as I recall, said they felt perhaps more information was needed and that further discussion should be had on these.

Q. Did they postpone all action? A. As far as I know, they did. I don't recollect whether they took action at that meeting on the Gove-Hill part of this. It seems to me that occurred later on.

Q. What occurred subsequent to that January 18th meeting? [289] A. Another community meeting was planned, and the fact that we had anticipated a larger crowd at this

second meeting, it was scheduled for Manual High School in the cafeteria. And again we invited Dr. Oberholtzer and people from the School District to attend. And we particularly asked Mr. Holme to come out with his maps again to tell us why the boundary changes were as being presented.

Q. And approximately how many people were at that meeting? A. At that meeting it seems to me that there were about 150 citizens present. We had—Mr. Holme was there from the School District. Mr. Hindeman, Mr. Ketchem, Mr. Bennett. And fifteen school principals who had—who were principals of schools in the area, and Mr. Frank Traylor, the vice-president of the Board of Education, and 150 people, as I mentioned, or more.

Q. Did you present your findings from your investigation at that meeting? A. Yes, but the order of the meeting was such that Mr. Holme made his presentation first and he made the presentation utilizing the maps, telling why they had made the changes, again, discussing such things as distances and transportation, and indicating that this was the only thing that he had in mind, but also, he investigated the fact that only 150 students would be involved and that he couldn't understand why the [290] community was so upset about that; that it wouldn't affect that number of students. He made a thorough presentation and then responded to questions from the audience.

After this part of the meeting, I then presented a rebuttal to what he had said and raised questions about many of the points he had made.

[291] Q. Was this rebuttal based on the investigation that you had conducted? A. Yes, I pointed out that by this time the analysis that I had made had convinced me that the proposed changes were discriminatory and I based it on the following: I said that the schools that were over-

crowded were not being relieved of their overcrowdedness and the schools with empty seats would still have empty seats. For example, Smiley had an overcapacity of 242 students and Cole was under capacity by 371 students, and, yes, the optional area line had been extended only four blocks, four blocks away from Cole, and this corresponded more or less with movement of the Negro population.

Q. That is, that the area which would then be mandatory to Cole had only been extended— A. Four blocks, right, and that by extending this four blocks they picked up thirty-six of the Negro students who attended Smiley, leaving only ten Negro students in Smiley, and I raised the question as to why the old optional area between these two schools was ever placed five blocks from one school and eighteen blocks from the other school, because the optional area from Cole over to Smiley was eighteen blocks, and wondered why they had ever permitted students living in this optional area to go to Smiley when Cole was underutilized.

[292] Q. How far away from Cole might a student have been who attended Smiley? A. A person could have traveled as much as thirty blocks to Smiley.

Q. And lived how far from Cole? A. Eight or nine blocks.

Q. All right. A. I also pointed out that the school administration had not applied their criteria in this action because they had not relieved overcrowding at Smiley and they left a lot of empty seats at Cole, and I said in a sense this movement was increasing segregation at Smiley and also increasing segregation at Cole. I also pointed out that Morey was under capacity by 196 students and that what they were doing, they were creating more empty

seats at Morey in order to fill empty seats at Cole, and raised the question as to why they could not take the three high schools together and create empty seats in all.

Q. Junior high schools? A. The three junior high schools in question, and by doing this they would have empty seats in all three junior high schools and have integration in all three. I pointed out that the transportation to Cole from the area—from the optional area as such—

Q. That is the area between York and Cole? [293] A. Yes, that the transportation from this area was more convenient to Cole than to Smiley, especially for those young people who live north of 29th and 30th Street. The same was true with Manual and East. East was over capacity by 96 students and Manual had 534 empty seats, and the movement of the line betwen these two schools relieved the overcrowding at East by less than 50 students and left almost 450 or more seats empty at Manual.

Q. Did you make any proposals for alternative boundary lines? A. Yes, I pointed out that all of the students living north of 29th Street, all the way to the airport, lived closer to Manual than they did to East, had better transportation coming into Manual than to East, and wondered why they did not place the boundaries between the two schools in such a way that it would bring in a large number of white students into Manual to fill the empty seats there, creating integration in Manual and at the same time relieving the overcrowdedness in East and creating integration there.

Q. Did you make a similar proposal with regard to Cole and Smiley? A. Yes, I proposed that they take a look at the three schools in question and come up with some kind of lines between the three schools which would create empty seats in all three, and by doing so they could create

integration in all [294] three, more integration in all three. I also asked the question as to why they were only moving 150 students at this time when the main reason given for the changes were that they wanted to fill empty seats and to relieve the overcrowdedness.

Q. Now, at this meeting on January 31, did the representatives of the School District agree to make any concessions to your point of view? A. No, there was no offer of any concessions. Mr. Traylor said that they would take a look at this and the presentations made at this meeting and the questions raised by the people who had attended and that we could be assured that the School Board would give every consideration to this before they made a decision.

Q. After this meeting on January 31, was any portion of the proposal changed? A. Repeat that, please?

Q. Was any portion of the proposed boundary line redrawn to your knowledge subsequent to the January 31 meeting? A. Yes, after that meeting the school district held a series of small group meetings that took place early in February, at which they discussed the proposed boundary changes with small groups. I attended a meeting I believe on the 8th of February and I noticed at that time that the maps had been changed, that they had now removed the stockyards [295] and the Smith-Holly area from the maps which reduced the geographic size of the Cole area from a large "L" type area to a smaller type area, which was about two-thirds the size of the Smiley area, and by doing this also for the Manual area, they had a geographic area for Manual that appeared to be about half the size of the East area.

Q. Did this change affect the considerations of capacity that you have discussed earlier? A. No, because actually

the area that they had removed from the maps did not include any people, so it was just a matter of—it appeared smaller on the map.

Q. Mr. Traylor, you have testified that you lived in the 2100 block on Vine Street. Are you able to say what other Negro families lived in that area when you were there? A. Yes, I had a neighbor was was Mr. Alexander, who I believe is a judge here now. He was a next-door neighbor. In the next block above us was Councilman Caldwell, and it was interesting to note that in drawing the new boundaries Mr. Caldwell had not been disturbed. In other words, he remained in the optional Morey area and also lived in the optional East area, East-Manual area.

Q. In the course of your investigation and the meetings to which you have testified, did you become familiar with other people who lived in the optional area between York and Race? [296] A. Yes, in fact, I knew many of the people already, because in my activity with the Urban League, I had been in contact with them quite frequently on other matters relating to the League, so they were no strangers.

Q. Did you come to know the racial composition of that area? A. Yes, by 1956, the area west of York was predominantly Negro. By this time, I would say, just about all of the white families with children had moved from the area and at this particular point I don't recall more than one or two white families who lived to the west of York.

Q. What was the composition of the area when you first arrived? A. When I arrived in Denver in 1952, the area east of Race Street to York was predominantly white and the Negroes had moved up to about Race, with the exception of a few families, and I would say that York and Vine

and the street—Gaylord, I guess it is—between the two streets, was really where many of the Negres who could afford to purchase homes were moving.

Q. Do you recall in this series of meetings that you have described whether Councilman Caldwell was at any of those meetings? A. Yes, I believe that Councilman Caldwell was at both the meetings at the YMCA and also at the—at Manual High [297] School and also in at least one meeting we had with school officials at the Administration Building.

Q. And what is his race? A. He is Negro.

Q. Do you recall if at any of these meetings Senator George Brown was present? A. Yes, I believe that Mr. Brown was also at these committee meetings and was at at least one of the meetings at the Board of Education Building.

Q. When you discussed the capacity utilization of Manual High School, upon what figure did you base that capacity? What was the figure that you had for 1956? A. The figure that I had for 1956, well, were the figures that I had secured from Mr. Holme, which stated that the capacity was 1600, and that the enrollment was 1066.

Q. Now, had you had any occasion prior to this discussion beginning in 1956 to inquire into the capacity of Manual High School? A. Yes, in 1952, when I came to Denver, there were discussions going on in small group meetings throughout East Denver, meetings that had been encouraged by the School District, to provide community participation in the development of Manual. There was discussion then as to what size Manual would be, once it was completed.

Q. That is the new Manual being constructed? [298] A. The new Manual, yes.

Q. And was the capacity of the new Manual discussed at those meetings? A. Yes, and we received information from the school officials which indicated that the capacity might range anywhere from 1,000 to 1,250, and one of the points they made was that they could not be sure about this because they wanted to be sure that it was an outstanding high school, that it had the kind of space that a new high school would have, that it would be a modern high school, and I think at that time they said it was probably the most modern school in the country and they wanted to be sure to have enough laboratories and other type facilities to make this really an outstanding high school.

Q. Were boundaries also discussed at those meetings? A. Yes, boundaries were discussed, because there were many of us who were concerned about the fact that the old Manual as such was predominantly Negro and we felt that building of the new high school would provide an opportunity for Manual to become integrated because with new facilities and with a new look we felt that the white families who we felt had rejected the old Manual could not resist coming in to the new school that the School Board was saying was one of the best in the country.

Q. With whom were these discussions held? [299] A. We met with various school officials, including Mr. Holme, Mr. Ketcham, school principals. Some of these meetings were held at the old Manual. Some were held at Shotter AME Church and some at private homes.

Q. Do you recall the approximate dates? A. These meetings took place in late 1952 and early 1953.

Q. And was this topic of boundaries for the new Manual discussed at more than one or several of these meetings? A. Yes, we discussed boundaries quite frequently and we

were told that the school district had to take the overall boundary problem in the future and certainly Manual's boundaries will be considered when this took place.

Q. What were you told would be the capacity of the new Manual then? A. As I mentioned, we had figures that ranged from 1,000 to 1,250.

Q. What were the figures you were given in 1956? A. In 1956, we were given the figure 1,600, and I recall I said to Mr. Holme at that time that I was quite surprised to learn that Manual had a capacity of 1,600, because, remembering that we had talked about something around 1,250, and he indicated that they had looked to the future, they were concerned about providing for the [300] anticipated population increase.

Q. Turning your attention back to the 1953 proposed boundary changes, do you recall whether there was any publicity on the meetings that you discussed? A. Yes, beginning in late December and continuing through February, there were several articles in the Denver Post, and fewer in the Rocky Mountain News, about the proposed boundary changes.

Q. Handing you what has been identified as Plaintiffs' Exhibits 339, 340, 341, 342, 343, and 344, can you identify what those are? A. Yes, 339 is a page from the Denver Post which includes, under the date of July 11, 1956—which has an article called, "Schools Face Segregation Suit."

Q. Before you testify as to what they say, if you can just identify them, do you know where that newspaper cilpping came from? A. Yes, this particular paper, which is dated July 11, was mailed to me by Mr. Clark after I had left Denver.

Q. All right, would you identify the others? A. 344 is an article which states that, "Two Civic Groups Probe School Racial Charge."

Mr. Creighton: Objection, Your Honor. He is merely asked to identify, not read it.

The Court: Very well, just state what date it came [301] out.

The Witness: The date is not on there, Your Honor.

Q. Is that from your files? A. Yes.

Q. Was it kept in the same place that the others were kept? A. Yes, I kept all of the news clippings that I took from newspapers at the time.

Q. All right, what is the next one? A. The next is an article from the Denver Post dated July 12, 1956.

Q. That's 342? A. 343.

Q. 343, and the next one? A. The next one is from the Denver Post, January 18, 1956, 342. The next is 341. It is from June 21, 1956, Denver Post, and this is a copy of the new school boundary maps in the Denver Post, January 13, 1956.

Q. And that is Exhibit 340? A. 340, yes.

Mr. Barnes: I believe that the authenticity of the exhibits has been stipulated to by the original defendants, and I offer them into evidence.

Mr. Creighton: Your Honor, it is true that we have [302] have been able to agree that they are true clippings from newspapers indicated. We object to the admission of all of them, generally, on the ground that this is not the proper way to prove the facts stated in a newspaper, if this is what they are being offered for, and in particular on some of these exhibits there are additional writing on them not in the original clippings. In other words, the objection is as to their competency.

Mr. Brega: Your Honor, we have the further objection that they state conclusions of the writer and editorializing of the facts, if they be facts, and are the rankest type of hearsay.

Mr. Barnes: These are not offered for the truth but to show there was newspaper publicity at the time of these meetings, to show there was publicity of these boundary changes.

The Court: I will receive them for that circumstantial purpose, going to whether the board and the staff were mindful of these considerations at this time. We are not taking them on any testimonial basis.

(Plaintiffs' Exhibits Nos. 339, 340, 341, 342, 343, 344 were received in evidence.)

Q. Mr. Traylor, turning your attention to your activities on behalf of the Urban League, did you have anything to do with hiring, the proposed hiring, of Negro teachers by the [303] Denver Public Schools? A. Yes, from the—almost from the time that I arrived in Denver in March of 1952, I was in touch with the personnel office for the school district for the purpose of trying to get them to employ qualified Negro teachers and also to get them to place Negro teachers already employed, those to be employed, in schools outside of the Negro area.

Q. Did you meet with any representatives of the school district to express your interest in this subject? A. Yes, I met—in the four years that I was in Denver, I met with Dr. Oberholtzer on several occasions, with Mr. Holms many times more, and perhaps talked to Mr. Ketcham on an average of once a week or more.

Q. Would that be Mr. Holme, rather than Mr. Holms? A. Holme, yes, sir.

Q. H-o-l-m? A. Yes.

Q. When you met with Dr. Oberholtzer, what did you propose?

Mr. Ris: May we pin this time down, timewise? He just said he met with him many times.

The Court: Yes, surely.

Q. Did you have specific proposals to make with Dr. Oberholtzer? A. Yes.

[304] Mr. Ris: Same objection, if the Court please.

The Court: The objection is that you have not placed it at any particular time.

Mr. Barnes: I am sorry.

Q. Can you identify when you met with Dr. Oberholtzer? A. At this time I can't pinpoint any specific date, but I met with Dr. Oberholtzer within the first three months after I arrived in Denver to initiate discussions with him as to the matters I mentioned.

Q. Where did you meet with him? A. At the school Administration Building.

Q. Who else was present? A. On the first occasion I met with Dr. Oberholtzer alone. On another occasion I met with him with the Urban League Committee.

Q. Who was that? A. That included the people I named earlier, Mrs. Dickerson, Mr. Charles Cousins, I believe a Mrs. William Grant, and other people I just can't recall now, but we had a committee of about seven or eight people.

Q. And this meeting occurred early in 1952? A. The committee meeting occured later in 1952. I met with Dr. Oberholtzer alone—

Q. On the first occasion when you met alone with him, did you have specific proposals about hiring of Negro [305] teachers? A. Yes, we expressed the concern that at that time there were less than thirty Negro teachers employed in the Denver school system and I pointed out to him that we had in the Urban League files many persons who appeared to be qualified for teaching in the system and that we felt that it was fair to give these people an opportunity for employment.

Q. What qualifications did you point out that these people had? A. These people had college degrees with majors in elementary or secondary education. Some of them had master's degrees. Others had—and some of these, too, had years of experience in teaching in other parts of the country.

[306] Q. What was Dr. Oberholtzer's response? A. His first response was that Denver was making progress, that he felt that they had to move slowly; that they had to be careful about this; that he was not sure that the white community was ready to accept Negro teachers, and he also expressed concern that he did not want any school in the Negro area to become—to have a faculty that was all Negro. And he was careful to point out that, at that time, at Whittier they did not permit the number of Negro teachers to reach more than 50 percent because they wanted an integrated faculty. I pointed out to him that this did double harm to the Negro applicants; the fact that they would not hire Negro outside of the Negro area and then limit the number they would hire in the Negro area meant that equal opportunity was not even possible, even in the second instance.

Q. Now, were these same concerns discussed at the second meeting which you have described with the Urban League Committee? A. Yes, many of these were discussed and we got some of the same answers.

Q. Did you point out your concern in any other way during the time you were here? A. Yes, I interviewed more than 150 persons in the four years who were deemed to have at least the minimum [307] qualifications required by the school district. And all of these people were referred to the Personnel Office of the Denver school district.

Q. How were they referred? A. They were referred to Mr. Ketchum's office. I had been to see Mr. Ketchum. I had indicated our interest and our concern, and he had said he wanted to cooperate, so he asked us to refer any qualified persons to his office to get applications.

Q. How many had you referred, approximately, in the time you were here? A. I would say in excess of 150.

Q. In this four-year period? A. Yes.

Q. And approximately were hired? A. Well, when I left Denver in 1956 the number had increased from less than 30 to, I believe, 59 or 60. So in four years we had doubled the number as such but the number started at less than 30. And all of these were still—were located in the so-called Negro areas.

Q. Handing you what's been identified as Plaintiffs' Exhibit 410, can you state what that is? A. This is an Urban League fact letter, March, 1956.

Q. Was that letter prepared in your office? A. Yes, this fact letter was prepared in the Urban [308] League office.

Q. Turning your attention to the article on Page 2 of that letter, which discusses Negro employment in the Denver Public Schools, where did the information for that

article come from? A. This information came from the Urban League files because we kept an up-to-date, day-by-day listing of Negro teachers employed in Denver. In fact, any time the school district hired a Negro teacher I was informed by the Personnel Office that they had hired one person or two persons and where they were being placed. Then, too, the fact that we had so few—that every time a Negro was hired in the Denver system, it was news.

Q. Was it a part of your business, your job, to keep track of these placements? A. Yes, I had the responsibility of keeping track of the placements because, as the educational and vocational counselor I was concerned about filling opportunities that might become available.

Q. Have you reviewed the list which is contained there for the accuracy for the identification of the placement of those teachers? A. Yes, I believe so. This would be correct.

The Court: What is the exhibit number?

Mr. Barnes: 410, Your Honor.

[309] I offer Exhibit 410.

Mr. Creighton: No objection.

Mr. Brega: Your Honor, I believe the plaintiffs must be offering the second page of the exhibit. I believe the remainder of that exhibit has matters which would not pertain to this proceeding and I wonder if they want to offer the entire matter or just—

Mr. Barnes: We are prepared to stand by the whole document. We are concerned about offering into evidence particularly that one article to which he has referred.

Mr. Brega: We don't object to the second page, but we don't believe that the rest is material to this proceeding.

Mr. Barnes: I think it's accurate, Your Honor.

The Court: Pardon?

Mr. Barnes: I think that's accurate, Your Honor. The second page is the part that is material to this case.

The Court: Well, are you going to separate the face sheet from the second page?

Mr. Barnes: I could do that.

The Court: It will be received then, 410.

(Whereupon, Plaintiffs' Exhibit 410 was received in evidence.)

The Court: Mr. Kerr will do it for you; putting [310] the mark on the second page and return the first page to you.

I'll tell you what we can do. We can merely cross out the first page as being immaterial and that way you can identify the document better.

Is that all right?

Mr. Barnes: That's fine.

Q. Turning your attention to Plaintiffs' Exhibit 410, Mr. Taylor, how many teachers—Negro teachers are shown there to be in Cole Junior High School? A. Twelve.

Q. And how many in Smiley Junior High School, if any? A. Smiley is not listed.

Q. Were there any in Smiley Junior High School? A. No.

Q. Were there any in East High School? A. No.

Q. How many were there in Whittier Elementary School?

Mr. Brega: Your Honor, I object to this. This is merely going through the exhibit and asking—

The exhibit speaks for itself.

The Court: Overruled. We will permit them to point up the things. I assume it's not going to take too long.

[311] Q. You may answer. A. Eleven.

The Court: Where now?

A. At Whittier Elementary School.

Q. Mr. Traylor, do you know whether your wife applied for a job in the Denver Public Schools? A. Yes, she did.

Q. When was that, if you know? A. In 1952, shortly after we arrived in Denver. I came in March and she came after school closed in New York City where she was teaching and it was during the summer—early summer of 1952.

Q. What kind of a school was she teaching in in New York City? A. In a secondary school.

Q. Was she awarded a contract by the Denver Public Schools after her application, if you know? A. No, she was told that—

Mr. Brega: Object, if the Court please, unless we establish that this witness was present, I believe it would be hearsay because it would have to be what she told him.

The Court: True, and I don't see that one instance of this sort has very much probative value, Mr. Barnes.

[312] Mr. Barnes: All right.

Q. I have one question to fill in a gap that I may have left out, Mr. Traylor. Turning your attention back to the 1956 proposed boundary change, you indicated that you thought that 36 of the Negro students in Smiley Junior High School would be taken out of that high school by the proposed change. Is that a correct statement of what you testified? A. Using the number present at that time and applying the boundary changes going into effect, we pointed out that the 36 who lived on this side would be eliminated.

Q. Lived on what side? A. On this side of York; on the west side of York. I do believe we were told by the school district that those students already in Smiley would not be affected but we pointed out that those same families could no longer send children into Smiley, so the future result would be the same.

Q. When did you leave Denver again? A. I left Denver in May of 1956, I believe, and came back for a short visit and then left.

Q. Had the boundary changes been accomplished by the time you left? A. No, they had not, as I recall. They had made decisions which affected Gove and Hill but no decision had [313] been made, as I recall, on the other schools.

Mr. Barnes: No further questions.

Cross-Examination by Mr. Creighton:

Q. Mr. Traylor, you have mentioned frequent conversations with Mr. Holme. Is that Mr. Peter Holme? A. Yes.

Q. Do you know whether he is now alive? A. I believe he's deceased.

Q. And also conversations with the then board member, Mr. Traylor. Do you know whether he is now alive? A. I do not, no.

Q. Mr. Traylor, in your testimony under direct examination, you were referring to some notes, were you not? A. Yes, sir.

Q. When did you make those notes? A. These notes were prepared recently from other notes I had in my file.

Q. What file is this? A. It's a file that I kept which I called school boundary material that I began collecting in 1955, I suppose in the Urban League. It was a personal file which included many of the exhibits you have here.

Q. And did you bring that file with you? [314] A. I have that folder, yes.

Q. As well as your notes prepared from your personal file? A. Yes, but not all of them.

Q. Not all of your basic file? A. No, because some of the material I presented here came from the Urban League file. These were changes that I had kept in a personal file.

Q. Now, what was your initial duty with the Urban League when you came in 1952? A. I was educational and vocational guidance counselor and industrial relations secretary with the Urban League. I was responsible for trying to develop equal employment opportunity for Negroes in Denver through the Denver Urban League program and also had the responsibility for interviewing people interested in jobs in which we were trying to fill.

Q. Did your responsibilities and efforts extend beyond the public schools so far as employment was concerned? A. Oh, yes.

Q. The City and County of Denver? A. The City and County of Denver, yes, private enterprise.

Q. Tramway? [315] A. Yes, sir.

Q. Were you making efforts in all of these areas to get the employers, as the case may have been, to employ more Negroes? A. Yes.

Q. What kind of success were you having in the area with the City and County of Denver during that period? A. I would say that we were having minimal success; not as much as we thought we should achieve. I think the overall atmosphere here was one of discrimination against minority group people and one of the things we said quite frequently to the City and County of Denver and to the Board of Education was that you should provide leadership; that, as a public employer, if you provide the leadership, that will help the private citizen come along.

Q. Are you suggesting that the public employers were more responsive than private enterprise? A. I would say on the whole, yes, with the exception of the school district.

Q. And what about the school district? A. The school district did not move rapidly. In fact, we received what I felt was a rather reluctant desire to move forward. As indicated by the fact that in 1954, after the Supreme Court decision, I had a meeting with the school board officials and pointed out to them that [316] now is the time for Denver to integrate its schools, because legally—

Q. Well, now— A. Let me finish, please. I felt that legally that Denver had a responsibility, as the schools in the South did, and that was discussed with them.

Q. Were you talking about employment? A. Employment, integration, school boundaries, the whole thing, because it all ties together.

Q. So you pointed that out in 1954 following the Supreme Court decision? A. That's quite true.

Q. Do you regard the increase from 30 to 60 in the years you were here in the employment of Negro teachers according to your testimony minimal in terms of proportion? A. I would call it somewhat less than minimal for the fact that during that period we had a tremendous increase in

terms of numbers of qualified people coming into Denver and it was significant, the fact that many people coming into Denver were what I considered to be middle-class people, who came here with an educational background, who came here with a desire to be a part of this community. And I referred to the Denver Public Schools in the four years I was here more than 150 people, and only, I would say, less than 40 were accepted or even given an opportunity, [317] and that does not include many of the people who did not through us, but came directly to the school board for application.

Q. And you were in touch with Mr. Ketcham, I believe, weekly during this period? A. Yes, any time we had a person who had just finished college who was out here for the summer, I would pick up the telephone and call Mr. Ketchem and say, "I've got a good person here in the office. I'll be sending him over."

Q. Did you follow up to determine how many of the people you referred actually completed applications? A. Yes, in fact one of the things we did—we said to the people, "When you go to the school district, report back to us and let us know how they treated you. Let us know if you got an application blank. Tell us who talked with you. Let us know how you were received." Because we had gotten some complaints that when they did not get the right person or that they were shunted aside and given some sort of a short answer.

Q. Of course, part of your job was to put them in touch with the right person, wasn't it? A. That's right, yes.

Q. Did you get reports back as to any failures to [318] hire of those who applied? A. Yes, I would say that a large majority of the people who went there would call in and say—

Mr. Brega: Just a minute. I object to the response of what they said.

The Court: Do you object to it, too?

Mr. Creighton: No, that's my question.

The Court: Overruled.

The Witness: Would you state your question again, please?

Q. In your follow-up procedure did you get reports back from the people you had sent over as to whether or not they were hired? A. Yes, they would call in and say they had received an application blank or they had been greeted and they were told that there were no openings and they would be contacted when they did have openings, and that kind of thing. On a few cases, they had had a chance to have a more in depth discussion at which time their background may have been gone into and I would suppose that some of the people who were eventually employed were the persons that came out of the files that the school district developed from the people we sent there.

Q. Now, were you sending people over at all times of the year? [319] A. I would say, without question, because we had applicants coming into the office right around the clock. I would say—we had probably a larger number going over in the late spring, early summer.

Q. But you were getting reports back that one reason people you had referred were not hired at least at that time was that there were no openings, is that correct? A. That is correct. But we questioned that for the simple reason that we also knew at that time that the school district, especially during the early part of the year, they were recruiting in Texas, Oklahoma and Arkansas and other points of the South because we had been informed that they were

leaving on recruitment trips and one of the questions I raised over and over with Mr. Ketcham was the fact that we had qualified people here in Denver. "Why not give them a chance?"

And I often got the response that "We don't have any openings for Negro teachers because we're not ready" in a sense "to move them out of the Negro area."

Q. Is that what Mr. Ketcham said? A. That's right.

Q. Do you know whether Mr. Ketcham is alive? A. Not that I know.

[320] Q. Mr. Traylor, I don't think you gave us the date at least at the time you described the meeting at which about 150 people appeared. It was in the Manual High building, and you remember— A. That was January 31, 1956.

Q. All right, Mr. Traylor, you described the optional area as an old optional area. Do you personally know how long the Smiley-Cole optional area had been in existence in the form it was in when you came here? A. No, I don't know the exact time it was in existence when I came, but I do know that at my first look at it, it raised questions in my mind, and that is I could not understand how the School District could permit students who live within four or five blocks of a school with empty seats to go thirty-some-odd blocks to another school, and, of course, right away it brought to my mind that this could have been racial, and after making my check and after the 1956 incident I had no question in my mind that it was discriminatory.

Q. In forming that conclusion of yours, did you check for information regarding other optional areas in other parts of the city? A. Yes.

Q. Were you aware that there were other optional areas

all over the city? [321] A. Yes, I was. In fact, we took a look at the optional area which was between Gove and Smiley, which was a smaller area with very few youngsters in it, and one thing we said to Mr. Holme—

Q. Where was that, please? A. North of City Park here someplace. I am little hazy now, but it is to the west of City Park. I am sorry, south of City Park and to the east portion of that.

Q. And this was in the period of your investigation in 1955-56? A. Yes, sir.

Q. And did you find optional areas in the south part of Denver? A. Yes, we found optional areas between—

Q. West part of Denver? A. I did not look at the area on the other side of the river, other side of—what is called—the other side.

Q. West of the Platte River and Cherry Creek? A. Well, I am not—I don't recall the names of these streets now, but I am talking about the area that's going toward the mountains. We did not look at that area.

Q. Did you look at the south part of Denver? A. Yes, if that includes Gove and Hill and parts of Morey.

Q. Well, how about south of Cherry Creek? Did you [322] check for optional areas in that part of town? A. Isn't that a part of either Hill or Gove at that time? I don't know what you have here now. I mean, you may have more junior high schools now, but would that not have been in that area at that time?

Q. I am just inquiring whether you checked south of Cherry Creek for optional areas. Do I understand you did not? A. Do I understand—

The Court: Well, we will agree, I think. We will take a recess, about twelve minutes.

(The court recessed from 3:32 o'clock p.m. until 3:46 o'clock p.m.)

The Court: Mr. Creighton.

By Mr. Creighton:

Q. Mr. Traylor, when you were discussing your remarks at the January 31 meeting with Mr. Holme and others, you said you proposed, as I recall, as an alternative making the area north of 29th at the senior high level mandatory Manual. Was that the proposal? A. No, I suggested that in terms of fair boundaries and in view of the criteria that they had spelled out, that is distances between schools, convenience of transportation, desire to integrate a school, that a fair boundary line would be closer to go down 29th or 28th Street to the airport, because all of those youngsters lived closer to Manual, and [323] I questioned why they had ever been permitted to go to East.

Q. Now, was that the only specific boundary line you proposed at that meeting? A. No, we suggested that there were many things that they could consider. First, they could just carry out the total action, the criteria that had been laid out for these boundary proposals.

Q. Was that the only boundary change you proposed? A. I just said no, because of what I am saying—

Q. Did you propose any specific boundary changes at any other time?

Mr. Barnes: May the witnes be permitted to finish his answer to the prior question?

The Court: Yes, he may answer.

A. (Continuing) The suggestion—

The Court: You interrupted him. He had more to say, I think.

A. (Continuing) The suggestion they carry out the criteria—

The Court: He wants to list the ones. You asked if there were any others.

Mr. Creighton: Your Honor, I asked only with respect to a boundary, and he started on other criteria. I think he was not responsive and going beyond the question.

The Court: I can't tell yet.

[324] A. (Continued) If they carried out the criteria as proposed, they would have new boundaries in several schools, and we suggested that was one thing they might do. That is, take total action, not take token action to eliminate a few Negro kids. Fill all the empty seats, create equality in terms of empty seats in the schools. Let East have some empty seats also, not all of them being in Manual.

Q. You said that before, but was the 29th Avenue or 28th Avenue proposal your only specific boundary proposal? A. No.

Q. Did you make any other specific boundary proposals at the January 31 meeting? A. We said that there were many things that they could do and the results would be new boundaries that would create an integrated school district. We didn't spell out where the lines ought to be. I merely made reference to the fact that if they were really concerned about one element of the criteria, which was distances to schools, that if they looked at their map they

would discover that for years they had permitted white students who lived to the north of 28th to go into East when they really lived closer to Manual.

The Court: I think you can well afford to not persist further with this question. I think we have the answer.

Mr. Creighton: I think we have the answer. No [325] further questions.

Mr. Brega: I only have a couple, Your Honor.

Further Cross-Examination by Mr. Brega:

Q. Mr. Traylor, had you had occasion to speak to the Board prior to 1956 about boundary changes? A. In 1952, when I first came here, I mentioned that there were several meetings we had regarding Manual High School, the new Manual, and during that period and '52, early '53, we had discussions with school personnel about boundaries for Manual and the possibility of setting up boundaries at Manual in connection with other schools so that there would be integration in whatever school Manual was going to be next to.

Q. Well, you were aware, then, of the problem that during this time Denver was sustaining a rapid growth in student population? A. I was aware of the fact that in one meeting we met with Dr. Oberholtzer and raised the question about building some additional elementary schools in East Denver and he told us at that time that the population was going down, that they didn't anticipate any further growth in East Denver. We pointed out to him that Denver was such an attractive place that there was going to be a possibility of additional people coming into Denver to live, especially [326] Negroes.

Q. Was there a great influx of Negroes from outside of Colorado in 1956? A. I wouldn't say a great influx, but quite a number, yes.

Q. These people settled in the north, northeast part of the city for the most part? A. Yes, but you can probably note that the number was probably not as great as may have seemed because of the empty seats in Manual, the one school Negroes could go to except a few in the East.

Q. You say it is the only one? A. One high school, except a few in East.

Q. Isn't it a fact if they lived in the East attendance area, they could have gone to East? A. Yes, sir.

Q. And if they lived in the South attendance area, they could have gone to South? A. Yes, sir.

Q. Same with North? A. Yes, sir.

Q. During the time you were making your studies, were you aware of the fact that during 1951 to 1955 there were 23 school buildings built in Denver? A. No, sir.

Q. Were you aware of the fact that between '55 and '56 [327] that the school population of Denver increased 5,000? A. I have heard that figure.

Q. These create problems for school capacity and utilization? Now, during the time that this boundary change was proposed for East-Manual, at the time of the proposal, East was running over capacity, wasn't it? A. That's true.

Q. And one of the purposes of this area that was to be ceded was to eliminate, to alleviate some students at East? A. That's correct, but we also wanted to know why they didn't want to eliminate—

Q. I did not ask you what you wanted to know. A. I am answering your question, though.

Q. The— A. The question we raised—

The Court: Hold up, just a minute. You will get an opportunity to comment.

The Witness: I am sorry.

The Court: On redirect. This is cross-examination, so limit your answer to the question asked.

The Witness: Okay.

Q. Now, at the same time that we dealt with this, we were taking a piece off of Smiley and ceding it to Cole, were we not, in '56? [328] A. That's correct.

Q. And at that time Smiley was over capacity, wasn't it? A. That's correct.

Q. And Cole was under capacity. Now, at the time that you submitted your plan to the Board, it was your purpose, was it not, to make the boundary changes for the sole purpose of increasing the Negro representation in the various schools that you were interested in? A. That's not true.

Q. Was that one of your main purposes? A. That was one of the reasons, yes, sir.

Q. Now, when you sent the teachers over to be interviewed by the administration, do you have any knowledge of how many applications were made in the year of 1956 to be teachers in the City and County of Denver School District? A. No, I don't.

Q. Do you know how many teachers that were not black were turned down by the school administration? A. I have no way of knowing.

Q. Do you know that figure for 1955? A. No.

Q. '54? A. No.

Q. '53? [329] A. No.

Q. Now, during this period of time that you were in Denver, you were aware, were you not, that the city and the school district were co-terminus? In other words, they have

the same district. If Denver annexed a piece of property, it automatically became a part of the school district? A. I am not sure of that.

Q. Were you aware of the fact during this period of time in the fifties and sixties that the area population of Denver doubled and that the school district doubled during that time? A. I know there has been a tremendous increase in the population. I don't know how much.

Q. Did you make any studies in that regard? A. We took a look at the increase of the population we were concerned about.

Q. Just in that area? A. That's right.

Q. Did you take any in the west side of Denver? A. No.

Q. Annexation in the south? A. No.

Q. Or in the east? A. No.

Q. Now, in your Exhibit 401—do you have that?

[330] The Court: You say the geographic area of Denver doubled in what period of time?

Mr. Brega: I have the figures, 58 point square miles and 98.

The Court: In what years?

Mr. Brega: From 19—I will give the Court the exhibit.

The Court: Oh, you mean—I didn't mean to interrupt what you were doing.

Mr. Brega: I have it here, which will be offered at a later time.

The Court: All right.

Q. Do you have 401? A. This is 410.

Q. Exhibit 410. Now, Mr. Traylor, considering the listing of Negro personnel which is on the right side of 410,

do you know what the racial breakdown of the Whittier School was in 1956 at that time? A. I would say that it was over 75 percent—maybe even higher—Whittier.

Q. All right, and what about Manual? A. Manual, as I recall, was close to 75 to 85 percent.

Q. In 1956? A. Yes.

Q. Would you be surprised to learn that it was 42 [331] percent? A. I would be.

Q. In 1956? A. I would be.

Q. You would be? A. I would be.

Mr. Brega: Do you have Exhibit 401?

Mr. Ris: I may have it here.

Mr. Brega: Do you have it?

The Court: His surprise is of no probative value, as I view it.

Q. All right, let me hand you 401, so you can just check with me. Do you know what the composition as far as the races were of Cole in 1956? A. My impression was that it was in the neighborhood of, as I said before, 70 to 80 percent.

Q. All right, 401 shows it was 40 percent. Now, was it your impression and statement to the School Board that they should not place Negro teachers in schools that were predominantly white? A. No.

Q. So you have no objection to the Negro teachers in 1956 at this time being throughout the school system? A. This is what we wanted.

Mr. Brega: Your witness.

[332] *Redirect Examination by Mr. Barnes:*

Q. Directing your attention, Mr. Traylor, to Exhibit 401, is there any indication on that exhibit of the Hispano enrollment? A. No, let's see—I don't see it.

Q. Is there any indication, therefore, on that exhibit of the total minority enrollment at those schools? A. I can't tell from here, no.

Q. It is not on that exhibit, is it? A. No.

Q. Take your time to look at it, if you need to. A. Well, this says Negro enrollment.

Q. So there would be no indication on that exhibit whether or not the schools listed there are predominantly Anglo, would there? A. No.

* * * * *

[348] * * *

Paul Klite (resumed).

Mr. Greiner: A few questions, Dr. Klite.

Redirect Examination by Mr. Greiner:

Q. In cross-examination by Mr. Ris, a number of factors were listed by counsel which may or may not have been [349] considered as criteria for boundary changes. Do you recall that list of items which were considered? A. Yes.

Q. Or might have been considered? I believe one of the items which Mr. Ris did not mention was the question of principal recommendations. Did any of these boundary changes, do you know, have their genesis in recommendations by principals? A. The Board minutes of 1952—I forget the exhibit number—concerning the Harrington-Colum-

bine-Stedman optional zones indicated that the initiation for these was the school principals.

Q. Also, in response to Mr. Ris' cross-examination, Dr. Klite, I believe you mentioned the fact that between, I believe it was 1948 and 1956, the racial and ethnic data developed by you and reflected in certain exhibits came from what source? A. From the principals' reports that were made available to us by the defendants for those years. These were membership enrollment and racial and ethnic data collected from each school, each semester, by the principal.

Q. There were two reports, one for the first and one for the second semester, is that correct? A. That's correct.

Q. Now, and the principals also recommended boundary [350] changes in certain instances? A. Yes, the instance I just mentioned.

Q. Now, Dr. Klite, do you know whether or not the principals knew what the racial composition of their schools was? A. Seemed likely that they did.

Q. Dr. Klite, you will recall testimony regarding the attendance area for Gove Junior High School? That was the arm reaching eastward along East Colfax? A. Yes.

Q. That's depicted in Exhibit 20? A. Yes.

Q. Does that arm still exist today or have the boundaries of Gove been changed? A. They have been changed.

Q. Do you recall what schools, for example—what was the elementary school north of Colfax that was picked up in that corridor when it existed? Ashley? A. The western portion was Ashley.

Q. And what junior high school does Ashley feed to, do you recall? A. Smiley.

Q. You will recall on cross-examination by Mr. Jackson that an error was discovered in Exhibit 376? A. Yes.

[351] Q. That pertained to what school, Denison, do you recall? A. I believe it was Denison.

Q. Do you recall what the total enrollment is at Denison? A. No, sir, I don't.

Q. Do you recall whether Denison has been depicted by the defendants as the twin of Barrett? A. That might be the case.

Q. And Barrett is a small elementary school? A. Barrett has a capacity of less than 500.

Q. Now, Doctor, with respect to Exhibit 376, would the miscalculation or the inclusion of Denison in Exhibit 376 substantially affect its accuracy? A. There are approximately 33,000 Anglo elementary students in Denver. If Denison had 500 students that were all Anglo, this would affect the percentage of Anglo indicated in Exhibit 376-R by one and one-half percent.

Q. Do you happen to know what the capacity of Denison is? A. No, I don't.

Q. Finally, Doctor, if you would direct your attention to Exhibit 83, which I believe was in front of you, on the cross-examination by Mr. Jackson you were asked some questions concerning the highest test scores and the third quartile test [352] scores in certain selected schools, do you recall that? A. Yes, I do.

Q. Doctor, turning first to the report contained in Exhibit 83, at the third grade level, what does that show for the first quartile at Ashland School grade three? A. It shows that, for example, in the words study skills test, the first quartile percentile level is four.

Q. Four percent? A. Four percentile.

Q. What does it show then for the median? A. Twenty-two.

Q. What does it show for the third quartile? A. Thirty-eight.

Q. And what about Barrett Elementary School? A. In, for example, the language test, the Q-1 score, the first quartile, is two.

Q. What does the two mean? A. It means that 25 percent of the students are below that level.

Q. And what does the second percentile mean? A. It means that 98 percent of the students nationally are above that level.

Q. All right, would you turn your attention to Garden Place in the third grade? What was the Q-1 score at Garden Place? [353] A. The range on different tests—from language, the lowest value on the chart, the Q-1 is one percentile.

Q. And what is the Q-3? A. Twenty-two percentile.

Q. Now, with regard to Harrington Elementary School, Doctor, what is the Q-1 score at Harrington in the third grade? A. Well, for the arithmetic comprehension test, the Q-1 is one percentile.

Q. And what is the Q-3? A. Twenty-eight percentile.

Q. By turning your attention to grade 5 in Exhibit 83 for Bryant-Webster, what's the Q-1 percentile of Bryant-Webster? A. The lowest score is in Arithmetic Test 5, where the Q-1 is the fifth percentile.

Q. And what is the Q-3 in that test? A. Thirty-one percentile.

Q. And, finally, Doctor, at grade 5 at Mitchell, what is the Q-1 percentile? A. Mitchell has one of the lowest average scores. The highest Q-1 percentile is in, paragraph meaning. It is 9 percentile.

Q. What's the Q-3 in that test? A. Thirty-four. The lowest Q-1 is in several subjects [354] tied at the third percentile, science and arithmetic applications.

Q. What are the Q-3's in those subjects? A. Sixteen and twenty-one percentile, respectively.

Mr. Greiner: We have no further questions, Your Honor.

Your Honor, I am sorry, I do have one other question.

The Court: All right.

Q. You were asked by Mr. Jackson as to the comparability of the tests administered every three years in the triennial testing program. Do you recall those questions? A. Yes.

Q. Referring to Exhibit 379, you will recall this morning you read certain excerpts from Exhibit 379? A. Yes, sir.

Q. Did any of those excerpts relate to comparisons being made by the School District itself? A. Yes.

Q. And what were the nature of those comparisons, Doctor? A. As I recall, they were comparing the—

Mr. Jackson: I am going to object, if he can't recall what it is. If the exhibit contains it, let the exhibit speak for itself.

[355] The Court: Well, he is trying to recall. Do you remember?

The Witness: Yes, in the Baker 1956 test summary, for example, is stated that there had not been a 1953 test to compare with. In another part of that exhibit under Morey it says that comparing the '65 data with the '62 data at Morey is difficult because of a changing population, and in 1959 I think for Cole it compared it to '56 data.

Q. So, in other words, the school district did make comparisons? A. Yes.

Q. Every three years? A. Yes.

Q. The current test with the prior year's test? A. Yes.

Q. And the school district did find them comparable evidently? A. They made the comparison.

* * *

[356] *Redirect Examination by Mr. Jackson:*

Q. Doctor Klite, in your perusal through Exhibit 83, just a moment ago, where you were discussing various percentile rankings at Ashland, Garden Place, Harrington, Bryant-Webster and Mitchell, these are purely random selections? A. No, sir.

Q. What were they? A. They were picked to show the extremes, just as picking the range of one student at 99 percentile is an extreme.

Q. We found earlier this morning, Dr. Klite, in some predominantly Anglo schools we had children achieving at first percentiles? A. That's correct.

Q. Meaning that 99 percent of the children in the United States were above those? A. Well we didn't know if it was those or him or her.

Q. Well, those achieving in the first and 99th percentile? A. That's right, there is a wide range.

* * * * *

[371] * * *

GERALD P. CAVANAUGH, a witness called by and on behalf of plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Greiner:

The Court: Give us your name and address, please.

The Witness: Gerald P. Cavanaugh, 10601 West 35th Place, Wheatridge, Colorado.

By Mr. Greiner:

Q. Mr. Cavanaugh, are you presently employed by the School District No. 1? A. I am.

Q. And what is your current occupation? A. Supervisor, Testing Services.

Q. And how long have you held that position? A. Since January, 1967.

Q. Can you give us just a brief resume of your duties and responsibilities as chief of the testing service? A. The general responsibilities involve the assistance and selection of tests, ordering of tests, distribution, in-service education of teachers administering these tests; [372] arranging for scoring of tests, reporting the results back to buildings, publishing reports, and assisting faculties in interpretation of results.

Q. Now, prior to January of 1967, were you also employed by the Denver Public Schools? A. Yes, sir.

Q. In what capacity? A. Immediately preceding January, 1967, I was acting principal, Lincoln Elementary School. Prior to that I was supervising teacher assigned to the Department of General Curriculum Services.

Q. Can you give us the dates of that tenure, please? A. May I refer to my notes?

Q. Certainly. A. I was originally hired as a teacher in the schools in March, 1949. I was assigned as a teacher on special assignment to the Department of General Curriculum Services, September, 1960. I was assigned as a supervising teacher in the same department, August, 1962; acting principal, August, 1966; supervisor, January, 1967.

Q. Now, when you were in the Department of Curriculum Services, did your work there concern the administration of tests? A. That was part of my responsibility, yes.

Q. Can you describe in a little more detail, please? [373] A. My total responsibilities?

Q. Vis-a-vis testing. A. I worked under the direction of the Director of Guidance Counsel and Evaluation and assisted him in a program of administering the testing program similar to my present occupation.

Q. Now, does your current occupation—do you aid in the administration of achievement tests in the Denver Public Schools? A. Not actual administration but assisting teachers administering, yes.

Q. Does your office also supervise the ordering of tests from the national publishers? A. It does.

Q. Is this done under your direction? A. Yes, sir.

Q. Now, how is it decided each year—and I will draw your attention first to the annual testing program—how is it decided which tests will be administered in the annual testing program? A. We have teacher committees—I should say just committees—which include teachers from all grade levels. We also have principals represented on these committees. It's approximately a one-third primary teachers, one-third intermediate teachers, and one-third administrators, [374] principals and assistant principals.

We discuss the programs that have preceded and tests that are to become available on the market and make recommendations to the instruction committees of the schools as to the program that we feel should be followed. The committees on instruction then act on these and then make recommendations to the superintendent and his staff as to whether this is the program that should be followed.

Q. In the development of the lists of tests which may be used in the annual testing program, does that list include

alternate tests? In other words, does an individual school have any discretion in the tests which will be administered annually? A. Yes, some tests are optional.

Q. Is there always a list of mandatory tests which must be given in each school? A. Yes.

Q. Now, ordinarily, Mr. Cavanaugh, a child in the Denver Public Schools going from kindergarten through the twelfth grade is tested approximately how often for achievement? A. Under the present program for achievement they are tested each year in the elementary schools; once minimum in the junior high; once minimum in the senior high. During survey years, we will possibly involve [375] youngsters in two testings in their junior high experience or senior high experience.

Q. Now, how long has that current program which you have just described been in effect? A. Two years. This is the second year. There is one more year to go on this particular program.

Q. Now, prior to the implementation of that program, was the normal Denver Public School student tested more often or less often than you have just described? A. It has varied from year to year. At one time the history of testing in Denver—there was considerable testing done of children twice a year, beginning the year and at the end of the year.

Q. Is there a variance at a particular grade level each year in the annual program as to the subjects which are tested for? A. Some of the subtests vary from battery to battery, level to level. Yes.

Q. So, in any given year, in comparison to the previous year the same subjects are not always tested, is that correct? A. Not always, that's correct.

[376] Q. Now, approximately in the last, say, five to seven years, Mr. Cavanaugh, how many different achieve-

ment tests have been administered in the Denver Public Schools? A. We have relied primarily on the Stanford achievement tests, the California achievement tests, and the Iowa tests of educational development.

Q. Prior to 1950, did the district administer more tests than the major ones which you have just described? A. Not to my knowledge, no, sir.

Q. There was not a greater variety of tests employed? A. I don't believe so.

Q. Are you familiar with the triennial testing program? A. Yes, sir.

Q. When was that program instituted? A. 1950.

Q. What was the objective of that program, if you know? A. I believe that the superintendent felt that it was essential that we sample a large population within the system, and it was recommended that we check all youngsters at Grades 3, 6, 9 and 12, and evaluate curriculum at these particular levels.

Q. As opposed to the objective which you just [377] described for the triennial program, what are the objectives of the annual program? A. Test results are reported back on the annual testing program and are provided to the individual teachers for numerous reasons: one, to evaluate curriculum, to evaluate teaching techniques, to assist in the counseling and guidance of youngsters and to assist in parent conferences. Basically, this constitutes the major—

Q. Are some of those same objectives or purposes employed with respect to the triennial program; for example, the use of counseling? A. Yes, sir.

Q. And what about the use of the materials or the test results in terms of parent-teacher meetings? A. Yes, sir.

Q. Now, it is my understanding that the annual testing

is done primarily in the fall of each school year? A. This was at one time the schedule, in the fall of the year, yes, sir.

Q. Was that to enable you to make changes in curriculum that might be required by the test results for that same school year? A. This was a part of it, yes, sir.

Q. Is that still the policy of the administration? A. No, the major testing is done in the spring of [378] the year.

Q. So the curriculum changes are implemented in the fall? A. That's right, there is some time in the summer months to study the results.

Q. Does the Denver Public School system—let me start first with your office—use the results of the triennial achievement testing for comparative purposes? Do you compare the test results in one test year with the prior year at particular schools? A. Within the office, from time to time, yes.

Q. What publications does the Office of Testing or the Denver Public School system publish with respect, first, to annual test results? Is there any general distribution of those test results publicly? A. To individual buildings, the results are returned, but as far as a publication, no, in the annual program.

Q. Now, you have before you what has been marked for identification as Plaintiffs' Exhibit 82, entitled, "The Denver Public Schools Look at Themselves." Can you identify that document for us? A. Yes, sir, this is a publication of my office.

Q. And is that publication based upon the results of a triennial test? A. It is.

[379] Q. For which year? A. 1968.

Mr. Greiner: Your Honor, I don't believe that this exhibit is in evidence at this point. We would offer it on behalf of the plaintiffs.

Mr. Jackson: No objection.

The Court: It will be received.

Mr. Brega: No objection.

(Whereupon, Plaintiffs' Exhibit 82 was received in evidence.)

Q. What year does that Exhibit 82 pertain to? A. 1968.

Q. I believe you said the triennial program began in 1950? A. Yes, sir.

Q. Were you involved in testing in 1950 when the program was instituted? A. As a classroom teacher, yes.

Q. Did you participate in any of the decisions that led up to the decision to begin the triennial testing program? A. No, sir.

Q. So you were not involved with the Department of Testing at that time? A. No, sir.

[380] Q. Now, since 1950, for each of the triennial tests, has a publication similar to Exhibit 82 been published by the school district? A. It has.

Q. Now, would you refer, please, to Exhibit 82. As I understand it—let me ask you first, does that exhibit give any individual school data on achievement test results? A. No, sir.

Q. What is depicted in Exhibit 82? A. Citywide results. To elaborate a bit, the Grade 3 chart, for example, shows the total picture and a bar graph of the test results of 7,358 youngsters taking the word-meaning test, for example. The same thing is true, numbers varying from subtest to subtest, Grades 3, 5; farther back in the book we get into Grade 11.

Q. Now, I believe you said that that exhibit is prepared in your office? A. It is.

Q. Can you give us an idea of how many copies of Ex-

hibit 82, for example, were printed? A. I don't know the exact number. I can give you an approximation.

Q. All right. A. Ten thousand.

[381] Q. Now, what is done with the triennial test reports such as 82? For example, is a copy of it distributed to the principal at each school? A. It is.

Q. What about to each of the teachers in each school? A. Yes.

Q. So, there is a copy made available to each teacher? A. Yes.

Q. What about the distribution to, for example, parent-teacher organizations? A. It is not a normal course of action. They do request them, however, and they are sent.

Q. We have what? Around 4,000 teachers in the Denver Public Schools? A. Yes, sir.

Q. And about 116 principals? A. Yes.

Q. What generally happens to the other 5,000 copies of these reports? A. They are sent to other school systems throughout the nation on an exchange basis. They exchange similar publications with us.

Q. Now, I believe you said that the annual testing program does not produce an exhibit such as Exhibit 82, [382] is that right? A. Yes, sir.

Q. Now, does the the administration, Mr. Cavanaugh, have any policy with respect to requiring in each school a meeting such as a parent-teachers meeting, at which the results of the triennial program are reported to the parents at a particular school? A. I know of no such policy.

Q. Is it a practice? A. This is my understanding.

Q. Do you know? A. No, sir.

Q. Have you ever participated in such a program? A. I have.

Q. But you don't have any idea of how general such

programs are throughout the district? A. Not an accurate one, no, sir.

Q. Now, in the triennial testing program, Mr. Cavanaugh, over the succession of the three-year periods are the same children receiving these triennial tests? A. No, sir.

Q. Why not? A. Because of the use of the Grades 3, 5, 9 and 11 on a three-year basis will not pick up these individual kids for retesting over and over.

[383] Q. So, in each third year it is a different group of children being tested? A. For the most part, yes.

Q. Is it possible, Mr. Cavanaugh, in the annual testing program for a teacher to request that a test be administered that is on the list of approved tests for the annual testing program? A. Yes, sir.

Q. What procedure is followed in that regard? A. The request is made directly to my office.

Q. Is there any deviation from the standard tests applied in the triennial program? A. No, sir.

Q. Those are completely standardized? A. Yes, sir.

Q. There is no discretion at the individual school level? A. No, sir.

Q. You were a principal at Lincoln School during what period of time? A. January, 1967, until August of '67.

Q. During that period of time, did you receive the results of a triennial test? A. '67, no, sir.

Q. You did receive the results of an annual test? [384] A. Yes, sir.

Q. As a principal in that particular school, Mr. Cavanaugh, did you use the results of the annual testing in any kind of a group parent-teachers meeting? A. No, sir.

Q. Has it ever been your practice while employed in the Denver Public Schools to use the annual test results for such group meetings? A. No, sir.

Q. What about the triennial test results? A. Yes, sir.

Q. When was the first such occasion, do you recall? A. I don't recall.

Q. Would it have been back in the early 1950s, for example? A. I would have said in the '60s.

Q. As a result of your receipt of the results of the annual testing program at Lincoln School, did you authorize any changes in the curriculum at that school? A. I did not.

Q. What was the racial composition of Lincoln when you were there? A. Primarily Anglo.

Q. What factors did you consider in reviewing those annual test results which led to your decision not to [385] change the curriculum? A. Basically, it was my feeling as a principal that the staff was doing a professional job of instruction and were utilizing materials appropriate to the subject and the results were basically satisfying, in my own eyes.

Q. Now, you were a teacher in the Denver Public School system during what period of time? A. 1949, when I was first hired, until 1960.

[386] Q. Now, during that period of approximately eleven years, Mr. Cavanaugh, during that time period, did you as a teacher receive results of the triennial testing program in your school? A. Yes, sir.

Q. And what use did you make of those test results as a teacher? A. We reviewed, as a faculty, the results that were sent back to us. We drew comparisons of our achievement with those schools of the citywide picture.

Q. In other words, you would refer to an exhibit such as 82? A. Yes, sir. I did some of the self-evaluation as to the type of job I felt I was doing as a teacher.

Q. What were your bases for that? The test results of your children? A. This is right. And, these results in this

particular school were presented to the
a parent-teachers association meeting w

Q. At what school was that? A. Sm
School, 42nd and Shoshone.

Q. Were you at Smedley during that
I was.

Q. In evaluating your performance
Cavanaugh, did you take into considerati
of expectancy which had been establish
ticular class? A. This was one of the c

Q. How was that level established, do
that particular time, if I recall correctly,
tion of the I.Q. of the group and the tim
the test was administered.

Q. Now, during that eleven-year period
arithmetic you would have received the re
ennial tests? A. This is four, I believe.

Q. One in 1950? A. 1950, 1953, 1956
was assigned to another job, I am sure I
own experience in 1960.

Q. Now, do you recall whether in each o
the results of the annual or the triennial
were reported at a parents—a group pare
as you have described? A. Yes, sir.

Q. In each instance? A. Yes, sir.

Q. Was the question of the level of exp
to the parents at these group meetings?

[388] Q. Was it explained how that
was determined? A. I don't recall.

Q. Do you recall whether or not the par
ing were told that expectancy levels mig
schools? A. Yes.

Q. What were they told in that regard?
fect that the general ability of the group
used to set the expectancy. This is why c

this school may appear different than the citywide expectancy.

Q. Now, with respect to your receipt of triennial test results as a teacher, Mr. Cavanaugh, did you also receive the triennial test results of any other individual school? A. No, sir.

Q. Did you ever seek such data for comparative purposes? A. No, sir.

Q. You were only conterned then with how your class achieved in terms of the expectancy which had been set for it? A. This was one of the criteria, yes.

Q. And the other criteria which you used was the [389] average citywide achievement level? A. That was another criteria, yes.

Q. What were the other criteria? A. My own professional judgment as a teacher; what I thought the kids should be able to do.

Q. Now, during that eleven-year period, then, you received no other comparative test results with respect to other individual schools, is that correct? A. No, sir.

Q. Now, when you were a principal at Lincoln, did you ever receive comparative test results with respect to achievement in other individual elementary schools in the district? A. No, sir.

Q. Was there any kind of a citywide composite published on the basis of the annual testing program? A. No, sir.

Q. So, in evaluating the results of the annual testing program, what were the criteria which you would, as a principal use in evaluating the performance of your school? A. Previous years' experience with tests and test results.

Q. Were the same tests administered year to year? A. Basically the same, yes.

[390] Q. What other factors? A. Again, professional judgment.

Q. So you had no citywide average to use as a guideline at that point? A. This is right.

Q. Now, you took on your present position in January of 1967? A. Yes, sir.

Q. And when was the next triennial test program administered? A. During the 1967-68 school year, spring of 1968.

Q. Now, as I understand it, Mr. Cavanaugh, every three years a publication such as Exhibit 82 has been published with respect to the triennial test results, is that correct? A. Yes, sir.

Q. And in each instance those publications give only the citywide results? A. Yes, sir.

Q. Now, in the fall of 1968, was a decision made to publish comparative school data? A. The decision was reached to publish the test results from each school in alphabetical order for the grades tested.

Q. Now, prior to that decision, what had been the [391] policy of the school administration? A. Comparative results were not released to the general public. The individual school's results and the citywide results were returned to the individual school alone.

Q. Were comparative test results given, for example, to the Board of Education prior to the fall of 1968? A. No, sir.

Q. Are you familiar with the reasons underlying that decision not to publish comparative data? A. It was the philosophy of the administration at the time that this would be detrimental to the esprit de corps.

Q. Did you participate in the decision leading to the publication of comparative test results in the fall of 1968? A. I played a minor part in it, yes.

Q. What factors were considered in the decision to change the school administration's policy? A. The open

records law which was one of the reasons for giving this consideration.

Q. Can you explain that, please? A. It was my understanding that the state legislature passed a law—

Mr. Jackson: I'm going to object to this [392] witness's characterization of the law. If he knows what factors were considered in arriving at the decision, this is fine, but I would object to any editorial comments, Your Honor.

The Court: Well, he can say, I suppose—if he knows of his own knowledge that one factor was the enactment of this law.

What are you objecting to? His description of what it is?

Mr. Jackson: Yes, Your Honor. Any comments on the law.

The Court: Well, you're not going to have him discuss in detail what the law provides, are you?

Mr. Greiner: No, Your Honor. I'm just interested in how the law relates to the decision.

The Court: All right.

A. It was my understanding that on passage of this law, that test results became public information. And in discussing this with the administrative staff the decision was made to release these figures from all schools.

Q. Now, as I understand it, the release of this information did not include an individual student's test result, is that correct? A. This is right.

[393] Q. What types of results actually were released? A. The interquartile distribution of scores for each subtest administered at Grades 3, 5, 9 and 11.

Q. So no individual child's test score was singled out and published? A. This is true.

Q. What other factors were considered in making the administration's policy with respect to reporting comparative data? A. I don't know of the other considerations given.

Q. Now, do you recall, Mr. Cavanagh, that in the triennial program administered in 1965 at the fifth grade level, that there was a standardization employed as to the expected level of achievement? A. A norm adjustment was used at fifth grade level that year, yes, sir.

Q. As I understand it, the effect of that adjustment was to standardize expectancy in all the schools at that particular grade level, is that correct? A. Yes, sir.

Q. And that was established at what? 5 point— A. 5.7.

Q. 5.7? A. Yes, sir.

Q. Now, did you participate in any parent group [394] meetings wherein the results of the 1965 triennial test program was the subject of the parent group meeting? A. Yes, sir.

Q. Did you participate at any such group meeting at any of the schools with the Park Hill area? A. Yes, sir.

Q. In January or February of 1966, can you identify the schools where you spoke in Park Hill? A. No, sir.

Q. Do you recall any particular meeting? A. Stedman.

Q. And when did that meeting take place? A. I don't recall the date.

Q. Would it have been early in 1966? A. This is possible.

Q. About at what point in the school year do you receive back the graded achievement tests in the triennial program? A. We will start receiving them in the latter part of May and this will continue through part of June. This is the usual time.

Q. Now, the triennial test year was 1965, is that correct? A. Yes, sir.

Q. When was that test actually administered? [395] A. April, I believe it was.

Q. Of 1966? A. No, of 1965.

Q. I see. Now, with respect to the meeting—was it Stedman Elementary School? A. This is one I recall, yes, sir.

Q. Was there anyone else present at that meeting from the school administration? A. Yes, Gil Kruder. I don't remember all the people that were there. The principal of the school was there; some teachers, and members of the community.

Q. Had this meeting been called for any particular purpose? A. I was told—

Mr. Jackson: Objection to what he was told. If he knows he can answer.

The Court: Overruled.

A. The purpose of the meeting was to explain test results to the community.

Q. Was this just a normal parents' meeting? Was this a special meeting called for that purpose? Do you know? A. I don't know.

Q. About how many parents were there? A. Two-thirds of the auditorium was filled.

[396] Q. Did you make a presentation to this parents' group? A. I did.

Q. What was the nature of that presentation? A. Interpreting triennial test results; Grades 3 and 5, for Stedman. A comparison with the citywide picture.

Q. In the course of that presentation did you use any audiovisual aids? A. I did.

Q. What were they? A. I used an overhead projector with transparencies and I believe some 35-millimeter slides.

Q. Did those slides include pictures of the test results at Stedman? A. They did.

Q. Did they also include pictures of the citywide test results? A. They did.

Q. And were those results then compared? A. They were.

Q. What, if anything, was said, Mr. Cavanagh, with respect to the normalization or normalizing of the fifth grade of that test year? A. At Stedman?

Q. Yes. [397] A. There were questions from the audience, the teachers, as to why this was done, what did it mean, and which I attempted to explain to them.

Q. Did your presentation include an explanation of what the effect of normalizing had been upon the Stedman achievement scores? A. I believe so, yes.

Q. What was that effect, do you recall? A. In comparing test results with grade level of 5.7, grade points were added to the actual achievement scores to bring about this comparison.

Q. Did you get any audience response after you made that explanation? A. Yes, sir.

Q. What was that? A. Again, questions as to why this was done and was it done citywide, did all schools have this done.

Q. Was there any difference, Mr. Cavanagh, that you were aware of in the effect of the normalizing process if we were to compare, first, a low-achieving school with a relatively high-achieving school? Can you explain to the Court how normalizing might affect each of those schools' achievement levels? A. The low-achieving school would have grade points added to their actual scores. The high-achieving school [398] would have grade points subtracted from their actual scores.

Q. Now, in the course of your duties in the testing office, Mr. Cavanagh, do you know whether or not your office conducts any kind of an extensive survey of the testing results in each of the schools of the district? In other words, do you try to evaluate the performance of schools? A. We do not.

Q. Do you make—other than the publications such as

Exhibit 82, you don't prepare any comparative analyses? A. No, sir.

Q. Are you aware in your office of whether or not in each of the years in which tests are administered certain schools constantly achieve at a low level? A. Yes, sir.

Q. How are you aware of that fact? A. All of the test results come back through my hands.

Q. So they are observed? A. They are observed, yes, sir.

Q. Do you know, Mr. Cavanagh, whether there are certain schools in the district which, for years, have been in fact low-achieving schools? A. This is true.

[399] The Court: Before we leave this standard expectancy approach, is there any other purpose—What you suggested is that it minimizes the differences.

The Witness: Yes, sir.

The Court: And it undermines the effectiveness of the testing, I suppose, as a—

The Witness: In my estimation, yes, sir.

The Court: Well, what is the justification for it?

The Witness: This was one way recommended by the publisher for comparing test results from various schools, high-achieving and low-achieving, with a single reference point, that being the grade point or the grade level at the time of the test to 5.7 in this case, and the tables for doing this norm adjustment were provided by the publisher.

[400] The Court: I still don't see why they would—what it would furnish. I mean, what the value of it would be. I mean, they weren't doing it for any diabolical purpose, I don't suppose.

The Witness: No, sir.

The Court: Well, then, why didn't they just want to present the raw results?

The Witness: It is my understanding that the publishers were recommending this type of approach for the purpose of examining youngsters on a thinner band of expectancy. Basically, what this would do would take the scores of schools at this level and the scores of schools at this level and pull them into a narrow perspective rather than having such divergence of scores, where you have a very low and a very high, to compare between the two systems with different expectancies. This involved adjusting expectancy as opposed to adjusting scores.

The Court: Well, maybe I will see the purpose.

The Witness: This was used for one year, Your Honor, and that's it.

Q. It was also used only at one grade level, is that correct? A. This is the only grade level for which this was available.

[401] Q. I see, and that was the fifth grade? A. Yes, sir.

Q. In the 1968 testing program, did the publisher also make a normalizing procedure available? A. It was available, yes, sir.

Q. Was there any discussion in the testing office in the Denver Public Schools as to whether that would be employed again in the 1968 tests? A. None whatever.

Q. Had there been any discussion or evaluation of the employment of the normalizing process in the 1965 tests? A. Yes, sir.

Q. Can you give us some indication of what was discussed? A. Basically, it was found that this particular way of reporting was not satisfactory in the eyes of the teachers, the administration, the public, nor the office of testing services.

Q. So, it was decided to drop it? A. Yes, sir.

Q. Would you refer just briefly to Exhibit 379, which are the annual test reports, triennial test reports, excuse me, the summary for Wyatt School, Grade 5—

Mr. Jackson: Excuse me, Your Honor, could I inquire as to which exhibit we are on? I did not catch [402] the number.

Mr. Greiner: This is 379.

Q. This is the 1965 report for Wyatt School, Grade 5, is that correct? A. Yes, sir.

The Court: What year is that?

Mr. Greiner: 1965.

Q. Now, could you read what the summary is there for Wyatt School? A. Yes, sir. "The grade placement chart shows achievement well above the national norm by pupils at all levels of ability. Most scores reflect the success with which the staff is imparting basic academic skills. When comparison is made with the national norm, the fifth graders of Wyatt are well prepared to meet the academic challenge in the sixth grade. The percentile chart reveals a relatively low percentile XA. However, the median percentile scores indicate that these pupils are achieving well above expectancy in most academic areas. Strengths are noted in social studies, arithmetic applications and arithmetic concepts. These results reflect a carefully planned program of instruction for all levels of ability. The staff and community may be well pleased with the results."

Q. What community is referred to there? [403] A. Wyatt Elementary School.

Q. The community served by that school? A. Yes.

Q. And is that the way the term "community" is used throughout the triennial test reports? A. Yes, sir.

Q. So, you equate the term "community" with whoever happens to live in the school subdistrict attendance area? A. Yes, sir.

[403] * * *

Cross-Examination by Mr. Jackson:

Q. Mr. Cavanaugh, directing your attention again to the 1965 test program and the norm adjustment process that was utilized in Grade 5, am I correct in understanding that this process was utilized throughout the entire school district for that particular grade that year? A. Yes, sir.

Q. It was not limited to any particular group of schools? A. No, sir.

Q. You testified that the expected achievement in Grade 5 was established at 5.7? [404] A. Yes, sir.

Q. And how was that established? A. By the publisher.

Q. And by publisher, who do you mean? A. Harcourt-Brace-World, Incorporated, New York.

Q. Is this the firm that publishes this test and from whom you order it? A. Yes, sir.

Q. After you order the test from this publisher, do you make any changes in it? A. The test itself?

Q. The test itself. A. No, sir.

Q. Now, at the same time did the publisher describe the process by which these norm adjusters would be used? A. This information appears in the manual for the administration of the test, which is sent to all teachers who will administer the test.

Q. And was the same factor, the same adjustment factor, applied uniformly throughout the school district? A. To fifth grade, yes.

Q. How was that factor determined? A. By the publisher's table.

Q. And how did you know which factors within that table you would use at a particular school? [405] A. The median I.Q. for the group tested determines the factor to be used. If I might explain the table, what it looks like, on the left-hand side there is a column of I.Q. ranges, and across the top of the column are the subtests, and then next to the I.Q. range, under each column, is the factor to be used in norm adjusting.

Q. Was there any school in Denver whose norm was not adjusted? A. No, sir.

Q. And, again, this was because this was to comply with the instructions and requirements of the test publisher, is that correct? A. Yes, sir.

Q. At the same time, did the test publisher indicate that this was an experimental program on their part? A. No, sir.

Q. Did they indicate to you the reason for the establishment of the norm adjustment process? A. No, sir.

Q. Is it possible to compare the 1965 fifth grade results with any other test year without making some conversion? A. No. sir.

Q. And is this because of the adjustment that was employed in reporting the fifth grade test results for that [406] year? A. Yes, sir.

Q. Now, the 5.7 grade level which was utilized as the expected achievement, citywide, that was established, was it not, by the fact that the test was being given in the fifth grade in approximately the seventh month of the school year? A. Yes, sir.

Q. And that's what the 5.7 refers to? A. Yes, sir.

Q. And is this the only consideration given for the arrival at 5.7 as the expected achievement? A. Yes.

Q. Now, I believe you testified, Mr. Cavanaugh, that not only the testing office but the school administration, the principals, teachers, as well as community were all unhappy with the effects of norm adjustment, is that correct? A. Yes, sir.

Q. And this was not dropped at the insistence of any particular school or any particular result that was achieved thereby, but just because of the general ineffectiveness of the program? A. Yes.

Q. Do you know whether or not at the same time that [407] the Denver Public Schools utilized the norm adjustment process for Grade 5 in 1965, any other school systems in the country utilized it? A. I am not aware of any.

Q. And it is available or was available for 1968 but was not utilized by your office? A. This is correct.

Q. I would like to direct your attention to Exhibit 83, Mr. Cavanaugh, and in particular to that section of Exhibit 83 indicating Grade 5. Are the test results shown in there in two different fashions? A. They are for Grades 3 and 5, yes.

Q. And they are shown in percentile bands as well as— A. Grade equivalence.

Q. —grade equivalence? A. Yes, sir.

Q. Directing your attention to the back of that exhibit, immediately following the reporting of—the Iowa test, educational development, are reported in percentile. Immediately following that percentile ranking for the Iowa test, is other information contained within that exhibit? A. Yes, sir.

Q. Would you tell us briefly what this it? [408] A. We referred to it as community information, listing median

family income, based on the 1960 census, mean class size, daily attendance pupil-staff ratio and pupil mobility.

Q. And are those factors related to the schools in the Denver system that were tested that year? A. Yes, sir.

Q. And how are they related, Mr. Cavanaugh, by alphabetical listing? A. By rank order.

Q. What do you mean by rank order? A. From high to low or from low to high, depending on the category being considered.

Q. They relate to specific factors of the community information section? A. Yes, sir.

Q. Now, in 1969, in the annual testing program, was a citywide average furnished to each school?

Mr. Greiner: I am sorry, Your Honor, I did not catch the year.

Mr. Jackson: '69.

A. I don't recall. We sent back listings for each school. I believe we sent some for the city, but I really can't say.

Q. I believe you testified that at the time that you [409] were a teacher you did not receive any citywide results at the annual testing program, is that correct? A. This is right, yes, sir.

Q. Is that process still being followed? A. Yes.

Q. What was your main function in examining test results for your students during the time that you were a teacher? A. Well, again, the main reason for looking at them was to do some self-evaluation and take a look at what was being accomplished in teaching fifth and sixth-grade youngsters. Using these results along with the other criteria I have mentioned; I attempted to improve the instruction within my own classroom.

Q. You were more interested in the achievement of your pupils than in your standing in relation to the community at large? A. Yes, definitely.

Q. We find throughout the exhibits which have been introduced relating to testing various levels of expected achievement for schools, depending upon the manner of reporting, whether on a percentile band or grade equivalent band. How are these expected achievements arrived at? A. Can I give a historical background of this, as to how it developed?

[410] Beginning with the 1950 survey year, the expectancies were arrived at by examining the median I.Q. for the group at the time that the test was administered, following a basic formula, and this continued through the years. The last reevaluation of the tables was in 1962, and in 1968 we used the actual scores achieved by pupils of similar I.Q. groups as the expectancies. Prior to '68, a single expectancy was arrived at. An example, a group of youngsters at fifth grade with a given I.Q., the median might have an expectancy of 5.3, so a line was drawn across a bar graph at 5.3. This was the median. One year above and one year below this established a band of expectancy. This was the same for all subtests.

In '68, we went to this national picture, where the expectancies may vary from one subtest to the other, based on the actual achievement of youngsters across the nation.

Q. Now, you read a moment ago, Mr. Cavanaugh, the summary of the Wyatt results, Grade 5, in 1965, from Exhibit 379? A. Yes.

Q. Now, did the results for Grade 3 of Wyatt in 1965 appear in that exhibit as well? A. Yes, sir.

Q. And was there any norm adjustment used in the [411] third grade in 1965? A. No, sir.

Q. Now, the Grade 3 results at Wyatt in '65 were reported as grade equivalencies, are they not? A. Yes, sir.

Q. And the test in 1965 had eight subparts? A. Yes, sir.

Q. And at that time the median achievement of the students at Wyatt exceeded the expected achievement in six of those eight subtests, did they not? A. In one, two, three, four—

Q. Met or exceeded? A. Surpassed in five and met at one in the median, yes.

Q. The upper band, for example, in Test 5, word study skills, shows a Q-3 of 5.4, is that correct? A. Yes, sir.

Q. Now, there is no indication of any achievement above that level on this graph, is there? A. No, sir.

Q. In terms of marking? A. No, sir.

Q. In fact, 25 percent of the students at Wyatt achieved even above that level, did they not? A. Yes, sir.

[412] Q. And the same is true throughout the graph, that 25 percent of the students were achieving at a level higher than the upper portion of the bar? A. Yes, sir.

Q. And again, there was no norm adjustment used in the third grade at that time? A. No, sir.

The Court: Who writes those glowing comments about how good they are?

The Witness: Teachers are brought in during the summer usually following the survey and are asked to analyze these, write, and after writing they are submitted to—well, at the present time they would be submitted to me from the 1968 survey.

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[413] * * *

Redirect Examination by Mr. Greiner:

Q. Mr. Cavanaugh, I thought you told me that the school district does in fact compare test results from the triennial program? A. I did.

Q. Are you saying those comparisons are invalid? A. No, sir.

Q. What did you mean in answer to counsel's question, then? [414] A. He asked me—I believe the question entailed comparison year to year from the comparisons contained—if different editions of the tests were used, and my response was that it's difficult to compare one edition of a test with another such as M, I believe he said, in 1962 which was the 1953 edition of the test, with the 1965 or 1968 editions which are 1963 publications.

Q. Well, then, in reporting the results of tests such as are reflected in Exhibit 379, are not such comparisons in fact made by the school district? A. Comparisons are made? Yes.

Q. From one— A. —year to the next.

Q. One prior three year test to the current one? A. This is true.

Q. Now, you mentioned the conversion—that a conversion would be necessary, Mr. Cavanaugh, with respect to the fifth grade achievement level of Wyatt in 1965. Calling your attention to that fifth grade achievement level as reported in Exhibit 379, where is the—is it the mean achievement or the median achievement? A. Median.

Q. All right. Where is the median achievement, for example, in word meaning? A. In word meaning, it's at 6.9.

[415] Q. And the expectancy was 5.7, is that correct? A. Yes, sir.

Q. Now, if we were to convert that 6.9 score, Mr. Cavanaugh, what would the result be? A. I don't have the tables available. I can give you an approximation if that's acceptable.

Q. Please do. A. Approximately 5.7—roughly 5.7 would be my guess.

Q. Now, let's take the next subtest, paragraph meaning. The median reported there is 6.4, is that correct? A. Yes.

Q. And if you converted that score, what would the median be? A. Again, an approximate one, 5.2.

Q. Then, let's take another subtest. Arithmetic computation. The median there is 6.0 as reported, is that correct? A. Yes, sir.

Q. And if you converted it as you have described, where would it be? A. Somewhere between 5.2 and 5.4 would be my guess.

Q. Now, you mentioned that the effect of normalizing, Mr. Cavanaugh, was to in effect lower the reported achievement at higher achieving schools and raise the reported achievement at lower achieving schools, is that correct? [416] A. Yes, sir.

Q. And the normalizing process was described to the school district in advance of the administration of the test, is that correct? A. I can't answer that, I don't know.

Q. When was the decision made to employ normalization? A. This I don't know.

Q. Is it fair to say, Mr. Cavanaugh, that those actual results were in fact predictable in advance? You knew that's what the effect would be, didn't you? A. No, sir.

Q. Why not? A. I don't believe so.

Q. Why not? A. Because in 1965 the new edition to the test was used for the first time in the survey.

Q. Well, you knew that there were some schools that

were achieving at a low level on the 1965—say, on the 1962 test, is that correct? A. Yes, sir.

Q. Is there any thing in the nature of the differences of the composition of the 1962 test and the 1965 test that would automatically change a school's achievement level? A. There were more subtests involved. Well, basically, I would say that the 1965 test was a more exacting test. You [417] would anticipate lower scores at both ends of the scale. The high achieving schools as well as the low achieving schools.

Q. And I believe you have told us, have you not, Mr. Cavanaugh, that from year to year there are particular schools that always seem to come out on the low end of the achievement totem pole, is that correct? A. Yes, sir.

Q. So you could sort of anticipate in advance what schools those are going to be, can't you? A. Yes, sir.

Q. And the same is true with respect to the higher achieving schools? A. Yes, sir.

Q. Isn't that right? A. Yes, sir.

Q. Now, you mentioned with respect to Exhibit 83 that there were certain factors in the background of that exhibit which were listed by rank order, is that correct? A. Yes, sir.

Q. Does Exhibit 83 have any predecessor? A. No, sir, not to my knowledge.

Q. That was the first time it was ever done, was it not? A. Yes, sir.

Q. Now, you also mentioned the achievement levels at [418] Wyatt. Is Wyatt a minority school, by the way? A. Yes, sir.

Q. What was its racial composition in 1965, the year we are focusing on? A. 1965? I don't know.

Q. Can you give us an approximation of what its racial composition was? A. No, sir.

Q. Well, we have in evidence—there is in evidence, Mr. Cavanaugh, Exhibit 243. This purports to give the ethnic distribution at Wyatt in 1965. According to Exhibit 242 it was 12.9 percent Anglo; it was about 45.6 percent Negro and 2.4 percent Anglo according to Exhibit 242.

The achievement levels at grade 3 for that school, Mr. Cavanaugh, as reported by you—were they relatively higher than they were at grade 5? A. With relation to the expectancy, yes.

Q. Is this a typical situation? A. I would say yes.

Q. In these minority schools? A. Yes.

Q. The children achieve relatively better in the early grades? A. Yes.

* * * * *

[419] *Recross-Examination by Mr. Jackson:*

Q. Mr. Cavanaugh, Mr. Greiner alluded to high achievement schools versus low achievement schools and the predictability of the norm adjustment that would be made on the 1965 test. The norm adjustments made for each school were not based on the school's prior history of achievement, was it? A. No, sir.

Q. Did that enter into it at all? A. No, sir.

Q. Was it considered at all? A. No, sir.

Q. Was anything but the IQ distribution in the school at the time the test was given utilized to arrive at the norm adjustment? A. No, sir.

Q. That was the only consideration given? A. Yes, sir.

Q. And the only factor used? A. Yes, sir.

* * * * *

[420] * * *

MARY MORTON, a witness called by and on behalf of plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination By Mr. Barnes:

The Court: Please give us your name and address.
The Witness: Mary Morton, 1210 South High.

By Mr. Barnes:

Q. What is your race, Mrs. Morton? A. White, Caucasian.

Q. What is your occupation? A. Elementary school principal.

Q. Of what school? A. Of Montclair Elementary.

Q. And of Montclair Annex as well? A. Right.

Q. For how long have you been principal at those two [421] schools? A. This is the ninth year.

Q. Can you give us the location of those schools? A. Montclair is at Eleventh and Newport. The Annex is at Thirteenth and Quebec.

Q. Do you know the location of the Philips Elementary School? A. Montview and Monaco, I think.

Q. About the corner of Monaco and Montview Boulevards? A. Yes.

Q. Can you tell us whether the area is bounded by East Colfax on the south, Kearney Street on the west, East Sixteenth Avenue and Batavia Place on the north, and Oneida Street on the east, if that was ever a part of the Montclair school district? A. Yes.

Q. During what years was it a part of the Montclair district? A. Around 1964, I believe, until—1968 was the last year, I think.

Q. The last school year was 1968-1969? A. Yes.

Q. That's not this year, but the year preceding this one. Was it a part of the Montclair school district in the year preceding this one? [422] A. Yes.

Q. It was one of the areas affected by the preliminary injunction, was it not? A. Yes.

Q. So that subsequent to that injunction or preceding that injunction, it was a part of the Montclair district? A. From 1964 on, yes.

Q. Do you know what district it was in prior to 1964? A. In the Philips area.

Q. Do you know what junior high school district that area has been in since 1964? A. Smiley.

Q. Have you ever talked with the parents of children living in this area about the junior high school their children should attend? A. Have I talked with them about it?

Q. Yes. A. Yes.

Q. Do you recall the names of these parents, some of the ones to whom you talked? A. The Price family, the Anderson family, the Patton family.

Q. Might there have been a McClintock family? A. It's possible. I don't remember the names of all [423] the children.

Q. This was during the period between the year 1964 and the end of the last school year of 1969? A. Yes.

Q. Might there possibly have been other parents to whom you talked concerning the junior high school their children should attend? A. Either talked or communicated by letter.

Q. Do you recall the race of the Prices and the Andersons and the Pattons? A. Yes, the Prices were Caucasian. The Andersons were Caucasian. And the Pattons were Negro.

Q. And the McClintocks? A. I can't remember.

Q. Did you ever have occasion to initiate discussions with parents of these four families or other families living within this area about the choice between Smiley Junior High School and the junior high school? (sic.) A. Will you repeat the question?

Q. Can you give us the location of the Smiley Junior High School, approximately? A. I believe 26th and Jasmine. I am not certain.

Q. 26th and Kearney— would be approximately right? A. It's in that general area.

[424] Q. And the Hill Junior High School? A. Is it Third and Clermont? Fourth and Clermont.

Q. At about Fourth and Clermont? A. Yes.

Q. Were the parents and children who lived in this area that we have been discussing living closer to the Hill Junior High School than to Smiley or vice versa? A. I never investigated this.

Q. The area is located north of Colfax Avenue, is it not? A. Yes.

Q. And Colfax Avenue is approximately at Fifteenth Street as you go north from First Avenue, is it not? A. Yes.

Q. And Smiley Junior High School is in the 25- to 2600 block going north? It's located directly north of this area?

The Court: We can take notice of distances. That needn't be proven.

Mr. Barnes: All right, Your Honor.

Q. Do you recall whether Hill was predominantly an Anglo school during the years 1964 to 1969? A. I would say yes.

Q. Do you recall the racial composition of Smiley during these years? [425] A. I would say—I had no personal contact with Smiley. I would say Negro probably.

Q. Predominantly Negro? A. (Nods affirmatively.)

Q. What was the racial composition of Montclair and the Montclair Annex for these years? A. Predominantly Anglo.

Q. To which junior high school did most of the students in the Montclair and Montclair Annex subdistrict go? A. To Hill.

Q. Did you ever request from the pupil personnel department of the authority to permit the children of families living in the area we have described to attend Hill? A. I did.

Q. And were these requests granted? A. Yes.

Q. In the absence of the permission granted by these requests to attend Hill, which school would these children have attended? A. Smiley.

Q. Did all of the children living in the area attend Hill and not Smiley pursuant to the permission that you requested? A. As far as I know, yes.

Q. In order to request this permission to attend Hill [426] rather than Smiley, did you require the children to furnish you with medical excuses? A. No.

Q. Or babysitter excuses? A. No.

Q. Did you discuss with these children the possible relative merits of the attendance at Hill or Smiley? A. No.

Q. Did you discuss with them differences in curriculum? A. No.

Q. Did you discuss with them the comparative distances between the two schools? A. No.

Q. Were there documents such as curriculum guides sent routinely to Hill Junior High School for the children living in this district? A. Curriculum guides?

Q. The curriculum choices that the children in the sixth grade would make before they went to high school. A. The junior high furnished us with cards for the children, to

have their parents sign, which indicated the courses offered and the parents could select with the child and the teachers' counsel which courses he would like the child to have.

Q. And where were these cards forwarded after they left [427] Montclair for these children living in this area? A. To Hill.

Q. Between the period 1964 to 1969, do you know how many Negro families attending Montclair lived in this area that we have been describing? A. No.

Q. How many do you recall? A. The Patton family is the only one I'm certain of.

Q. That's the only family whose children you recall attending Montclair who were Negro? A. Oh, no, I thought you were speaking within this small area.

Q. I was. I meant to be. A. That's the only one I'm sure of within that area.

Q. Between 1964 and 1969 approximately how many Anglo students lived in this area who attended Montclair? A. Are you speaking of all grade levels?

Q. Yes. A. This varied year to year. And this is only an approximate guess; twelve to twenty, perhaps. I don't know.

Q. And these children when they left Montclair would go where to junior high school? A. To Hill.

Q. And there would be about 12 to 20 each year that would come out? [428] A. No.

Q. How many would there be each year? A. The numbers in the sixth grade, the least there ever were was one, and the most was three or four.

Mr. Barnes: That's all I have.

[429] *Cross-Examination by Mr. Ris:*

Q. Mrs. Morton, how long have you been associated with the Denver Public School District No. 1? A. Since 1941.

Q. What was your first assignment? A. As a teacher at 24th Street School, which is now called Crofton.

Q. Where is it located? A. 24th and Arapahoe Street.

Q. What did you teach? A. Second grade.

Q. How long did you teach there? A. One year.

Q. What was its predominant racial characteristic? A. Largely Hispano.

Q. Then where did you go? A. To Whittier School.

Q. What was your assignment? A. Second grade in the beginning and then First.

Q. How long were you there? A. Until 1949.

Q. What was it predominantly? A. Negro.

Q. And then what was your assignment in 1949? [430] A. I became an elementary coordinator.

Q. For how long did you do that? A. About five years.

Q. Is that on a citywide basis? A. Yes.

Q. That took you then to about 1954? A. Yes.

Q. And what was your next assignment that year? A. As principal of Wyatt School.

Q. How long were you principal there? A. Two and a half years.

Q. And what was the predominant racial characteristic of Wyatt? A. It was Spanish and Negro predominantly.

Q. And after your termination of your assignment as principal of Wyatt in '56 what did you do? A. I was sent to Steck Elementary.

Q. How long were you there? A. Four years.

Q. And from there you went to Montclair in 1961? A. Yes.

Q. So you have either taught or been a principal or some association with the schools of varying ethnic and racial composition? A. Yes.

[431] Q. With regard to the so-called niches that plaintiffs have referred to, I would refer you to Plaintiffs'

Exhibit 71, which purports to be a map of the northeast section of Denver and showing various areas in yellow, and with arrows going from those yellow areas. Do you recognize those as being the results in that area of various boundary changes made in 1964? A. Yes.

Q. And would you just mark where this particular area is that we have been discussing this morning? Just put a "M" on it if you will, please. A. Just over it?

Q. Yes. A. (Witness drawing.)

Q. All right, now, you have put a "M" just to the right of the arrows. A. What is this? Is this Kearney here?

Q. Yes, Kearney, 209. A. Well, it should not—it doesn't mean just right of the arrow, but—

Q. No, it is the enclosure in which the "M" is placed. A. Right, right. This area was changed—

Q. All right, but the enclosure with the "M"—there is a little "x" ahead of it. I don't know where that [432] came from—but that is the area that we are discussing now? A. Yes.

Mr. Ris: Mr. Kerr, could I have Exhibit 71. I am sorry, I did this on our copy. Well, we don't seem to be able to find the original. With leave of Court, may we conform the original when we do find it?

Mr. Greiner: Your Honor, Exhibit 71 was one of the exhibits marked for identification at the summer hearing and not put into evidence, and 71 is not at this point in evidence.

Mr. Ris: That may be the answer then. We will have it so marked. Is it agreeable?

Mr. Greiner: I think we are talking about Exhibit 80 and 81, actually, Your Honor. Oh, you are talking about 71?

Mr. Ris: Yes.

Mr. Greiner: Oh, yes, 71 is in. I misspoke, Your Honor. Sorry.

Mr. Ris: Well, we will conform it, if it is agreeable with counsel, when we find the original.

Mr. Greiner: Yes. Counsel, 71 is on one of these boards right here.

Mr. Ris: All right.

Q. We now have the original, and I will ask you to [433] do it on the original, if you will, please. A. (Witness drawing on exhibit.)

Q. Thank you. Mrs. Morton, the first year then that you had students from this particular area was the school year 1964 and 1965, is that correct? A. I believe so.

Q. At the end of that school year, were you approached by some pupil or his family about going to Hill rather than to Smiley? A. The pupils expressed their wish to me.

Q. Was this initiated by the pupils? A. Yes.

Q. It was not initiated by you? A. No.

Q. And what was the stated reason by these pupils? A. They wanted to go with their friends.

Q. From the sixth grade at Montclair? A. From the sixth grade at Montclair.

Q. And how did you consider that as a reason? A. I considered it a logical and very understandable reason.

Q. All right. And, generally, insofar as the neighborhood school concept as it had been applied in the past, was that one of the elements that went into determining where the pupils would go, that they would so far as possible stay [434] with their own peer group? A. This varies from junior high to junior high. It is a geographic chain but—

The Court: He means, generally speaking, one of the values of the neighborhood school is that it

maintains this association of a person with other friends that were in his neighborhood and so on.

The Witness: I can't speak for the reasons why.

The Court: Isn't that what you are asking?

Mr. Ris: Yes, that's exactly what I was asking.

The Witness: Why they are set this way—but I would certainly assume that this would be a part of the reason.

Q. You don't know what all the elements are that go into it? A. No.

Q. Now, did you then speak to the parents or communicate with the parents one way or the other, or did this request come through the parents initially? A. The children—the first year, it came to me through the children.

Q. All right. A. I asked—I don't recall the exact procedure. This was some time ago.

Q. Yes. [435] A. I made a contact with the parents and asked, if this were possible, would they prefer that the child go with their classmates to Hill or to Smiley. Upon their decision then I made the contact with the pupil records department or the pupil personnel.

Q. So, each of the instances, in each of the five years, was your request then of the pupils and the parents? A. Yes, at the same time I did request that the boundary of the junior high be made to coincide with the boundary of Montclair so that it would not isolate these one to three or four children.

Q. And you say that in the various years involved from '64 to '69 there was never less than one or more than four or five involved? A. Right.

Q. And was there any distinction made with respect to the one Negro child? A. None.

Q. Did the Negro child also, and her parents, request that you initiate proceedings to have him or her go to Hill also? A. Yes, sir.

Q. Did you do so? A. Yes, sir.

[436] Q. Was that request granted? A. Yes.

Q. As you made these requests to the Administration Building, was the color or race or ethnic background of these children disclosed? A. No.

Q. Were these requests in writing? A. Yes.

Q. And no reference to race or ethnic origin at all? A. No.

Mr. Ris: That's all. Thank you, Mrs. Morton.

Further Cross-Examination by Mr. Brega:

Q. Mrs. Morton, did you have any racial or ethnic motivation in requesting these applications to Hill? A. Absolutely none.

* * * * *

[440] MARLENE CHAMBERS, called as a witness by the plaintiffs, being first duly sworn, on her oath testified as follows:

The Court: Please take the witness chair, if you will, please, and give us your full name and address and occupation.

The Witness: My name is Marlene Chambers. I live at 2905 South High, and I am a housewife.

Direct Examination by Mr. Greiner:

Q. Mrs. Chambers, do you have children currently enrolled in the Denver Public School System? A. Yes, I do. I have two children, both girls. One is a sixth grader at Hallett and one is a fourth grader at Hallett.

Q. Are those children participating in the Hallett voluntary open enrollment program? A. Yes, sir, they are.

Q. You live at 2905 South High? A. That's right.

Q. Which elementary school district is that located in? A. The Slavens area.

Q. Are you familiar with the origination of the Hallett program, Mrs. Chambers? A. Yes, I am. Just before the Christmas recess in [441] 1968, the school administration sent home notices with some children at some schools, explaining that the Board had approved on November 21 a new kind of voluntary open enrollment program.

Q. Mrs. Chambers, I am handing you what has been marked for identification as Plaintiffs' Exhibit 413. Is that the notice to which you have reference? A. Yes, it is.

Q. And that was sent out from the schools? A. It was sent home from University Park School December 17th, I believe. At Slavens, they weren't sent home until January 2nd.

Mr. Greiner: Your Honor, we would offer Exhibit 413 at this time.

Mr. Creighton: Your Honor, this is a new exhibit and we haven't seen it.

The Court: Well, just take your time, just so you hurry up.

Mr. Creighton: I hope it is a short exhibit.

Your Honor, this exhibit appears to be the same pages as Plaintiffs' Exhibit 36, previously admitted, with the addition of a blank copy of Plaintiffs' Exhibit 37-B without any writing on it. I have no objection.

The Court: Very well.

Mr. Brega: No objection.

[442] The Court: It will be received.

(Plaintiffs' Exhibit No. 413 was received in evidence.)

Q. You said that some parents at the University Park School had received the notice, an example of which is Exhibit 413? A. That's right.

Q. You were not then in the University Park district, is that correct? A. No, sir.

Q. Were you contacted by University Park parents? A. Yes, during—informally first by a friend, who notified me of this possibility, but then during the Christmas vacation I was called to a meeting which had been arranged at the home of Carolyn Edder, and there were several parents asked to attend this meeting from several south and southwest school districts.

Q. Did such a meeting take place? A. Yes.

Q. Do you recall approximately when the meeting took place? A. It was on December 30th, the Monday after Christmas.

Q. What time of day did the meeting take place? A. It was in the morning.

Q. Now, do you recall what schools were represented at [443] that meeting? A. Not precisely, no. There were several people there from several different schools. There were—

Q. Can you identify the schools that you recall being represented at the meeting? A. Ash Grove, Slavens, University Park. I am not sure of the names of the southwest schools. There were two different southwest schools at least there.

Q. Were there any parents at the meeting from the Hallett school? A. Not that I recall.

Q. All right, now, what was the subject of the meeting, Mrs. Chambers? A. The subject was to decide whether or not there was some way to make this voluntary open enrollment program effective. You see, the form that had been—the letter that had been sent home explaining the plan—

Q. You are referring now to Exhibit 413? A. That's right, this exhibit—just explained the possibility if the child's enrollment in the new school would improve the racial balance there and if space were available in the new school requested, then a transfer might be effected, and the purpose of this meeting was to find out if there was some way to concentrate the volunteers to a particular minority school, rather than sending the children [444] out so that they would become fractional minorities in their new schools, also to see if it weren't possible to actually desegregate some minority school by this joint effort.

Q. Now, during the course of this meeting, did the group decide upon a target school? A. Yes, they did.

Q. And what was that school? A. Hallett.

Q. Did you have an idea, Mrs. Chambers, of how many volunteers you were going to need for the Hallett program? A. Well, during the discussion that morning some of the people present felt that the whole plan would be much more attractive to many more white parents if they felt that Hallett would become a majority white school by this action, and so the possibility was discussed of making all of the answers conditional answers. That is, people would fill out this form in a way that would say, "I will send my child to Hallett, if Hallett thereby becomes a majority

white school," and in that case about 300 or 350 volunteers would have been needed, both into and out of Hallett.

Q. Now, Exhibit 413, Mrs. Chambers, did that have a deadline by which responses were to be returned to the school? A. Yes, the date January 6 is given.

Q. Was that deadline a subject of discussion at this parents' meeting? [445] A. Well, it was the subject of concern, and during the course of the meeting we decided to draw up a communication which could be sent to some parents or to some schools which would explain our plan and that we would take this communication to the office of Lloyd Jones, who had sent out the original communication.

Q. The original communication being Exhibit 413? A. Right, Exhibit 413, and we would see if he could help us get this information—our information distributed to certain schools, and at the same time we would ask him if it were at all possible to extend this deadline, which was a very short time.

Q. And was a proposed statement then drafted at the meeting? A. Yes.

Q. I am handing you what has been marked for identification as Exhibit 414 and ask if that is the statement to which you have reference? A. Yes, it is.

Q. Has that been in your possession since it was drafted, Mrs. Chambers? A. No.

Q. Where has it been? A. Carolyn Edder had in her files.

Q. But you can identify it as the draft? [446] A. Yes.

Mr. Greiner: Your Honor, at this time we would offer Exhibit 414.

Mr. Creighton: Again, we have not seen this before, Your Honor.

The Court: Do you wish to see it?

Mr. Brega: I have already gone through it, Your Honor.

The Court: All right.

Mr. Creighton: May I voir dire?

Voir Dire Examination by Mr. Creighton:

Q. Do I understand that this is a carbon of a letter you wanted Mr. Jones' office to send out? A. Right.

Q. And it would be signed by, as it states here, a group of interested parents? A. At that time, yes. That was the idea.

Q. In other words, this was your group's letter that you wanted Mr. Jones to send out? A. Well, it was our suggested letter, yes.

Mr. Creighton: Well, we have no objection to the exhibit being received.

The Court: It will be received.

(Exhibit No. 414 was received in evidence.)

[447] The Court: I guess you have none, either?

Mr. Brega: I believe there is some handwriting on the bottom. Is that yours?

The Witness: That is Mrs. Edder's handwriting. I think she wrote it there after it was rejected.

Mr. Brega: It wasn't there at the time it was submitted?

The Witness: No, it wasn't on there at the time it was shown.

Mr. Brega: I have no objection, Your Honor.

Direct Examination by Mr. Greiner (Continued):

Q. Mrs. Chambers, that meeting was on Monday, December 30? A. That's right.

Q. Did you then contact Mr. Jones? A. We contacted his office and made an appointment that afternoon for four of the people.

Q. Did a delegation from the group go down and talk with Mr. Jones? A. Yes, sir.

Q. And that was the afternoon of December 30th? A. That's right.

Q. Who was present at that meeting? A. Well, the delegation consisted of Mrs. Pat Samuel, [448] Mrs. Diane Greenspun, Mr. Craig Barnes and myself.

Q. And— A. And the person we met with was Mr. Lloyd Jones.

Q. And can you tell us, please, what was said to Mr. Jones at the meeting? A. Well, we explained to Mr. Jones our concern for the success of a voluntary open enrollment program which would lead to integration and the drawbacks which we saw in the way the plan had been presented to the schools or the children of the schools and to the parents, and we suggested to him that he might like to consider the idea that the group had had for making the voluntary open enrollment an effective means of desegregating the schools rather than kind of a shotgun approach.

Q. Did you have Exhibit 414 with you at this meeting with Mr. Jones? A. I think so.

Q. Did you discuss 414 with Mr. Jones? A. We discussed sending out a notice, yes.

Q. Did Mr. Jones make any comments regarding the content of your proposed notice? A. No.

Q. All right, what else if anything was said by your group to Mr. Jones concerning this idea of a target program

at Hallett? Did you discuss the condition of conditional [449] transfers? A. Yes, we discussed the question of conditional transfers and—

Mr. Creighton: Excuse me, Your Honor, I don't understand conditional transfers.

The Witness: Well, our—

The Court: Hold up just a minute.

The Witness: Oh, excuse me.

The Court: Well, she has already explained it, I believe, as a program that they conceived as a variation of the original proposal whereby these transfers would come about only on condition that they had a large number of people to make a real impact on the segregated school. That was my understanding.

Mr. Creighton: Yes, the reason I asked is there is a traditional transfer meaning relating to a word of art relating to the school system.

The Court: Well, this is in this context. The transfer would take place only if the school would become predominantly Anglo, is that correct?

The Witness: That's correct.

Q. What if anything did Mr. Jones say? A. Well, he said, "As I understand it, if you don't get enough people to volunteer to make this a majority white school, then it is no go?" And we said, "Yes, it is no go," [450] and he just nodded his head, and that was that.

Q. Did you discuss with Mr. Jones any means by which your proposed notice might be sent to the parents? A. Yes, we asked him if it might be possible to send this notice out through the school offices. We had selected six white schools to concentrate the recruiting efforts in and we felt that it

wasn't unreasonable to ask the administration to circulate some notice concerning the plan to the children in those six schools.

Q. Did you discuss with Mr. Jones the total number of such notices that might be required? A. No.

Q. Did you discuss with Mr. Jones the identity of the schools which you had selected? A. Yes.

Q. And there were six such schools? A. Right.

Q. Now, what if anything did Mr. Jones say with respect to your request that the notice be sent out through the schools? A. He said that it might be possible. He seemed to agree in theory that the plan was a good plan to concentrate voluntary efforts in one minority school, but he did not agree to send out the notices at that time.

[451] Q. Did Mr. Jones make any suggestions as to where your group should next go? A. He asked us if we would meet with him and Howard Johnson and Dr. Keppe.

Q. And was such a meeting arranged? A. Yes, it was for the following day.

Q. And did it take place then the following day? A. Yes, it did.

Q. And who was present at that meeting? A. The same four members of the delegation, Lloyd Jones, Howard Johnson, and Dr. Keppe.

Q. Where did the meeting take place? A. In Howard Johnson's office.

Q. Can you describe for us, please, Mrs. Chambers, what went on then at that meeting? A. At that meeting Lloyd Johnson—Lloyd Jones explained to Howard Johnson the plan, if you want to call it the Hallett plan—told him what sorts of things we were asking from the administration in order to make it work and expressed the idea that he would like to do this for us.

Q. What was Mr. Johnson's response, if any? A. His immediate response was, "and leave town, Lloyd?" Because, Mr. Jones was planning to go to a sabbatical shortly thereafter.

Q. Mrs. Chambers, did you have Exhibit 414 with you at [452] the conference with Mr. Johnson? A. Yes.

Q. Was Mr. Johnson given a copy of this proposed notice? A. Yes, he next read the notice and I think as we might have anticipated he objected to a number of the statements in the notice.

Q. What did your group say with respect to any of those objections? A. Well, at each objection, we agreed that the objection should be deleted from the notice, that the objectionable material should be deleted.

Q. Do you have any recollection as to what some of Dr. Johnson's objections were? A. Well, certainly—the primary one was that there is a statement in this notice to the effect that we do not believe that voluntary integration is the proper way to integrate the schools.

Q. And he wished that deleted? A. He wished that deleted, understandably.

Q. Anything else? A. Pardon me?

Q. Anything else? A. I can't recall many of the other ones. He did [453] object somewhat to the idea of a conditional response and that also is included in this letter. He felt that the schools couldn't accept a conditional kind of response, and later in the discussion he did—we suggested that perhaps parents might fill out this form conditionally in any event, and he said—well, we asked him what would happen in this case, and he said, well, these forms then would be put at the bottom of the pile, and if there were any room left they might or might not be processed. So, we actually got no definite answer about the conditional response.

Q. What if anything did Dr. Johnson say about the sending of this proposed notice under the school auspices? A. He said it was impossible even with the deletions that we agreed to; that the schools could not do this because the board had instructed the administration to inform the parents that voluntary open enrollment was available but they had not instructed the administration to promote it.

Q. Now, Mrs. Chambers, I take it then, as a result of that meeting that your notice was not sent out by the school district? A. Certainly not.

Q. And what, if any, help did you receive from the school administration in trying to implement the Hallett [454] A. Well, we had asked for three different sorts of aids: one was that the notice would be distributed through the administration, and that was refused. We had asked that the administration accept a conditional kind of response to the form, and that was really noncommittal. And the third thing we had asked for was an extension of time as far as returning the forms so that the parents could have a little more time to think over the possibilities of the plan. And—

Q. With respect to—pardon me. A. I was just going to say, and the last request was granted. Mr. Johnson agreed to a three or four-day extension of time at that moment.

Q. Mrs. Chambers, in the course of your meeting with Mr. Johnson and in discussing the question of getting notice to the parents, did you also discuss the possibility of calling parent meetings at the various target schools, recruiting schools? A. I don't believe that we did.

Mr. Greiner: No further questions, Your Honor.

Cross-Examination by Mr. Creighton:

Q. Mrs. Chambers, I believe you said your initial talk with Mr. Jones was on the 31st of December? A. No, our initial talk with Mr. Jones was on the [455] 30th of December.

Q. On a Tuesday? A. A Monday, isn't it?

Q. Well, then, your meeting with your group was on what day? A. On that same Monday, that same day.

Q. The group met in the morning and you saw Mr. Jones that afternoon? A. That's right.

Q. That was the 30th? A. That's right.

Q. Then the next day, December 31st, you— A. —met.

Q. Met with him? A. Johnson and Jones and Keppe, the three of them.

Q. Now, when was the second semester to begin? A. I think it was January 27th, but I'm not absolutely positive.

Q. That date is reflected in the notice, is it not? A. I don't know.

Q. And didn't you estimate that it would take some 350 children each way, given the size, I suppose, of Hallett, to accomplish your objective of what—at least 50 percent— A. 350 would have been sixty percent. 300 would have been fifty.

[456] Q. And that fifty percent of which school? A. Of Hallett.

Q. And that was your objective? A. That was our objective, yes.

Q. And Mr. Jones agreed that the idea of targeting in on a school had merit, didn't he? A. Yes, he did.

Q. And did he urge the meeting with Mr. Johnson the next day? A. He asked us—he invited us to join him at the meeting, yes.

Q. And so, by the time you met with Mr. Johnson, you

would have had something like 27 days left before the semester began? A. That's right.

Q. Would this involve busing, given the locations of the schools? A. Certainly.

Q. Did you understand it would involve arrangements for busing? A. Certainly.

Q. Did you understand it would involve shifting of records and coordination of children's courses? A. Yes.

Q. Was there an actual risk that you might not achieve [457] your 300 each way? A. Of course.

Q. And we understand that if you did not achieve that number, then—for your part, you didn't want the program to go forward? A. For my part personally, I did.

Q. But the group as a whole? What was its— A. The group as a whole had at that time determined it would not go forward if the objectives were not met.

Q. So Mr. Johnson correctly understood that, if you couldn't get 300 each way in the next 27 days, of these background and necessary arrangements of busing, curriculum, notification, and so forth, then the deal was off; no go, you say? A. That's right.

Q. What kind of a new deadline did you want for finding out whether it was go or no go? A. Well, considering the fact that the notices had not even been delivered to my school yet, I felt that it would only—that it was only right that there should be a few days at least for parents to consider the new approach to the voluntary open enrollment.

Q. Well, how many days? What new deadlines did you want? A. We agreed at the time—agreed to the three or [458]four days which he suggested.

Q. Which would have been about the 10th of January? A. Uh-huh, about the end of that week. January 6th was a Monday; after school resumed on the 2nd, which was a

Thursday. And he agreed to accept the notices up till the end of that week, which was the 10th, wasn't it?

Q. Who is this, again? A. Mr. Johnson.

Q. Now, the notice reached the Hallett parents when? Do you know? A. No, I don't know.

Q. When did you hear of it from the Hallett parents?

Mr. Greiner: Pardon me, Your Honor. Could we have identified which notice counsel is talking about?

The Court: The original notice, I assume, from the school administration.

Mr. Creighton: Yes, I beg your pardon.

Q. The original notice of the VOE program, I believe you testified you heard about from Hallett parents? A. No, I heard about it initially from University Park parents.

Q. Excuse me. University Park parents.

And when was this? A. The notice—the notices, I believe, were delivered to them on December 17th. I heard about it by the following [459] Friday from a friend.

Q. Do you know of the date of the arrival of this notice at any other schools besides University Park and Slavens? A. You mean the date that the notice arrived from downtown?

Q. Yes. A. Or the date it was given out to the children? I'm not sure—

Q. The date that it reached the children, from them to their parents? A. Yes, I do know. There were several schools at which it was not delivered until after the holidays.

Q. Where were these schools? A. Moore was one of them.

Q. Now, that's not in your area, is it? A. I don't know what you mean by my area.

Q. Was Moore school included in your group of schools?

A. In the group of six that we were trying to recruit, no.

Q. Any other schools you know about when the notice arrived to the parents? A. Well, I'm not positive of the names of the schools but I do know there was at least one other school. It might have been Montclair, where it was not delivered until after [460] the holidays, because, special arrangements had to be made for two or three schools—they finally received an even more extended deadline.

Q. That was the Montclair School in your group of six? A. No.

Q. So in your group of six schools, only your own school, Slavens, got the notice through to the parents late in December? Is that a fair— A. No, it is not. Slavens didn't receive the notice until January 2nd.

Q. Yes. A. And I'm not sure when the other schools besides University Park received it.

Q. And, as you went through the objections that Mr. Johnson raised to your proposed form of notice, what was done about the provision in your proposed form of notice of what you call the conditional response? A. I'm not sure that I understand the question.

Q. Did Mr. Johnson agree that that could be removed from your notice? A. He asked that it be removed and we agreed.

Q. And you agreed to that. Then, you made the counter-suggestion that all of the applications contain the condition? Was that the arrangement? [461] A. No. At the outset of the meeting our plan really was to cooperate as fully as possible with the administration and secure their utmost cooperation in order to make the voluntary open enrollment plan a feasible opportunity for many people who otherwise would not be willing to volunteer one child, you know, black or white, into a school where that child might be the only

member of his race. And whatever Howard Johnson said about wishing to have something changed in our notice, we were willing to agree with, because we wished to have some notice to explain this plan sent out to the parents.

And I don't really understand if I have answered your question or not.

Q. Well, let me ask another then. Did you then, when he agreed to take out, among other things, the conditional aspects of the—

The Court: He didn't agree to it. He suggested it.

Q. He suggested it and you agreed to it.

The Court: We ought to get these things moving on the right—

Mr. Creighton: Beg your pardon.

Q. Then, in agreeing to Mr. Johnson's suggestion that that conditional statement in the notice come out, did you then state that the request would be conditional; that that [462] would be part of your plan? A. I still don't understand what question I'm supposed to be answering. What request do you mean?

Q. Well, Mrs. Chambers, Mr. Johnson went through your proposed form of notice, did he not? A. Yes, sir.

Q. And there were several items there that he felt could not be contained in such a notice if it went out from the district, is that right? A. Yes, sir.

Q. And one of them was that the program would not be implemented unless certain—a certain level of participation was achieved, is that right? A. One of the items that he objected to was that.

Q. Yes, and he suggested— A. No, he did not. He didn't.

He objected to our having parents fill out these forms in a conditional way. He wanted the parents to fill out, "Yes, I'm sending my child regardless of who else is going." He didn't want to allow the conditional kind of response by the parents.

Q. Right. And was anything said at that meeting about any school district policy regarding the sending out by the school district of notices not originated by it, do you recall? A. No, I don't think that was the basis for his [463] objection. The objection was that, in sending out the notice, the administration would be promoting voluntary open enrollment for integration, not merely informing the parents that there was such a plan.

[464] Q. And are you quoting Mr. Johnson? A. Yes, I am.

Mr. Creighton: All right, you may examine.

Mr. Brega: No questions, Your Honor.

Redirect Examination by Mr. Greiner:

Q. Mrs. Chambers, who was Howard Johnson at the time you were attending this meeting? A. He was the Deputy Superintendent for the Denver Public Schools.

Q. And who was Dr. Keppe? A. Superintendent of Instruction, I believe.

Is that right?

Q. At what level? A. Citywide, at the elementary level.

Q. And who was Mr. Jones? A. Lloyd Jones at that time was the Superintendent of Elementary Education. Is that—I am—I can't remember exactly.

Q. Approximately how many parents did you want to contact in the target recruiting schools, do you have any idea? A. We wanted to contact them all.

Q. And do you have any idea how many that was? A. No, I really don't.

[465] Q. Do you have a ball-park figure? A. Maybe 3,600. It is a ball-park figure.

Q. Now, you received no administration help in contacting the parents that you wanted to have contacted? A. No, we had to arrange our own means of informing parents.

Q. Subsequently, were you in fact able to contact these 3,000 some odd parents? A. We probably didn't contact them all, but we did manage to inform most of them of meetings. We had to—through the school community relations committees of the PTA's in these various schools, we arranged very quick meetings, at which the program was discussed.

Q. What was the total attendance of parents at those meetings, do you recall? A. I really couldn't say for sure. I would say possibly 500 people.

Q. And do you recall whether or not your objective of a predominantly Anglo school at Hallett was achieved? A. No, it was not.

Q. About how many volunteers did you succeed in getting? A. I'm not absolutely sure how many Anglo volunteers there were. I think it was in the neighborhood of 100 before a meeting which was subsequently held to decide what possibilities were open to these volunteers at that time, and many of [466] the initial volunteers conditionally were at that time withdrawn, so that only 55 children participated in the program last January.

Q. That's 55 Anglo children? A. That's right.

Mr. Greiner: No further questions.

Recross-examination by Mr. Creighton:

Q. Mrs. Chambers, subsequent to the second semester of the last school year, that is, subsequent to last January,

this Hallett program has been supported by the school district, has it not? A. To a certain extent, yes.

Q. Hasn't the school community relations office of the school district made it a special part of its efforts? A. As far as recruiting white children to Hallett and as far as trying to recruit Negro children to leave Hallett, that's true, but as far as making the move attractive in either direction, it is not true.

Q. What makes the move attractive? A. Well, I haven't been in court during the days that you have been going over this, but most of the parents who were involved in the Hallett plan who cared enough about integration to do something about it in the schools believed quite strongly that a segregated minority school is an [467] inferior school.

Q. Mrs. Chambers, what my question was, what makes this kind of program attractive to those involved? A. The thing that makes it attractive is to improve the quality of the school.

Q. And how is that done? A. Well, I assume one of the ways of doing it, as far as many majority white parents are concerned is to improve the quality of the materials available for the children. There were many materials, for instance, that were available to my children at Slavens that were not available to them when they moved to Hallett.

Q. Now, is it the materials at the schools then that makes this attractive? A. I think it makes it attractive to many people, yes. I think the experience and quality of the staff is also an important factor. Hallett happens to have primarily inexperienced teachers on its staff, not that that makes them bad teachers in my view, but as is generally true the inexperienced teachers are assigned to schools like Hallett rather than to schools like Slavens.

Mr. Brega: I am going to object. I don't believe that's responsive and it is hearsay and drawing a conclusion of the witness.

The Court: She is giving her viewpoint and, anyhow, [468] he has a right to pull this out if he wishes. It is cross-examination. It is not for you to rescue him, or me either. I mean, he is in on this. Let him find his own way out.

Q. Well, in your view, Mrs. Chambers, younger teachers are not necessarily poorer teachers? A. In my personal view, yes, but I think in the opinion of many parents, no.

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PALICIA LEWIS, called as a witness by the plaintiffs, being first duly sworn, under oath testified as follows:

The Court: Please take the witness chair and state your name and address, please.

The Witness: Palicia Lewis, 5301 East 36th Avenue, Denver, Colorado.

Direct Examination by Mr. Barnes:

Q. What is your occupation? [469] A. I am a teacher in the Denver Public Schools system, Horace Mann Junior High.

Q. Do you have children in the Denver Public Schools? A. Yes, I do have.

Q. What are their names and grades and schools? A. Lawrence Lewis, Jr., eighth grader at Kunsmiller.

Camelia, fifth grader at Moore.

Paul and Pamela, third graders at Moore.

Q. In what school district do you live? A. Smith Elementary School District.

Q. How did you learn of the voluntary open enrollment plan when it was announced last year? A. A notice was sent home by our son from Smiley Junior High School.

Q. About what time did you receive that notice? A. Shortly before the Christmas holiday began.

Q. And did you fill in that form and return it? A. Yes, we filled in the form, returned it to Smiley.

Q. And how did you return it? A. By our son.

Q. And that son is— A. Lawrence Lewis, Jr.

Q. About what time was that when you sent it back? A. After the Christmas holidays, 2nd or 3rd of January, sometime that week.

[470] Q. Did you indicate a choice or did Lawrence indicate a choice of schools where he would like to voluntarily enroll? A. Yes, he did.

Q. What was that choice? A. Hamilton Junior High School.

Q. Was there a second choice? A. Hamilton Junior High School.

Q. And a third? A. Smiley.

Q. After sending the notice back to Smiley Junior High School, did you receive a response from the school? A. No, sir, we did not.

Q. How long did you wait for such a response? A. Maybe a week. I waited until some of the people I knew started—began receiving their responses. I had a niece in Smiley and she received hers and her request had been granted.

Q. Did you then subsequently inquire what happened to your returned notice? A. I called the school and asked if my request had been granted and I was referred to a Mrs. Barnes. She indicated that the request had been received but it had been denied.

Q. What were the grounds given for its denial?

Mr. Brega: I am going to object to that, if the [471] Court please.

The Court: Well, what's the purpose of this, Mr. Barnes?

Mr. Barnes: It is offered, Your Honor, to show the state of mind of the school district and the conditions upon which denial was sent.

The Court: Who was the speaker?

Mr. Barnes: I think the witness testified Mrs. Barnes at Smiley Junior High School.

The Court: What position?

The Witness: Coordinator.

Q. Was she coordinator of the voluntary open enrollment? A. She was coordinator of the school.

Q. Were the requests in her custody, as I understand it? A. This was the person to whom I was referred when I asked the question.

The Court: Well, I think all of these individual experiences are of limited probative value, frankly. In other words, I don't see how you can prove up the policy. You get some indication of it, perhaps, but—is that what you are trying to do? Are you trying to prove intent or motive or plan or scheme? Is that the idea of this?

Mr. Barnes: It also is a partial explanation of the failure of the voluntary open enrollment policy to [472] integrate, Your Honor. This is very brief at this point.

The Court: Well, is this offered as a policy of the school board or just the—

Mr. Barnes: No, it is not the policy of the school board.

The Court: Well, it can't be of much value to us, I do not suppose. You are just saying that there are a number of obstacles to ever making this kind of a program work, is that your idea?

Mr. Barnes: Yes, Your Honor.

The Court: All right, we will hear it then for that limited purpose and overrule your objection.

Q. What did Mrs. Barnes say to you was the reason for the denial of your request? A. She stated that only children who were already on buses to Smiley were being bussed to Hamilton, would be accepted at the Hamilton program.

Q. And was your son already on a bus? A. He was not.

Q. Where did Lawrence then go to school the second semester? A. To Smiley.

Q. Went to Smiley? A. Yes.

Q. Mrs. Lewis, did you work last summer on the so-called [473] Hallett Program? A. Yes, I did.

Q. Have you heard the testimony of Mrs. Chambers this morning describing the initiation of that program? A. Yes.

Q. Is that a program which you worked on last summer? A. Yes.

Q. What was your responsibility in connection with that program? A. We contacted parents throughout the city, recruiting volunteers for the program, promoting class community communication.

Q. Did you work out of an office in the Administration Building? A. Yes, I did.

Q. What was that office? A. School-Community Relations office.

Q. What were the dates that you worked there on this program? A. I worked from mid-August—about the 23rd of June to mid-August, the 15th of August.

Q. Were you employed by the Denver Public Schools to do this? A. Yes.

Q. Was there anyone else working in the School-Community [474] Relations office on this program? A. Yes, there was one other person working full time, two people who worked on it sometimes, three secretaries, one full time.

Q. And was it a part of your responsibility to publicize the program to parents in the district? A. Yes.

Q. What were the various methods you used to try and do that? A. We made phone contacts. We held coffees. We had tours. We had picnics.

Q. When you contacted parents, did you attempt to explain the details of the Hallett Program to them? A. Yes, we did.

Q. What were the details which you related to them that would make it attractive? A. We promised integration, the first thing. Then they were promised, as the plan finally developed, that a group of consultants would be provided to go from Hallett School to the focal schools to define the problems and to provide directions for working with them and coping with them.

Q. Did you contact parents, both Anglo and Negro parents? A. Yes, we did.

[475] Q. And Hispano parents? A. Yes.

Q. And did you contact them in all areas of the city? A. Practically, except north.

Q. To assist you in this effort, were there any other people in the school administration? A. Many of the

offices did work on this program. Mr. McWilliams worked on it. Dr. O'Hare. Dr. Jones.

Q. Excuse me. Do you recall what office Mr. McWilliams was in? A. His office dealt with the assignment of children in the voluntary open enrollment program.

Q. And Mr. O'Hare's office? A. Dealt with pupil services.

Q. And Mr. Jones' office? A. Elementary education.

Q. And were you also assisted by Mr. Olander's office? A. Yes, for transportation.

Q. Did you also engage the assistance of volunteers from the community? A. Yes.

Q. Approximately how many such volunteers did you have helping you? A. Approximately 170.

[476] Q. And, altogether, with the work of the people in the School-Community Relations office and your 170 volunteers, approximately how many citizens do you think you contacted directly by phone and at meetings? A. Two or three thousand.

Q. Did you contact some of these people more than once? A. Yes.

Q. What was the purpose of the subsequent contact? A. Many people had additional questions to ask. I failed to indicate we had a publication, VOE Dialogue, that went to large—to a large number of people, and when they had questions or if there were questions that arose at coffees or meetings, that individual's school chairman reported to us, and we made contacts to—

Q. Did you identify any focal schools for Negro parents to send their children to that would have the same attractiveness of the single Hallett School for the Anglo parents? A. Attempts were made to do this.

Q. What schools were identified? A. Ellis, Carson, Slavens, Johnson, University Park—perhaps.

Q. And did you suggest that there was a possibility that a Negro child who volunteered might be able to go to [477] one of these schools as opposed to any one of the fifty elementary schools in the district? A. They were given the freedom of choice. They were told these were focal schools but their choice would be honored even if it were any one of the thirty-four schools that were involved.

Q. This was offered as an additional inducement to participate, was it not? A. Yes.

Q. How many new Anglos did this program—Would you describe it as a two-month effort? A. It was an all-summer effort; June, July and August. I worked for two months.

Q. How many new Anglos did you recruit to come into Hallett as a result of your efforts? A. August 9th—I left the 15th of August—the record showed 153 new Anglo parents—children volunteered.

Q. And how many new Negro children did you recruit to leave Hallett? A. Ninety-seven by that date.

Q. What was your goal for children into and out of Hallett? A. Five hundred into, five hundred out of.

Q. And would this have made Hallett a predominantly Anglo school? [478] A. Yes, it would have.

Q. Did you succeed? Apparently you did not. A. No.

Q. Do you think you would have succeeded given more time? A. No.

Q. If you were given this coming summer to promote the same program, would you expect that you would succeed?

Mr. Ris: If the Court please, that's pure speculation.

The Court: Sustained.

Q. Do you know of any improvement in the voluntary program at Hallett which could be implemented to make it succeed? A. No.

Q. Mrs. Lewis, did you attend a meeting in January of 1966 to consider overcrowding in Smith Elementary School? A. Yes.

Mr. Ris: What year?

Mr. Barnes: January, 1966.

Q. Did you have a child in Smith at that time? A. Yes.

Q. Did you have more than one? A. Yes.

Q. Two? [479] A. Two.

Q. Who else was present at that meeting? A. The parents of Smith School community.

Q. Was there a large group? A. It was a pretty large group, a couple of hundred.

Q. Where was it held? In the Smith School, in the auditorium or the cafeteria? A. In the auditorium at Smith School.

Q. Was there anyone there representing the school district? A. Yes.

Q. Who was that? A. Mr. Howard Johnson was there, Mr. Olander was there.

Q. What was Mr. Johnson's position at that time? A. Deputy Superintendent.

Q. What was the approximate racial composition of Smith at that time? A. It was predominantly Negro.

Q. Was there a discussion at that meeting of various measures which might be taken to relieve the overcrowding

at Smith Elementary School? A. Two measures were discussed.

Q. Was Smith on double sessions at that time? A. Yes, in the first grade. Kindergarten was on multiple sessions.

[480] Q. What were the measures which were discussed to relieve overcrowding? A. Busing children out or adding six mobiles.

Q. And the representative of the district—was that Mr. Johnson? A. Yes.

Q. And he presented all these alternatives? A. Briefly, yes.

Q. Did Mr. Johnson represent to what places the busing might occur? A. Yes, a list of schools were given. I think Olander gave them, not Mr. Johnson.

Q. Mr. Olander had the list? A. Yes.

Q. Do you recall any of the names of the schools? A. I recall Crofton and Whittier and Ebert. The core city schools were the ones I recall.

Q. What was the racial composition of those schools at that time? A. Predominantly Negro; minority.

Q. Do you recall whether Mr. Olander offered to arrange any busing to any part of the southeast Denver or southwest Denver area? A. I do not recall any.

Q. Were the parents at that meeting encouraged to [481] express an opinion as to their choice between these alternatives; mobile units and transportation? A. We were given an opportunity to vote, yes.

Q. How was this vote conducted? A. By paper ballot.

Q. And did you yourself vote? A. Yes.

Q. How did you vote? A. I voted to have the mobiles added.

Q. Did you make a decision as between mobile units and

the particular schools which had been represented to you with a choice? A. Yes, between the—

Q. Why did you make that decision? A. We had moved just recently from the core city to have our children in an integrated situation and Smith was an excellent school and I did not wish to return to Ebert, where I had just moved from.

Q. Smith was not itself integrated at that time, was it? A. When I moved.

Q. When you moved there it was? A. Yes.

Mr. Barnes: That's all I have of this witness.

Cross-Examination [482] *by Mr. Ris:*

Q. Mrs. Lewis, what year did you move to your East 36th Avenue address? A. 1962.

Q. When you were working during the summer of 1969 on the VOE program, you were a salaried employee of the school district? A. Yes.

Q. And these other people, either full-time or part-time employees you mentioned, the secretaries—they were also salaried? A. Right.

Q. And distinguishing them from the 170 volunteers? A. Yes .

Q. With regard to the schools that were discussed in the January of 1966 meeting, do you recall how many schools were actually listed as receiving schools in the busing? A. I don't remember how many were listed. I believe we were told there were—There were eleven on the list.

Q. And you remember only the three in the core area? A. I remember the ones that I recognized were in the core area.

Q. And those were the three schools you mentioned? A. Yes.

Q. So there were eight schools then that you did not [483] recognize and so it would have been outside of the core area? A. Not necessarily. Those are the ones I remember of the list, you know, that were called. And I'm not sure the entire list was called.

Q. Well, you had left the core city, so you knew what schools were there. A. Right, but I don't remember all the schools that were called.

Q. Well, all of the eleven schools were not core-area schools A. Perhaps not.

Q. In fact—that is a fact, is it not? A. I don't remember all of the schools.

Mr. Ris: That's all.

Can I ask one other question?

Q. You indicated you voted for the mobile units. The majority there voted for the mobile units, is that right? A. Yes.

Cross-examination by Mr. Brega:

Q. Mrs. Lewis, were you present at the meeting of the school board in January of 1966 when they voted to erect the three mobile units? A. Perhaps so. I'm not certain.

Q. And you're aware of the fact that that was voted [485] unanimously by all members of the board at that time? A. No.

Q. Do you think any voted against it? A. I don't know.

Q. You just don't recall? A. I don't recall.

Q. Now, between September, 1968, and September, 1969, do you know the change in racial composition at Hallett under the Hallett Plan? A. State the dates again, please.

Q. Between September, 1968, and September, 1969. A. The Hallett Plan—there were about—I really can't tell the change in racial composition. I think there were about 36 white children who came in on the voluntary basis.

Q. Do you know that in 1968 Hallett was what? About ten-percent white? A. Perhaps.

Q. And are you aware that in September of 1969, after the program was in effect one year, the white percentage was 38 percent? A. I don't know the percentages. Perhaps.

Mr. Brega: Thank you.

Mr. Ris: May I ask one other question which is still on cross?

[486] *Cross-examination by Mr. Ris* (Continued):

Q. You said your goal was 500 in and 500 out. A. This was the administration's stated goal.

Q. And that was the absolute ultimate, if you could accomplish that? A. Yes.

Q. And do you know what percentage that would make of Anglos in Hallett at that point? A. The capacity of Hallett is about 756. Or, 856, if you took the very maximum, I think.

Q. Well, what I'm getting at is—the goal of Mrs. Chambers in her group was—to get 60 percent Anglo in Hallett would require 350 Anglos to go in, and to get 50 percent Anglos would only require 300. A. Yes. This would perhaps be like 70-something percent.

Q. About 70 percent? A. (Nods affirmatively.)

Mr. Ris: Thank you.

Redirect Examination by Mr. Barnes:

Q. Mrs. Lewis, do you recall discussion by parents at the meeting that you described in January of 1966 of the alternatives that were presented to you by Mr. Olander and [487] Mr. Johnson? A. Yes.

Q. And was the subject of the discussion the choice between core schools and mobile units? A. Yes.

Q. And is it your recollection that you made a choice between and were offered a choice between core schools and mobile units? A. Yes.

Mr. Barnes: Thank you.

Recross-examination by Mr. Ris:

Q. You were not told that your children specifically were going to go to a core school? A. We weren't told which schools they would be going to. We were told that "Your children will be sent to schools where there is space available," and the schools were named. Some of the schools that were named were schools we recognized with core city schools.

Q. And some others that were named—you didn't recognize, or you didn't recognize as being the core city schools? You didn't know where your children were going? A. We did not know and we would not have known if we had known where all the schools on the list were.

Mr. Ris: Thank you.

[488] *Recross-Examination by Mr. Brega:*

Q. Did they provide you with a complete list at that time? A. Originally they did.

Q. And they said these are schools that have space available, or you can go where space is available? A. They said children will be sent where space is available.

Mr. Barnes: We have nothing further of this witness.

The Court: In other words, you couldn't select the exchange school?

The Witness: No, we could not, sir.

The Court: And I think what you're expressing is that there was a hazard that, even if there were non-core-city schools, that your children might be sent to these—the core schools that you mentioned?

The Witness: That is correct, sir.

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[490] * * *

MILDRED BIDDICK, called as a witness by the plaintiffs, being first duly sworn, on her oath testified as follows:

The Court: Will you please take the witness chair? State your name and address.

The Witness: I am Mildred Biddick. I live at 1901 East 13th Avenue.

Direct Examination by Mr. Greiner:

Q. Miss Biddick, how do you spell your last name? A. B-i-d-d-i-c-k.

Q. Miss Biddick, were you ever a principal in the Denver Public School System? A. Yes, I was principal at Fairview and Garfield from 1940 to 1951.

Q. Are those two separate structures? A. Yes.

Q. Were you principal of both of those schools at that time? A. Simultaneously.

Q. Subsequently to 1951, were you also employed as a [491] school principal? A. I was a principal at Newlon and Perry from 1951 to 1962.

Q. And, then, Newlon and Perry, those are two separate school structures? A. Yes.

Q. With respect to the schools of Fairview and Garfield, Miss Biddick, when you were principal there between 1940 and 1951, do you recall what the racial composition of those schools was? A. Between 80 and 90 percent Hispano.

Q. And what was the racial composition of Perry and Newlon schools between 1951 and 1962? A. 85 percent Anglo, 15 percent Hispano, less than 1 percent Negro.

Q. Thank you. During your tenure as a principal at Fairview or at Perry-Newlon, can you describe for the Court what the practice was as far as the disposition of requests for students to transfer into your school or out of your school? In other words, transfer from school to school. A. During the early part of those years, forties and early fifties, it was a very informal arrangement. Usually a principal would call the principal of the other school and indicate that here was a youngster whose interests would be best served by going to the other school.

[492] Q. What sort of criteria were employed to make that judgment? A. Oh, it might be the babysitter lived over in the other school district. It might be that a youngster had developed some emotional problems and would profit by getting a new start in a different situation. It might be a health reason.

Q. Now, did there come a point in time, Miss Biddick, when that policy, that informal policy was changed? A. Yes, toward the end of the 1950's, there was a tightening up of transfers, and at that time, while the transfer was still made by the arrangement between the two principals, at the

end of the school year their report, the annual report, had to include the number of pupils who were not residents of the school in which they were attending.

Q. Prior to the late 1950's, had any such report been required? A. No.

[493] Q. And to whom was that report sent? A. It was sent to pupil personnel, which had charge of all such records.

Q. That was in the central school administration? A. Yes.

Q. Now, from the time when you had to begin reporting these transfers—these were transfers into your school, if you were the reporting principal? A. Yes.

Q. After that time was the transfer policy further formalized, to your knowledge? A. Yes, and it was either in '60 or '61.

Q. And what was done at that time? A. At that time there was a formal statement of policy as to the acceptable reasons for transfer. And, if I remember, they included court-ordered transfers, transfers recommended by a doctor or psychiatrist that had to do with the emotional disturbances and so forth; cases where a youngster was physically incapacitated and stairs would be a hazard, something of that sort. And cases where baby-sitters lived in another school district.

Q. Miss Biddick, I'm handing you what's been received in evidence as Plaintiffs' Exhibit 34. Would you look that exhibit over, please, and see if you can identify it? A. From my memory, this was developed after the [494] report of the special study committee. And I have not seen it—

Q. That's Policy what of the Board of Education? A.

It's Policy—You would ask me when I didn't bring my glasses.

Q. I'm sorry. It's Policy 1226A. And that pertains to the transfer of students from outside the subdistrict? A. Yes.

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[538] * * *

GEORGE E. BARDWELL, a witness called by and on behalf of the plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Greiner:

The Court: Please give us your name and address.

The Witness: George E. Bardwell, 2201 South Harrison, Denver, Colorado.

By Mr. Greiner:

Q. Dr. Bardwell, you are the same Dr. Bardwell that testified in the preliminary injunction hearing, is that correct? [539] A. I am.

Mr. Greiner: Your Honor, we will be offering Dr. Bardwell as an expert witness in the fields of statistics and probability analysis. We have prepared a resume of the doctor's experience and education, being Exhibit 369. I wondered if counsel wished us to go ahead and formally qualify Dr. Bardwell or—

Mr. Ris: We will accept him as a witness in that field, period, but not in any other field. * *

The Court: Very well.

Mr. Greiner: Then 369 is accepted? We will offer it in evidence.

The Court: It is received.

(Whereupon, Plaintiffs' Exhibit 369 was received in evidence.)

Q. Dr. Bardwell, I am handing you what's been marked for identification as Plaintiffs' Exhibit 241. Would you please identify that exhibit for us? A. Yes, this exhibit shows the characteristics of pupil enrollment in Anglo and minority schools selected for study in 1968.

Q. Was that exhibit prepared by you? A. Yes, it was.

Q. Doctor, how were the schools that are shown on Exhibit 241 selected for comparative purposes? [540] A. There are 21 Anglo elementary schools and 20 minority schools. The selection process for the 21 Anglo schools and 20 minority schools was based on a probability analysis which was conducted as follows: That considering the smallest school in the area—

Q. In the District? A. —in the District, it was determined that had a probability of about one in one billion—

The Court: About what?

The Witness: —one in one billion, that this amounted to a deviation on either side of the District-wide average of approximately 60 percent; that the school that had 90 percent Anglo enrollment or more, or 30 percent Anglo enrollment or less, comprised then a probability level or equivalent to a probability level of about one in one billion. This is approximately so.

George E. Bardwell—for Plaintiffs—Voir dire

Q. Doctor, what do you mean by a probability level of one in one billion in terms of the racial composition of more than 90 percent Anglo or less than 30 percent Anglo? A. That means that the chances of a school departing from the city average by more than the stated amount had a probability of one in one billion or rarer.

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[543] * * *

Voir Dire Examination by Mr. Ris:

Q. In considering the characteristics of pupil enrollment and to arrive at this probability, you were considering the racial composition of the City and County of Denver as a [544] whole? That's your starting point? A. That's right, sir.

Q. And then with that racial—first, where did you get that? A. From the September report for 1968, which was the ethnic and racial composition of students in the District.

Q. All right. Now, were you taking up the pupil population or the overall population? A. Well, there are two figures that have to be used. One is the overall Anglo proportion for the District in the elementary schools in 1968 in the September report.

Q. You are talking about pupil population? A. Pupil population. We are not talking about citywide population.

Q. All right. A. And those figures were determined from the 1968 report.

Q. All right. A. Then the percentage Anglo composition for each school was determined. The question was then raised, given the Anglo proportion for a given school, what is the probability that its racial composition could

have arisen by chance if in fact students randomly were distributed throughout the District.

Q. So, you are comparing each school racial composition? [545] A. Yes, sir.

Q. And the racial composition of that school? A. Yes.

Q. With the citywide racial composition of all students, citywide, at that level? A. Yes, sir.

Q. In arriving at this, you do not take into consideration residential patterns of the races? A. No.

Q. Your whole basis would assume in computing your probability in the context of the school system that the races are evenly scattered throughout the School District? A. Randomly distributed.

Q. That's one of your basic assumptions? A. Yes.

Q. Which isn't a fact, we know. A. Of course, it isn't.

Q. And you do not consider the actual boundary or boundary changes? A. That's right.

Q. And you also don't consider any assignments outside of or transfers outside of the specific subdistrict? A. That's right.

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[548] • • •

By Mr. Greiner:

Q. Doctor, referring then to Exhibit 241, what does that exhibit depict with respect to the proportions of Anglo, Negro and Hispano students present first of all in the 21 Anglo schools at the elementary level? A. At the elementary level the 21 Anglo schools contain 30.9 percent of all Anglo students in the school.

Q. At the elementary level? A. At the elementary level. These same Anglo schools have 2.8 percent—

The Court: Go a little slower here now. This is all brand new to me. I think counsel has had some opportunity—some exposure to this before.

Now, the selected Anglo schools have this percentage of Anglo population in them, is that right?

The Witness: On the basis of that probability.

The Court: Okay.

Q. And what percentage of all the Negro elementary children in the District go to these selected Anglo schools, Doctor? A. 2.8 percent.

Q. And what percent of the total Hispano elementary [549] school students in the District go to these 21 schools? A. 3.2 percent.

Q. Now, Doctor, calling your attention to the 20 minority schools depicted on Exhibit 241, what percentage of the total Anglo students at the elementary level in the District go to these minority schools? A. 3.8 percent.

Q. And what percent of the total of the Negro elementary school students in the District go to these selected minority schools? A. 83.9 percent.

Q. And what percent of the total of the Hispano elementary school students go to these selected minority schools? A. 39.7 percent.

Q. Now, does Exhibit 241 also depict those proportions at the junior high school level? A. They do.

Q. Could you give us those proportions, please?

The Court: These are actual figures you're talking about?

The Witness: These are actual figures, Your Honor, yes, sir.

At the four Anglo schools—

Q. What are the four Anglo schools? [550] A. The four Anglo schools are Hill, John F. Kennedy, Merrill and Thomas Jefferson. The four minority schools are Baker, Cole, Morey and Smiley.

Q. Could you then give us the proportions? A. At the four Anglo schools, 40.6 percent of all Anglo students in the School District attend those four Anglo schools. Similarly, 1.2 percent of all Negro students in the School District attend those four Anglo junior high schools. And, 3.1 percent of all Hispano students in the District attend those four Anglo schools.

Q. Now, turning your attention to the minority junior high schools, what are the proportions? A. At the four minority schools the percentage of all Anglo students in the School District that attend those four minority schools is 5.4 percent. The percentage of all Negro students in the School District which attend those four minority schools, 86.8 percent. And the percentage of all Hispano students in the District that attend the four minority schools is 31.0 percent.

Q. Now, does Exhibit 241 also depict similar information with respect to the senior high school level? A. It does.

Q. What are the six senior high schools depicted on Exhibit 241? A. The three Anglo senior high schools, George [551] Washington, John F. Kennedy and Thomas Jefferson. The three minority senior high schools are East, Manual and West.

Q. And then turning your attention first to the three Anglo senior high schools, Doctor, would you give us the proportions contained in those three schools? A. The per-

centage of all Anglo students in the School District that attend the three Anglo schools, 38.3. The percentage of all Negro students in the School District attending these same Anglo schools, 3.6 percent. The percentage of all Hispano students in the School District that attend the three Anglo schools, 2.7 percent.

Q. And then could you give us the data for the minority senior high schools? A. At the three minority senior high schools, 17.7 percent of all Anglo students in the School District attend those minority schools. The percentage of all Negro students in the School District that attend the three minority senior high schools, 95.7 percent. And the percentage of all Hispano students in the School District that attend these three minority schools, 42.7 percent.

Q. Now, Doctor, did you compute individual probability levels for each of these 41 schools? A. I did.

Q. I am handing you what's been marked for identification as Plaintiffs' Exhibit 386 and ask you to identify that. [552] A. Exhibit 386 is a probability analysis that has been made on a computer school by school for all the elementary schools.

Q. Does it also include a probability analysis as to the racial composition of each of the junior and senior high schools? A. It does.

Mr. Greiner: Your Honor, we would offer Exhibit 386.

The Court: I assume that this exhibit has been brought forward as far as counsel are concerned, before?

Mr. Greiner: Yes, Your Honor.

Mr. Ris: Could we have just a moment, Your Honor?

The Court: All right.

Voir Dire Examination by Mr. Ris:

Q. Dr. Bardwell, is this probability analysis based upon the same factors and omitting the same factors as we discussed on Exhibit 241? A. They are.

Mr. Ris: We would object to it for the same reason as the objection I made as to 241.

The Court: Well, I just don't know enough about it to rule on it at this stage. I mean, I can't—it doesn't tell the story on the face of it, I wouldn't say, particularly.

[553] *Direct Examination by Mr. Greiner* (Cont'd):

Q. Dr. Bardwell, referring your attention to Exhibit 241, what is one of the elementary schools listed on 241? A. Ash Grove is one of the 21 selected Anglo schools.

Q. Now, turning your attention to Exhibit 386, does that exhibit contain a separately computed probability analysis for that school? A. It does.

Q. And it shows the range or the probability that Ash Grove would have of racial composition—that it in fact has, is that correct? A. That's right, it does.

Q. And how was that computed, Doctor? A. Based upon the size of Ash Grove, containing 801 students in 1968; the probability that its racial composition could have arisen by chance is one in ten to the hundredth power.

Q. Now, does Exhibit 386 contain similar calculations for each of the schools in the School District? A. It does.

The Court: I think it would be of some value to us to know what information you proceed on in arriving at this result. What do you feed into this computer in order to get this?

[554] The Witness: All right.

The Court: At this stage I think it would be of some value, you know.

The Witness: Excuse me?

The Court: At this stage I think it would be of some value for us to know this.

The Witness: All right.

The Court: What are the factors which contribute to this conclusion?

The Witness: The assumption, Your Honor, that was made in this particular case is that we raise the question as to the departure of each school's Anglo composition from the city average.

Q. Now, at the elementary school level what range of departure did you use? A. 62.8 percent is approximately the average Anglo proportion for the entire District.

Q. And at the elementary schools? A. At the elementary school level.

Q. How did you arrive at the 90 percent Anglo or less than 30 percent Anglo? A. In order to be most conservative, that is, all probabilities that would have been calculated would have been rarer than one in one billion, the smallest school in the District was used as a guide to establish the deviation from [555] the city proportion. That deviation was approximately 30 percent.

Q. Now, what does that mean in terms, Doctor, of the approximately 62 percent Anglo racial composition of all

elementary school students in the District? What do you do with that 60 percent? A. This roughly meant that a school that had an Anglo proportion of 90 percent or more, or a school—an elementary school that had an Anglo proportion of 30 percent or less would have constituted a criterion for classification of those schools into the 21 Anglo schools and the 20 minority schools. A school, therefore, that had an Anglo composition 30 percent or less would have fallen into the 20 minority group of schools. A school that had an Anglo composition of 90 percent or more would have fallen into the group selected for study at the 21 Anglo schools.

Q. Now, at the junior high school level, did you use that same less-than-30-percent Anglo, more-than-90-percent Anglo standard? A. This would have been given for the junior high schools and senior high schools.

Q. Why? A. Because the size of each school, the smallest school for the junior high school is considerably larger than the smallest school in the elementary group. Similar consideration [556] applies to the senior high schools, where the minimum sized school for being most conservative in this estimate is considerably larger than for the elementary schools.

Q. Now, besides the smallest sized school at the junior and senior high school levels, did you take into account the Anglo composition at the junior high school level throughout the District, for example? A. Yes, we did.

Q. And is that different than the Anglo composition at the elementary school level? A. It is, about 10 percent more.

Q. So it is what throughout the District, the Anglo composition of the junior high schools? A. Roughly 70 percent.

The Court: Which?

The Witness: Roughly 70 percent.

Q. Did you also take into account with regard to the senior high schools the District-wide Anglo proportion in the senior high schools? A. Yes, we did.

Q. Did that differ from the junior high schools? A. It did.

Q. What was it? A. Roughly 75 percent.

Q. Then taking these two factors, the minimum school [557] size and the percent Anglo composition at that level, what did you do in computing the probability of racial composition, first of all, of the selected junior high schools? A. Exactly the same procedure was used as in the case of the elementary schools. A percentage deviation from the citywide average was calculated.

Q. Now, what was the percentage—You have stated it was more than 90 percent Anglo or less than 30 percent Anglo at the elementary level. What was it at the junior high school level? A. I think it's roughly 18 percent.

Q. So a school which was more than what percent Anglo was selected? A. 90 percent.

Q. And a school which was less than what percent Anglo was selected at the junior high school level? A. It would be about 55 percent.

Q. And then what were the ranges at the senior high school level? A. Senior high schools were roughly 15 percent in either direction. 15 percent from the City average of roughly 75, which would make it 90 percent.

Q. And a school of more than 90 percent Anglo? A. More than 90 percent Anglo and in the other case less than 60 percent.

[558] Q. Now, in each instance at the elementary, the junior and the senior high school levels, Doctor, taking into consideration the actual racial composition of the selected school, did the probability ever become greater than one in one billion? A. By all means. The one in one billion is a very conservative estimate of what this probability would have been for every single school.

Q. For example, referring to Exhibit 241, would you select a junior high school? A. Yes, let us select Cole.

[559] Q. All right. And then referring to Exhibit 386, have you computed the actual probability at Cole? A. Yes.

Q. And what is it? A. The probability that Cole's racial composition could have arisen by chance alone is the astronomical figure of one in ten to the 554th power.

Q. And what's another junior high school listed on Exhibit 241? A. Morey.

Q. And what is the probability of Morey's actual racial composition? A. The probability that Morey's actual percentage Anglo could have deviated from the city proportion by the amount that it actually did, that probability is one in ten to the 146th power.

Q. Now, with respect to the senior high schools, one of the senior high schools selected was East? A. East.

The Court: What is your definition of chance?

The Witness: Excuse me, sir?

The Court: What is your definition of chance? I mean, what is the difference between volitional action and chance? I think we ought to have some definitions before we go very far on this, so we know what he is talking about.

[560] The Witness: Yes.

The Court: What is your conception of pure chance?

The Witness: Of pure chance?

The Court: Yes.

The Witness: Well, Your Honor, even from a—

The Court: As opposed—what would be the other elements?

The Witness: As something more common? All right.

The Court: What would non-chance be?

The Witness: Non-chance? A statistical — the statistician, I think, has a standard for that, and he would generally conclude that anything that occurs with a probability of 65 times in a hundred approximately, that this is a non-chance occurrence. In other words, we would expect this sort of thing.

The Court: What produces the non-chance occurrence, according to your conception and your knowledge?

The Witness: In my view, sir, there would be a number of factors that would contribute to an assignable cause that would be outside of the chance calculation that we have made here, that we can actually assign a cause to it.

Would you like me to elaborate on my opinion of what these are?

The Court: I just want you to state what your [561] conception is.

Mr. Greiner: Your Honor, I think I may be able to help the Court by asking the witness whether or not Exhibit 386 purports to make any judgments as to cause. A. None at all.

Q. That 386 simply eliminates chance as cause? A. It is an attempt to measure the probability that a school's racial composition could have occurred, the actual composition that it did have, and that, from a statistical point of view, if this chance is remote enough, then one would have to say that there are non-chance causes that contribute to the racial composition of that school.

Q. But 386 doesn't reflect any of these non-chance causes? A. It does not.

Q. Nor does it attempt to identify any of them, is that correct? A. That's right.

Mr. Greiner: In other words, Your Honor, the question—

The Court: The chance then means an occurrence without the intervention of any positive or affirmative force, just falling from the skies?

The Witness: Well, these probabilities are so rare, Your Honor, and in fact so astronomically small, in [562] my experience I have never been in a position prior to this time of calculating probabilities that were so remote and that I would simply have to conclude on the basis of that analysis that there were causes that contributed to that racial composition of each one of these schools that, by even the remotest stretch of the imagination, could not have occurred by chance.

The Court: All right. By chance is by chance, but we will just be patient now and listen. At least the next five minutes, we promise not to interrupt.

Mr. Greiner: We are offering Exhibit 386, Your Honor, which simply purports to show the individual

probability calculations for each school in the district as described.

The Court: Well, we will take that over the objection of the intervenors in order to get this picture.

(Whereupon, Plaintiffs' Exhibit 386 was received in evidence.)

Q. Dr. Bardwell, we have already in evidence in this case exhibits which give for the school district as a whole at the elementary school level the ethnic distribution by number and percentage of the pupils in the school district. Now, have you also prepared exhibits which purport to show the ethnic distribution in, first of all, the 20 minority schools and the 21 Anglo schools depicted on Exhibit 241? [563] A. I have.

Q. I hand you what has been marked for identification as Exhibits 249 through 252, and could you identify those exhibits for us, please? A. Yes. Exhibit 249 is the ethnic distribution of pupils for the 20 minority schools for the years 1963 through '68.

Exhibit 250 is the ethnic distribution expressed as a percentage for the 20 minority schools for the years 1963 through '68.

Exhibit 251 is the ethnic distribution of pupils for the 21 Anglo schools expressed as a number of students for the years 1963 through 1968.

Exhibit 252 is the ethnic distribution of pupils expressed as a percentage for the years 1963 through 1968.

Q. For which schools? A. For the 21 Anglo schools.

Mr. Greiner: Your Honor, the authenticity of Exhibits 249 through 252 has been stipulated to as far

as their accuracy is concerned and we would offer them in evidence at this time.

Mr. Ris: If the Court please, just a couple of questions on voir dire.

Voir Dire Examination by Mr. Ris:

[564] Q. Dr. Bardwell, this group of exhibits, 249 to 252, inclusive, in turn are based upon Exhibits 241 and 386, are they not?

Exhibits 241 and 386 are your foundation exhibits? A. That's right.

Mr. Ris: By reason of the objections made to those two exhibits, we would object to these two as not having the proper foundation. Other than that, we have no objection to their admissibility and we are going to have a whole group of exhibits, I presume, at the elementary and senior high level along the same line and with the same foundation. Is that correct, Mr. Greiner?

Mr. Greiner: Well, I don't know what counsel means by foundation, Your Honor. The source of the figures in these exhibits comes from the computer print-outs that are already in evidence.

I take it what counsel is referring to is the composition of the sample being reflected in the exhibits, if that's what he objects to.

Mr. Ris: Well, with respect to the numbers on these exhibits of Anglos, Negroes and Hispanos, we do not question the accuracy of those numbers, not at all.

The Court: You are objecting to the purpose for which this is being offered?

Mr. Ris: Well, the figures shown on here are [565] not disputed, by again, the relationship goes back to the two earlier exhibits, and by reason of the inadequate foundation on those, they taint these exhibits, and that's really our only objection. It relates back to those other exhibits, and with respect to the other print-outs you have then, and since they have the same relationship, we are going to have continuing objection, and yet I can just make them now as to the whole series of junior high and senior high that you are going to offer, first, ethnic, and then, I presume—

Mr. Greiner: Faculty.

Mr. Ris: Faculty and so forth.

The Court: These reveal actual compositions of these individual schools?

The Witness: Yes.

The Court: Elementary, Junor High—

Mr. Ris: Yes, sir, and we don't question these figures for the composition. Just the going back to what they are comparing to.

Mr. Brega: We have no objection to these exhibits, Your Honor.

The Court: The exhibits will be received, 249 through 252.

(Whereupon, Plaintiffs' Exhibits 249, 250, 251 and 252 were received in evidence.)

[566] *Direct Examination by Mr. Greiner* (Continued):

Q. Now, Dr. Bardwell, with respect to the comparison of the 21 Anglo schools and the 20 minority schools as to their racial composition, have you prepared a chart which

illustrates the data contained in Exhibits 249 through 252? A. Yes.

Q. And is that Exhibit 253? A. This is Exhibit 253.

Q. And what does 253 purport to depict? A. It depicts the percentage Anglo in the 20 minority schools and the 21 Anglo elementary schools for the years 1963 through 1968.

Q. And is Exhibit 253 then based on the data in Exhibit 241 through 252? A. That's correct.

The Court: This is a graphic study?

The Witness: Yes, this is a graphic depiction of the materials that are in the preceding exhibits that are on your desk.

Mr. Greiner: Your Honor, we would offer Exhibit 253 at this time. I believe the authenticity of the exhibit again has been stipulated to.

Mr. Ris: That's correct. Our objection would merely go back to the same as before.

[567] The Court: Do you have any objection?

Mr. Brega: No objection, Your Honor.

The Court: Exhibit 253 is received.

(Whereupon, Plaintiffs' Exhibit 253 was received in evidence.)

Q. Calling your attention then to Exhibit 253, Doctor, what does that exhibit show as to, first of all, the Anglo population over this time period in the Anglo schools? For example, in the year 1964, what percentage of the Anglo students in the elementary schools of the district were in these Anglo schools? A. Percentage Anglo students that were in the 21 Anglo schools in 1964, around 90 percent—excuse me, 95 percent.

Q. And what was it, for example, in 1966? A. In 1966,

somewhat less. I would estimate from the reading of the chart it would be around 92 percent.

Q. And what was the last year depicted on the exhibit? A. 1968.

Q. And what is the percentage by 1968? A. I would estimate on the basis of the intersection of these two lines it would be about 92 percent.

Q. Now, what similarly is shown with regard to the 20 minority schools on the exhibit? A. In the case of the 20 minority schools for comparable years, in 1964 I would estimate about 15 percent. In [568] 1966, I would estimate about 13 percent, and in about 1968 I would estimate about the same amount.

Q. Thirteen? A. Ten percent.

Q. Ten percent. That's ten percent of what? A. This would mean, in the 20 minority schools selected for study, that that racial composition of those 20 minority schools in 1968, for example, was ten percent Anglo.

Q. Now, similarly, Doctor, have you prepared exhibits with respect to the pupil ethnic distribution in the selected junior high schools? A. Yes, I have.

Q. Calling your attention, Doctor, to what's been marked for identification as Plaintiffs' Exhibits 280 through 283, would you please identify those exhibits? A. Exhibit 280 is a computer print-out showing the ethnic distribution of pupils by number of pupils for the four selected minority junior high schools.

Exhibit 281 is the ethnic distribution expressed as a percentage of the four minority junior high schools selected for study.

Exhibit 282 is the ethnic distribution of students by number of students for the four selected Anglo junior high schools for the years 1963 to '68.

The preceding two exhibits also cover the years [569] 1963 through '68, for the four selected Anglo junior high schools.

Q. Referring to Exhibits 280 through 283, Doctor, what is the source of the figures set forth in those exhibits? A. The source of these figures of the computer printouts have been submitted as exhibits covering all junior high schools, and I am sorry that I don't know the exhibit number.

Q. And the figures depicted on Exhibits 280 through 283 are the actual figures for the school years indicated? A. That is correct.

Mr. Greiner: Your Honor, we would offer Exhibits 280 through 283.

[570] Mr. Ris: We do not dispute the figures. We object to it for the same reasons as we objected to Exhibits 249 through 252.

Mr. Brega: Same objection.

The Court: They will be received, 280 through 283.

(Whereupon, Plaintiffs' Exhibits 280 through 283 were received in evidence.)

Q. Doctor, have you also prepared a chart which illustrates the information covered by Exhibits 280 through 283? A. We have.

Q. Is that Exhibit 284? A. That is Exhibit 284.

Q. Was that exhibit prepared by you? A. Yes, sir.

Q. And does it in fact reflect the information in Exhibits 280 through 283? A. It does.

Mr. Greiner: Your Honor, this is another exhibit, the authenticity of which has been stipulated to, and

we would offer it in evidence at this time.

Mr. Ris: Same objection.

The Court: The number on that one?

Mr. Greiner: Exhibit 284, Your Honor.

Mr. Brega: Same objection.

The Court: It will be received.

[571] (Whereupon, Plaintiffs' Exhibit 284 was received in evidence.)

Q. Exhibit 284 depicts what, Dr. Bardwell? A. Shows the percent Anglo students for the years 1963 through '68 for the selected four Anglo junior high schools.

The Court: This is percentagewise?

The Witness: Percentagewise, that's right, sir, and the percent Anglo students for the selected minority schools.

Q. All right. And the first year depicted on Exhibit 284, Dr. Bardwell, what was the percent Anglo composition in the Anglo junior high schools? A. Very nearly 100 percent.

Q. And what was it in the selected minority junior high schools? A. Approximately 30 percent.

Q. And by 1968, Doctor, as depicted in Exhibit 284, what was the Anglo percentage in the selected Anglo schools? A. 1968, the percentage is roughly 98 percent.

Q. And what was it in the minority schools? A. For the minority schools, the percentage is roughly 17, 18 percent.

The Court: Now, this is the year '68?

The Witness: 1968.

Q. Next, Dr. Bardwell, have you prepared exhibits [572] showing the ethnic and racial composition of the selected senior high schools? A. Yes.

Q. I have handed you what has been marked for identification as Plaintiffs' Exhibits 309 through 312. Could you identify those for us for the record. A. Exhibit 309 shows the ethnic distribution of students by number of students for the years 1963 through '68 for the three selected minority senior high schools. Exhibit 310—

Q. Does that show the same information? A. Shows the same information except as a percentage.

Q. All right, 311. A. 311 is the distribution, ethnic distribution of students by number, for 1963 through '68 for the three selected Anglo senior high schools.

Q Then is 312 the same thing but expressed as a percent? A. 312 is exactly the same, expressed as a percent.

[573] Mr. Greiner: Your Honor, we would offer Exhibits 309 through 312 at this time.

Mr. Ris: We wish to make the same objection as to Exhibits 249 through 252.

Mr. Brega: Same objection.

The Court: 309 through 312 will be received.

(Whereupon, Plaintiffs' Exhibits 309, 310, 311 and 312 were received in evidence.)

Q. Doctor, similarly, have you prepared a chart which illustrates the information contained in Exhibits 309 through 312? A. Yes, we have.

Q. Is that Exhibit 313? A. This is Exhibit 313.

Q. Does Exhibit 313 accurately depict the information contained in Exhibits 309 through 312? A. It does.

Mr. Greiner: Your Honor, we would offer 313.

Mr. Ris: The same objection as to 309 through 312.

Mr. Brega: Same objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 313 was received in evidence.)

Q. What does Exhibit 313 show as to the Anglo [574] percentage in the Anglo senior high schools as of 1964? A. 1964, the percentage Anglo students in the selected schools was very close to 98 percent.

Q. And what does it show in that year as to the percentage Anglo students in the minority schools? A. It would appear to be close to 55 percent.

Q. Then, calling your attention to the year 1968 as depicted on Exhibit 313, what is the percentage shown there for the Anglo schools? A. The Anglo percent—

The Court: What was that figure in the minority school?

The Witness: Yes, roughly 55 percent.

For 1968 the percentage Anglo students for the selected Anglo schools would be approximately 96 percent.

Q. And what is shown as to the minority schools? A. For the minority schools the percentage Anglo students would be approximately 40 percent.

Q. Now, Doctor, have you prepared exhibits with respect to the certain elements with regard to the faculty? And first of all, in the elementary schools of this district? A. Yes, we have.

Q. I have handed you what's been marked for identification as Plaintiffs' Exhibit 254 through 257. Calling your attention first to Exhibit 254, what does that exhibit purport [575] to depict? A. This depicts the ethnic distribution of the faculty by number for the years 1964 through 1968 for the selected minority schools.

Q. And then Exhibit 255 is the same information but expressed as a percentage? A. That's correct.

Q. Then what is 256? A. 256 is the ethnic distribution of the faculty by number for the years 1964 through 1968 for the 21 selected Anglo schools.

Q. And then Exhibit 257 is the same information but expressed as a percentage, is that correct? A. That is correct.

Mr. Greiner: Your Honor, we would offer Exhibits 254 through 257 at this time.

Mr. Ris: If the Court please, this gets into a different field not involving pupil segregation and we would therefore object to these exhibits and to the further line of evidence pertaining to faculty on the grounds of the lack of materiality.

The only position that I can recall at the moment is the Cook County case in which the ethnic distribution of faculty was deemed by a court to be a major factor and that involved virtually 100 percent of a racial minority [576] school which was also approximately one hundred percent, and this does not—this not being the case in Denver, we don't think it's material. So we would object to not only the exhibits but all the exhibits and testimony pertaining to ethnic distribution of faculty and would further object to this for the same reasons as we objected to 249 and 252.

The Court: What's the purpose of this offer for the record?

Mr. Greiner: For the record, Your Honor, the exhibits depict the overall racial composition of the faculty throughout the school district as a whole. Those exhibits are already in evidence. And they establish, for example, that at the elementary school level, as I recall there was about 90-percent Negro faculty throughout the school district. What these exhibits tendered now show is that in the minority schools there is, we contend, a disproportionate concentration of minority faculty—

The Court: This goes then to the character of the evidence being offered in so-called minority schools?

Mr. Greiner: This goes to the question of intent, Your Honor, and it shows, we believe, that the school district has assigned—

The Court: Your offer—you're offering it— [577] That's what I really asked you. —insofar as it sheds some light on the state of mind of the school board?

Mr. Greiner: Yes, Your Honor. It shows that the administration has consciously assigned minority teachers to these minority schools. There is no, I think, as the Court recalls, there is no neighborhood faculty policy and you can't explain the disproportionate concentration of these minority faculty in minority schools on any basis of adventitious geography. This is, we contend, a clear example of assignment on the basis of race and lends credence, we believe, to the overall contention that the school district has intentionally created and maintained

these minority schools. Furthermore, the concentration of minority faculty in a minority school simply confirms—

The Court: Okay. We will receive these based upon your statement that they are offered for the purpose of showing that there exists a process of classification that is conscious.

Mr. Greiner: Thank you, Your Honor.

(Whereupon, Plaintiffs' Exhibit 254, 255, 256 and 257 were received in evidence.)

Q. Dr. Bardwell, with respect to Exhibits 254 through 257, have you also prepared a series of exhibits showing the faculty experience at these selected minority and Anglo [578] schools?

The Court: What number is this?

Mr. Greiner: Referring now to Exhibit 259 through 262.

A. Exhibit 259 is a tabulation computer print-out showing the experience of the faculty in terms of number of teachers for the 20 minority schools for the years 1964 through 1968 according to whether or not that faculty person has no Denver Public Schools experience; whether they are on probation.

Q. What does probation mean, Doctor? A. That means less than three years of experience. And those teachers that have ten or more years of experience.

In addition to that, the median years of Denver Public Schools experience is shown for each of these minority schools.

Q. How was the median years' experience calculated?

A. The median years' experience was calculated by taking the distribution of experience of all teachers in each one of these schools and calculating that year which divides the faculty in terms of its experience in half.

Q. Then what does the next exhibit depict? The same information expressed as a percentage, is that correct? A. That is correct.

Q. And then the next exhibit is what? [579] A. The next exhibit is 261 and this shows the faculty experience by number for the 21 Anglo elementary schools with the same classifications of experience as previously mentioned for the years 1964 through 1968.

Q. Then the next exhibit is what number? A. The next exhibit is 262.

Q. Does it reflect the same information except expressed as a percentage? A. That is correct.

Mr. Greiner: Your Honor, we would offer Exhibits 259 through 262 at this time.

Voir Dire Examination by Mr. Ris:

Q. Dr. Bardwell, you know from other evidence that has already been brought into this case that a substantial percentage of newly-employed teachers have had experience in other school districts, do you not? A. Substantial percentage?

Q. Yes. A. (No answer.)

Q. Are you hung up on the word "substantial"? A. I sure am.

Q All right. That there is a percentage of newly-employed teachers in the Denver school system who have had previous teaching experience? [580] A. I agree.

Q. Do you recall what that percentage is? A. No, I do not.

Q. Would 30 percent refresh your recollection? A. Not necessarily.

Q. Pardon? A. It wouldn't, no.

Q. Well, whatever the percentage is, you have not taken that into consideration in your computations here at all, have you? A. That's quite correct.

Q. So when you're talking about experience, if a teacher here taught ten years in some other system and then was hired in Denver, that's not reflected here at all? A. That is correct.

Q. So that's not shown in your ten or more years? A. That's correct.

Q. It's not shown in your median years? A. That's correct. That information we were unable to get by race.

Q. Whether you were able to get it or not, it's not in there? It's not in your computer program? Right? A. No, it's not in there.

Mr. Ris: We have no objection to the mathematics [581] as they're shown on that, but we would have the same objections that we have made to the 252 through 257 and 249 through 252.

Mr. Brega: Same objection, Your Honor.

The Court: The objections will be overruled.

(Whereupon, Plaintiffs' Exhibits 259, 260, 261 and 262 were received in evidence.)

Direct Examination by Mr. Greiner (Continued):

Q. Doctor, I neglected to ask you with respect to the previous sets of Exhibits—have you prepared a chart which reflects the information contained in Exhibits 252 through 257? A. Yes.

Q. What's the number of that exhibit? A. Exhibit 258.

Mr. Greiner: Your Honor, we would offer Exhibit 258 at this time.

Mr. Ris: Same objection as to Exhibit 254 through 257.

The Court: Very well. We will receive 258.

(Whereupon, Plaintiffs' Exhibit 258 was received in evidence.)

Q. Doctor, calling your attention to Exhibit 258, what does 258 depict? [582] A. 258 depicts by percent minority school teachers located in the minority and Anglo schools selected for study for the years 1964 through 1968.

Q. Now, in the first—the first year depicted is 1964? A. That's correct.

Q. What is shown for the minority teachers in the Anglo schools? A. In 1964 there were approximately two percent of the teachers in the 21 Anglo schools that were minority teachers.

Q. What was the percentage of minority teachers in the minority schools? A. Around 28 percent.

Q. Do you recall, Doctor, in 1964 what the percentage of Negro teachers was, districtwide, at the elementary school level? A. I don't know. I would have to consult a previous exhibit.

Q. And by the year 1968, Doctor, what was the percentage of minority teachers in the Anglo schools selected? A. In 1968 the percentage of minority school teachers in the 21 Anglo schools was approximately that in 1964, around two percent.

Q. And what was the percentage of minority faculty in

[583] the selected minority schools by 1968? A. About 22 percent in the minority schools.

Q. Doctor, with respect to Exhibits 259 through 262, which have been received in evidence, relating to teacher experience in the elementary schools, have you also prepared a series of charts which graphically depict the information in those tables? A. Yes, we have.

Q. Handing you first what's been marked for identification as Exhibit 263, can you identify that for us, please? A. Yes, this shows by percent of total teachers in those 21 Anglo schools and 20 minority schools those with no Denver Public Schools experience for the years 1964 through 1968.

Mr. Greiner: Your Honor, we would offer 263 at this time. I believe, again, the accuracy of the figures shown on 263 has been stipulated to.

Your Honor, we are going to first identify this whole series of exhibits because counsel has indicated his objection would be the same to all of them.

The Court: Good.

Q. The next exhibit is 264. Would you tell us what Exhibit 264 depicts, Doctor? A. 264 is a graph showing for the 20 minority schools and 21 Anglo schools the percent of all teachers in those [584] schools that are so-called probationary for the years 1964 through 1968.

Q. And then Exhibit 265 depicts what, Doctor? A. 265 shows for the same two groups of schools the Anglo and minority schools, for the years 1964 through 1968, the percentage of all teachers in those schools with ten or more years of Denver Public Schools experience.

Q. And then Exhibits 266 depicts what? A. 266 shows for the same set of years, 1964 through 1968, for the same

two groups of schools, the median years of Denver Public Schools experience at elementary schools for the 21 Anglo schools and 20 minority schools.

Mr. Greiner: Your Honor, we would offer Exhibits 263 through 266 at this time.

Mr. Ris: To which we would make the same objections as to 259 through 262 from which they were taken.

The Court: Do you object?

Mr. Brega: Same objection.

The Court: Very well. 263 through 266 are received at this time.

(Whereupon, Plaintiffs' Exhibits 263, 264, 265 and 266 were received in evidence.)

Q. First of all, calling your attention, Doctor, to Exhibit 266, that is the exhibit which depicts the median years' experience? [585] A. That's correct.

Q. In 1964 what was the median years' experience in Anglo schools? A. Approximately eight years' median experience.

Q. What was it in the minority schools for that year? A. Approxmiately three.

Q. And in the year 1966, what was the median years' experience of teachers in the selected Anglo schools? A. Approximately nine years.

The Court: What year are you talking about?

Mr. Greiner: 1966, Your Honor.

Q. What was it in the minority schools? A. Approximately four.

Q. And then, in 1968, what was the median years of teacher experience in the selected Anglo schools? A. Approximately nine and a half.

Q. And what was it in the selected minority schools? A. Approximately four.

[586] Q. Calling your attention next, Doctor, to Exhibit 265, which depicts teachers with ten or more years of Denver Public School experience, in 1964, Doctor, what was the percentage of such teachers in the selected Anglo schools? A. Approximately 41 percent of the teachers had ten or more years' DPS experience.

Q. And what percent of teachers in 1964 in the minority schools had such experience? A. Approximately 15 percent.

Q. And by 1968, Doctor, what percentage of teachers in the selected Anglo schools had ten or more years DPS experience? A. About 45 percent.

Q. And what was the percentage of such experienced teachers in the selected minority schools? A. Approximately 18 percent.

Q. Calling your attention, Doctor, to Exhibit 264, dealing with probationary teachers in the elementary schools selected, what does that show the 20 minority schools' percentage of probationary teachers as of 1964 was? A. Roughly 45 percent of all the teachers in those 20 minority schools were on probation.

Q. And what is the percentage in the selected Anglo elementary schools? A. Approximately 22 percent.

Q. Now, by 1968, Doctor, what percentage of the teachers [587] in the minority schools were probationary according to Exhibit 264? A. About 47 percent.

Q. And what percentage of the teachers in the selected Anglo schools were probationary teachers? A. About 25 percent.

Q. Next, calling your attention, Doctor, to Exhibit 263, which depicts teachers with no previous DPS experience in 1964, what percentage of the teachers in the selected minority schools had no previous DPS experience? A. About 14 percent.

Q. And what was the comparable percentage in the selected Anglo elementary schools? A. About six.

Q. Turning your attention to the year 1968, by that year what percentage of the teachers in the minority schools had had no previous Denver Public School experience? A. About 24 percent.

Q. And what was the comparable percentage in the selected Anglo schools? A. Ten percent.

Q. I am handing you what has been marked for identification, Doctor, as Plaintiffs' Exhibit 267. Can you identify that for us? A. Yes, Exhibit 267 shows a comparison between the [588] 20 minority schools and Traylor Elementary School in terms of the median years of teacher experience.

Q. Is that for a given year, Doctor? A. Yes.

Q. What year? A. 1968.

Q. Why was 1968 selected? A. That was the year in which Traylor opened.

Q. Why are you using Traylor in this comparison? A. Well, it happened to be a school that opened very recently and happened to be a fairly large school. It is a school in southwest Denver, and it appeared to be rather unusual that an elementary school opening in 1968 would have a median year of teach experience of 11—

Mr. Ris: Pardon me.

Mr. Greiner: Don't read the figures yet, Doctor.

Mr. Ris: That's comment and opinion by the wit-

ness involving educational matter. I move that part be stricken.

The Court: Sustained. He asked him why he picked out Traylor, and I think he already answered it, anyhow.

Mr. Greiner: All right, Your Honor, we would offer at this time Exhibit 267.

Mr. Ris: No objection, except again going back to reference to the 20 minority schools, which takes us back to the objection we made to Exhibits 249 through 252.

[589] Mr. Brega: Same objection.

The Court: Exhibit 267 is received.

(Whereupon, Plaintiffs' Exhibit 267 was received in evidence.)

Q. Referring your attention to Exhibit 267, in the year 1968, what was the median years' experience of teachers in the selected 20 minority schools? A. Approximately four years.

Q. What was the median years' experience in Traylor elementary school when it opened? A. Over eleven and a half.

Q. Doctor, with respect to the junior high school faculty, have you prepared a similar set of exhibits showing the ethnic distribution of the faculty expressed as a percent and a number in the selected Anglo and minority junior high schools? A. We have.

Q. And what are those exhibit numbers, please. A. Exhibit 285 shows the faculty by number for the years '64 through '68 for the four minority junior high schools. Exhibit 286 is a similar tabulation by percentage for those minority schools. Exhibit 287 is the distribution of the

faculty by ethnicity for the four Anglo junior high schools for '64 through '68.

Q. That's expressed as a number? [590] A. Expressed as a number.

Q. And Exhibit 288 is the same data expressed as a percentage? A. That's correct.

Mr. Greiner: Your Honor, we would offer Exhibits 285 through 288 at this time.

Mr. Ris: Same objections as to 249 through 252 and 254 through 257.

Mr. Brega: Same objection.

The Court: The objection will be overruled; Exhibits 285 through 288 are received.

(Whereupon, Plaintiffs' Exhibits 285 through 288 were received in evidence.)

Q. Doctor, similarly, have you prepared a chart which purports to depict the information contained in Exhibits 285 through 288? A. We have.

Q. Is that Plaintiffs' Exhibit 289? A. Plaintiffs' Exhibit 289.

Q. And that purports to depict what? A. It shows the percentage of minority school teachers in the selected minority schools and selected Anglo schools for 1964 through '68.

Mr. Greiner: Your Honor, we offer Plaintiffs' Exhibit 289.

[591] Mr. Ris: Same objection as to 249 through 252 and 254 through 257.

The Court: Exhibit 289 will be received.

(Whereupon, Plaintiffs' Exhibit 289 was received in evidence.)

Q. Doctor, calling your attention to Exhibit 289, in the year 1964, first of all, with respect to the minority schools, what does Exhibit 289 show as to the percentage of minority school teachers in the minority junior high schools selected? A. Twenty percent of the teachers were minority teachers in those schools.

Q. And what about the percentage of minority teachers in the selected Anglo junior high schools? A. About 2 percent.

Q. Now, by the year 1968, Doctor, what was the percentage of minority teachers in the minority junior high schools? A. Approximately 25 percent.

Q. It had increased then since 1964? A. From 20 percent to 25.

Q. What was the percentage of the minority teachers in the selected Anglo junior high schools? A. Approximately 3 percent.

Q. Doctor, have you also prepared a similar set of [592] exhibits with respect to faculty experience in the selected junior high schools? A. That's correct.

Q. And handing you what has been marked for identification as Plaintiffs' Exhibits 290 through 293, I ask you if you can identfy those for us. A. Exhibit 290 is a distribution of the faculty by number, having various categories of experience, for the years 1964 through '68.

Q. What are the categories depicted on the exhibit, Doctor? A. Categories of experience are No Denver Public School Experience, Those Teachers that are on Probation, and Those that have Ten or More Years of Experience, and the Median Years of Teacher Experience.

Q. This then is the same information previously shown for the selected elementary schools? A. That's correct.

Q. And Exhibit 290 depicts it as a number, is that correct? A. Exhibit 290 depicts that information as a number.

Q. And Exhibit 291 depicts it by percent? A. That is correct.

Q. And what does Exhibit 292 depict? A. Exhibit 292 depicts the same information for the [593] four Anglo junior high schools.

Q. And Exhibit 293 depicts it just as a percentage, is that correct? A. The same information as a percent.

Mr. Greiner: We offer Exhibits 290 through 293 at this time, Your Honor.

Mr. Ris: Same objection as to 254 to 257 and 249 to 251.

Mr. Brega: Same objection.

The Court: The objections will be overruled. Exhibits 290 through 293 will be received.

(Whereupon, Plaintiffs' Exhibits 290 through 293 were received in evidence.)

Q. Now, Dr. Bardwell, similarly, have you prepared a series of charts illustrating the information contained in Exhibits 290 through 293? A. Yes.

Q. First of all, handing you what has been marked for identification as Exhibit 294, would you state, please, what that purports to depict? A. It shows the graph of the percentage of teachers with no Denver Public School experience in the junior high schools that have been selected for study for the years 1964 through '68.

Q. All right. Then, next, Doctor, is what has been [594] marked for identification as Exhibit 295. Would you describe, please, what it purports to be. A. It is a graph for the percentage of probationary teachers in those two groups of junior high schools for the years 1964 through 1968.

Q. Next is what has been marked for identification as Exhibit 296. What does 296 depict? A. Shows the percentage teachers in the two groups of schools, Anglo and minority schools, those teachers with ten or more years' DPS experience.

Q. Finally, Doctor, Exhibit 297 depicts what? A. It shows the median years of teacher experience for the two groups of selected junior high schools for 1964 through '68.

Mr. Greiner: Your Honor, we offer Exhibits 294 through 297 at this time.

Mr. Ris: Same objections as to Exhibits 290 through 293.

Mr. Brega: Same objections.

The Court: The objections will be overruled. They will be received in evidence. This is 294—

Mr. Greiner: Through 297.

The Court: They will be received.

(Whereupon, Plaintiffs' Exhibits 294 through 297 were received in evidence.)

[595] Q. Calling your attention, first, to Exhibit 294, which depicts teachers with no previous DPS experience, in the year 1964, what was the percentage of such teachers in selected minority schools? A. Approximately 18 percent.

Q. And what was the percentage in the selected Anglo schools? A. Approximately 15 percent.

Q. By 1968, Doctor, what was the percentage in the selected minority schools? A. Approximately 33 percent.

Q. And what was it in the selected Anglo schools? A. Approximately 15 percent.

Q. Approximately the same in the Anglo schools in 1968 as it was in 1964? A. No. Oh, in the Anglo schools, yes.

Q. And what was the comparison between '64 and '68 in the minority schools? A. Minority schools, 18 percent in 1964, compared to about 33 percent in 1968.

Q. So, it increased? A. It increased.

Q. Next, Doctor, Exhibit 295, with respect to probationary teachers in the selected junior high schools, minority junior high schools, in the year 1964?

[596] The Court: What's this subject matter?

Mr. Greiner: This one is probationary teachers, Your Honor.

A. 1964, for the minority schools, percentage is approximately 48 percent.

Q. And what was the comparable percentage in 1964 in the selected Anglo junior high schools? A. About 36 or 37 percent.

Q. Now, by 1968, Doctor, what was the percentage of teachers in the selected minority schools who were probationary teachers? A. About 62 percent.

Q. And what was the percentage that year in the selected Anglo schools? A. Approximately 33 percent.

Q. Next, Doctor, calling your attention to Exhibit 296, depicting teachers with ten or more years' DPS experience in 1964, what percentage of the teachers in the selected Anglo schools had ten or more years' DPS experience? A. About 31 percent.

Q. And what was the comparable percentage that year in the selected minority schools? A. About 12 percent.

Q. Calling your attention to the year 1968, in the year 1968 what percentage of the teachers in the selected [597] Anglo schools had ten or more years' experience? A. About 35 percent.

Q. And what was the comparable percentage in the selected minority schools? A. Ten percent.

Q. Finally, Doctor, with respect to Exhibit 297, which depicts median years of teacher experience in selected junior high schools, in the year 1964, what was the median years' experience in the selected Anglo schools? A. Approximately 4.6 years.

Q. And what was the median years' teacher experience in the minority schools that year? A. About 2.6 years.

Q. Now, by the year 1968, Doctor, what was the median years' teacher experience in the Anglo schools? What was the percentage? A. Not the percentage. Number of years.

Q. Pardon me, number of years. A. 5.6 years in the case of the Anglo schools.

Q. What was it for the selected minority schools? A. About 1.7.

The Court: I think we will take our morning recess now.

(The Court recessed from 10:58 o'clock a.m. until 11:10 o'clock a.m.)

[598] (Following a recess, the trial resumed at 11:17 a.m.)

Mr. Greiner: May plaintiffs proceed, Your Honor.

The Court: Yes.

By Mr. Greiner:

Q. Dr. Bardwell, have you also prepared a series of exhibits pertaining to the ethnic distribution of faculty in the selected senior high schools? A. We have.

Q. Handing you what's been marked for identification as Exhibits 314 through 317, I ask you if you can identify those, please? A. 314 is the distribution of faculty by ethnicity for the years 1964 through 1968 for the selected senior high schools.

Q. Which kind of senior high schools? A. East, Manual and West.

Q. Those are the minority senior high schools? A. Those are the minority senior high schools.

Exhibit 315 is exactly the same data expressed as a percentage.

Q. Then Exhibit 316? A. Exhibit 316 is the distribution of faculty by number for the selected Anglo senior high schools for the years 1964 through 1968.

Q. 317 depicts the same data as 316 except expressed [599] as a percentage, is that correct? A. That's correct.

Mr. Greiner: Your Honor, we offer 314 through 317 at this time.

Mr. Ris: Same objection as to 249 through 252 and 254 through 257.

Mr. Brega: Same objection.

The Court: The objections will be overruled. They will be received.

(Whereupon, Plaintiffs' Exhibits 314, 315, 316 and 317 were received in evidence.)

Q. Doctor, have you also prepared a chart depicting

the distribution of faculty in the selected senior high schools? A. Yes, sir.

Q. Handing you what's been marked for identification as Exhibit 318, I ask you to identify that? A. 318 shows a comparison of the Anglo schools selected for analysis and the minority schools selected for analysis on the basis of the percentage of minority school teachers for 1964 through 1968.

Q. And that is based on data that has just been received? A. That's correct.

[600] Mr. Greiner: Your Honor, we offer Exhibit 318.

Mr. Ris: Same objection as to 314 through 317.

Mr. Brega: Same objection.

The Court: Overruled.

(Whereupon, Plaintiffs' Exhibit 318 was received in evidence.)

Q. Dr. Bardwell, calling your attention then to Exhibit 318, in 1964 what was the percentage of minority school teachers in the selected minority senior high schools? A. About seven percent.

Q. And what was the percent of minority school teachers in the selected Anglo senior high schools? A. About two percent.

Q. Now, about 1968, Doctor, what was the percentage of minority school teachers in the selected minority schools? A. Twelve percent.

Q. Did it increase then from 1964? A. Yes, it increased from approximately seven to twelve percent.

Q. With respect to minority teachers in the selected

Anglo senior high schools, what was the percentage in 1968? A. About one and a half percent.

Q. It had decreased since 1964? A. It had.

Q. Next, Doctor, have you prepared a similar set of [601] exhibits depicting faculty experience at selected Anglo and minority senior high schools? A. We have.

Q. Handing you what's been identified as Exhibit 319 through 320, would you identify those for us, please? A. 319 shows the distribution of faculty by number at various experience categories for the selected minority senior high schools for the years 1964 through 1968.

Q. And 320 expresses the same data in terms of percentages? A. That's correct.

Q. And 321 expresses the same data in numbers for the selected Anglo schools? A. That's correct.

Q. And 322 expresses it as a percentage for the selected Anglo schools, is that correct? A. That's correct.

Mr. Greiner: Your Honor, we offer 319 through 322.

Mr. Ris: Same objection as to 249 through 252; 254 through 257.

Mr. Brega: Same objection.

The Court: Overruled.

(Whereupon, Plaintiffs' Exhibits 319, 320, 321 and 322 were received in evidence.)

Q. Doctor, similarly, have you prepared a series of [602] charts depicting the information as shown on 319 through 322? A. We have.

Q. Handing you what's been marked for identification as Exhibit 323 through 326, and I will ask you to identify each of those, please. A. Yes, Exhibit 323 is a percentage

analysis for the years 1964 through 1968, showing teachers with no Denver Public Schools experience for the selected senior high schools.

Q. And then the next one is 324. What does that show? A. That shows a similar analysis for probationary teachers.

And 325 shows a similar analysis for teachers with ten or more years of Denver Public Schools experience.

And Exhibit 326 shows a comparison of the median years of teacher experience for the two selected groups of senior high schools for the years 1964 through 1968.

Mr. Greiner: Your Honor, we offer Exhibits 323 through 326 at this time.

Mr. Ris: Same objection as to 319 through 322.

Mr. Brega: Same objection.

The Court: Overruled. They will be received.

(Whereupon, Plaintiffs' Exhibits 323, 324, 325, and 326 were received in evidence.)

[603] Q. Calling your attention first to Exhibit 323, Doctor, in 1964 with respect to teachers with no prior DPS experience, what was the percentage of such teachers in the selected minority senior high schools? A. About ten percent.

Q. What was it in the selected Anglo senior high schools? A. Slightly less than five percent.

Q. Now, by 1968, Doctor, what was the percentage of teachers with no prior DPS experience in the selected minority senior high schools?

The Court: What year is this?

Mr. Greiner: 1968.

A. About 16 to 17 percent.

Q. And what was the percentage of teachers with no prior experience in the selected Anglo schools? A. About seven and a half percent.

Q. Next, Doctor, with respect to Exhibit 324, and dealing with probationary teachers, in 1964 what was the percentage of probationary teachers in the selected minority senior high schools? A. About 30 percent.

Q. And what was it in the selected Anglo senior high schools in 1964? A. Approximately 16 percent.

[604] Q. And then by 1968, Doctor, according to Exhibit 324, what was the percentage of probationary teachers in the selected minority schools in 1968? A. About 35 percent.

Q. What was the percentage in the selected Anglo senior high schools? A. About 19 percent.

Q. Next, Doctor, Exhibit 325 dealing with teachers with ten or more years' experience, in 1964 what percentage of the teachers in the Anglo schools had ten or more years of DPS experience? A. About 46 percent.

Q. And what was the percentage of the selected minority senior high schools? A. About 41 percent.

Q. Now, about 1968, Doctor, in the selected Anglo senior high schools what was the percentage of teachers with ten or more years' DPS experience? A. About 51 percent.

Q. And what was the percentage in the minority schools? A. About 36 or 37 percent.

Q. So it had decreased somewhat in the minority schools? A. That's correct.

Q. Finally, Doctor, with regard to median years of experience in the selected senior high schools, in 1964 what

[605] was the median years' experience in the selected Anglo schools? A. Nine years.

Q. What was it in the selected minority schools in 1964? A. About seven years.

Q. Now, by 1968 what was the median years' experience in the Anglo schools? A. About ten years.

Q. And what was it by that time in 1968 in the minority schools? A. About six.

Q. So it had declined slightly? A. That's correct.

Q. Between 1964 and 1968, is that right? A. That's correct.

Q. Next, Doctor, have you prepared a series of exhibits purporting to show the building facilities at the selected elementary schools? A. We have.

Q. Handing you what's been marked for identification as Exhibits 268 and 269, can you identify those for us, please? A. 268 is a recapitulation of the state of the building facilities for the selected minority elementary [606] schools.

Q. What data is depicted on that exhibit? What are the columns? A. The first column indicates the date of original construction of the building. The second set of columns indicates the additions, construction dates of the additions. The next column indicates the capacity, the site size in acres, and the next column indicates the number of acres per hundred students.

The next one is the number of classrooms, the number of mobile units, library rooms, kindergarten rooms, the capacity of lunchrooms, physical education rooms, auditorium capacity, and whether or not that particular school had a swimming pool.

Q. Now, what does 269 depict? A. 269 depicts exactly the same information for the chosen 21 Anglo schools.

Mr. Greiner: Your Honor, we would offer Exhibits 268 and 269 at this time.

Mr. Ris: Subject only to our objection to 249 and 252, we have no other objections.

Mr. Brega: Same objection, Your Honor.

The Court: You don't presume that quality education is dependent upon physical facilities, I take it?

Mr. Ris: We will get into that later, but—

[607] The Court: I'm asking him.

Mr. Ris: I'm sorry. I thought you were asking me.

The Court: If you want to answer it, I'll hear you.

The Witness: Yes, that's correct.

The Court: You do presume that there is a relationship between physical facilities?

The Witness: We're simply presuming the information to show the differences between the two sets of schools in terms of their physical facilities, that's right.

The Court: I suppose the quality of the faculty, though, is really much more—a much more important element, isn't it?

The Witness: Am I entitled to answer that? I think you're right, sir.

The Court: Do you want to answer now?

Mr. Ris: No, I just want to make an observation here for the record, if I may. Ultimately we're going to object to this whole line of questioning pertaining to building for the same reason as we stated with respect to the teachers and basically for the same reason that the Court indicated or the basis

for the question to the witness, that this is a question pertaining to pupils and the racial and ethnic, and that the age of buildings and that type of [608] facilities are too remote.

So, frankly, I wasn't going to make any objection to the whole line of questioning inasmuch as the Court has permitted the matter to come in on the teachers, but we do ultimately contest all of this testimony for the same reason as stated on the teachers. That's our position.

(Whereupon, Plaintiffs' Exhibits 268 and 269 were received in evidence.)

[609] The Court: We will keep it in mind.

Mr. Greiner: I believe, Your Honor, that that would go to the weight of the evidence rather than to its admissibility.

Mr. Ris: I would agree in view of the Court's previous ruling it would.

The Court: We will receive them.

(Whereupon, Plaintiffs' Exhibits 268 and 269 were received in evidence.)

Q. Dr. Bardwell, have you prepared a chart which compares certain of the factors described in Exhibit 268 and 269? A. We have, yes.

Q. Exhibit 270 has been marked for identification, and this purports to depict what? A. It shows a comparison between the 20 minority schools and the 21 Anglo schools in terms of the acres per 100 students of the school sites for the year 1968.

Q. And then what has been marked for identification as Exhibit 271 purports to depict what, Doctor? A. It de-

picts the average age of the original structure for the two groups of schools selected for analysis.

Mr. Greiner: Your Honor, we would offer Exhibits 270 and 271 at this time.

Mr. Ris: In addition to our grounds of objection on 268 and 269, we submit that this is so remote, so irrelevant, [610] as not to be admissible at all with respect to the issues in this case.

The Court: Well, I can't tell at this stage. You are offering this to show that there is a classification, a recognized—or a classification, conscious or subconscious, even in terms of physical facilities; is that right?

Mr. Greiner: Yes, Your Honor, in terms of the disparity between the schools being compared.

The Court: All right, we will receive them then, 270 and 271.

(Whereupon, Plaintiffs' Exhibits 270 and 271 were received in evidence.)

Q. Doctor, with respect to Exhibit 270, what does it demonstrate with respect to the acres per 100 students, first of all, of the 20 minority schools? A. Twenty minority schools, the average number of acres per 100 students is slightly less than one-half.

Q. And what does it show for the compared 21 Anglo schools? A. About eight-tenths.

Q. Of an acre? A. Of an acre per hundred students.

Q. Exhibit 271 depicts what? A. This depicts the average age of original structure, comparing the 20 minority schools to the 21 Anglo schools.

[611] Q. What is the average age of the structure for the 20 minority schools? A. Approximately 50 years.

Q. And what is it for the selected 21 Anglo schools? A. Twenty-five years.

Q. Doctor, have you prepared a similar composite of the building facilities at the selected junior high schools? A. We have.

Q. That's Exhibit 298 and 299? A. Correct.

Q. Does it show the same data as the prior building facilities exhibits? A. They do.

Mr. Greiner: Your Honor, we would offer Exhibits 298 and 299, pertaining to the comparison of junior high school building facilities at this time.

The Court: This goes to the same—

Mr. Greiner: Same data, Your Honor.

The Court: —category?

Mr. Ris: Same objection as to 268 and 269.

Mr. Brega: Same objection.

The Court: Overruled. Received.

(Whereupon, Plaintiffs' Exhibits 298 and 299 were received in evidence.)

Q. Have you also prepared charts, Doctor, with respect [612] to the average number of acres and the age of original structure at the compared junior high schools? A. We have.

Q. Exhibit 300-A treats the average number of acres— A. Per hundred students, that's right.

Q. And what has been identified as Exhibit 300 depicts the average age of the original structures? A. That's right.

Mr. Greiner: Your Honor, we would offer Exhibits 300 and 300-A at this time.

Mr. Ris: Same objection as to Exhibits 270 and 271.

Mr. Brega: Same objection.

The Court: Overruled.

(Whereupon, Plaintiffs' Exhibits 300 and 300-A were received in evidence.)

Q. Doctor, with respect to Exhibit 300-A, what does it depict as to the average number of acres per 100 students in the selected minority schools? A. A little bit less than six-tenths of an acre per hundred students.

Q. What is shown on the exhibit with respect to the selected Anglo schools? A. Approximately .7 acres per hundred students.

Q. With regard to the average age of the original structures shown in Exhibit 300, what is the average age for [613] the selected minority junior high schools? A. Approximately 37 years.

Q. And what is it for the selected Anglo junior high schools? A. Approximately 10.

Q. Then, finally, Doctor, with respect to the senior high school building facilities, have you prepared a composite exhibit with respect to the selected minority and the selected Anglo senior high schools? A. We have.

Q. And what has been marked as Exhibit 327 depicts what? A. It shows the building facilities classified by various characteristics of the structure and site for the three selected minority senior high schools.

Q. And Exhibit 328 depicts the same data for the selected Anglo schools? A. That's right.

Mr. Greiner: Your Honor, we would offer Exhibits 327 and 328 at this time.

Mr. Ris: Same objection as to 268 and 269.

Mr. Brega: Same objection.

The Court: This is the swimming pool evidence?

The Witness: Excuse me, Your Honor?

The Court: This is the swimming pool evidence here?

The Witness: That's right.

[614] The Court: We will receive these.

(Whereupon, Plaintiffs' Exhibits 327 and 328 were received in evidence.)

Q. And, finally, Doctor, with regard to this computerized data, have you prepared charts based upon Exhibits 327 and 328 depicting certain of the aspects of facilities at these selected senior high schools? A. We have.

Q. And Exhibit 329 purports to depict what? A. It shows the average number of acres per hundred students for the minority schools compared to the Anglo schools that were selected for study.

Q. And Exhibit 330 depicts what? A. The average age of the original structure for the same two groups of schools.

Mr. Greiner: Your Honor, we would offer Exhibits 329 and 330 at this time.

Mr. Ris: Same objection as to 270 and 271.

Mr. Brega: Same objection.

The Court: Overruled; they will be received.

(Whereupon, Plaintiffs' Exhibits 329 and 330 were received in evidence.)

Q. Doctor, with respect to Exhibit 329, the average acres per 100 students, what is shown as to the average acres per 100 students for the minority schools selected? [615] A. For the minority schools it is approximately .07 acres per hundred students, and in the case of the Anglo schools it is about .15.

Q. All right, and then referring to Exhibit—

The Court: What's that last number you gave?

The Witness: .15.

Q. And what was it for the minority schools? A. .07.

Q. And with regard to Exhibit 330, the average age of the original structure shown for the minority schools is what? A. About 33 years.

Q. And for the selected Anglo schools? A. It is about seven years.

Q. Doctor, I am handing you what has been marked as Plaintiffs' Exhibit 240. Would you please identify that exhibit for us. A. Yes. Exhibit 240 shows the location of the 20 minority schools and the 21 Anglo elementary schools that have been selected for study in the preceding analyses.

Q. Those are the schools shown on Exhibit 241? A. Yes, the schools which are minority are shown in blue and the Anglo schools are shown in red.

Mr. Greiner: Your Honor, we offer Plaintiffs' Exhibit 240 at this time.

Mr. Ris: It accurately reflects 241?

[616] Mr. Greiner: Yes.

Mr. Ris: So our objection to this would be for the same reasons as 241. Other than that, we have no question as to its accuracy.

Mr. Brega: Same objection.

The Court: The objections are overruled.

(Whereupon, Plaintiffs' Exhibit 240 was received in evidence.)

Q. Next, Doctor, I am handing you what has been marked for identification as Plaintiffs' Exhibit 346. Can you identify Exhibit 346, please? A. Yes. Plaintiffs' Exhibit 346 compares the enrollment to the capacity for junior high schools for 1962 through '68, where the minority schools are the minority schools selected for study in the preceding analyses and the Anglo schools are Hill, Merrill and Jefferson. And it shows this comparison for the years '62 through '68.

Q. What is the basis—

Mr. Ris: Excuse me just a moment, could I see that?

The Court: What number are we on now? What number is that?

Mr. Greiner: No. 346.

Mr. Ris: If the Court please—excuse me, you haven't offered it yet.

Mr. Greiner: That's all right.

[617] Mr. Ris: Sorry.

Q. Doctor, what are the three Anglo junior high schools depicted on Exhibit 346? A. Hill, Merrill, and Thomas Jefferson.

Q. What is your basis for selecting those three junior high schools? A. Those schools had a constant capacity over the period 1962 through '68, and they are the same Anglo schools that were selected for the study among the Anglo junior high schools in the proceeding analysis.

Q. Now, 273 purports to depict the total capacity of Hill, Merrill and Thomas Jefferson? A. That's right.

Q. What is the source of the capacity data depicted on Exhibit 346?

Mr. Ris: I am going to object to that until the exhibit is admitted.

The Court: Overruled.

Mr. Greiner: I am laying a foundation for the exhibit.

The Court: Go ahead.

Q. What is the source of the capacity data? A. Exhibit 24.

The Court: Exhibit 24?

Mr. Greiner: Yes, which is in evidence, Your Honor, [618] from the summer hearing.

Q. What is the source of the enrollment data as depicted on Exhibit 346? A. The enrollment data are taken from the preceding exhibits that have been introduced here.

Q. With respect to what? A. With respect to enrollment.

Q. I am handing you what is in evidence as Exhibit 273, Doctor. Is that one of the sources you have reference to? A. Yes, that's correct.

Mr. Greiner: Your Honor, at this point we would offer Exhibit 346.

[619] Mr. Creighton: May I voir dire, Your Honor?

George E. Bardwell—for Plaintiffs—Voir Dire

Voir Dire Examination by Mr. Creighton:

Q. Dr. Bardwell, your capacity figures came from Exhibit 24, you said? A. That's right.

Q. And that is the August 1967 Planning Report for the bond issue that year? A. That's right, sir.

Q. Did that give capacities for any other area than that particular school year, 1966-67? A. Except that one can infer the information about the capacities from the year in which there were additions to the school, and not following 1968, no.

Q. Did you use such inferences in determining capacities for other years than 1966-67? A. Those figures are taken directly from Exhibit 24 which shows the capacity of the school building in the year 1967. It also shows the year in which there were additions to the plan, and these then would show that there had been for those schools since 1962 no changes in the capacity of the schools.

Q. Now as to membership, you used the principal's estimate of ethnic data; is that right? A. That's correct.

[620] Q. And you did not use the September principal's report used in all the school districts' capacity planning? A. That's correct.

Mr. Creighton: Your Honor, we have checked this with the capacity data and the inferences he has used and with the enrollment data from the source. It accurately reflects those sources of information. We do make an objection to the exhibit itself because it involves this classification of minority schools, again, the same objection we have been making.

Mr. Brega: The same objection.

The Court: May I see it, please?

Mr. Creighton: Your Honor, I have one further question of this witness.

The Court: Go ahead.

Q. Was a junior-senior high school involved in that exhibit, Dr. Bardwell? A. That's right.

Q. How did you get the membership of a junior-senior high school? A. Contacted the office of Mr. Crowley, who at that time supplied the enrollment for me in the years I needed it and in addition to that gave me the racial composition of those junior high schools.

Q. In other words you sought information breaking out [621] those three years of the junior high from that six-year school? A. Yes, because the usual report that comes out in September combines the junior and senior high school enrollment usually under the senior high school. So, one has to then have supplemental information in order to break out the junior high school component of the school.

Q. This is not then an instance where you arbitrarily divided the junior-senior high school in half to get your junior high membership? A. No, although I can add, that as a rule of thumb, from the school administration—and this was the advice that was given to me—that this is very close to the truth.

The Court: We will receive 346.

(Whereupon, Plaintiffs' Exhibit 346 was received in evidence.)

Direct Examination by Mr. Greiner (Cont'd):

Q. With reference, Dr. Bardwell, to 346, the thick, green line on the exhibit depicts what? A. It shows the combined capacity of—

Q. Pardon me. It depicts what? A. The capacities of those three-year schools, and those are the Anglo schools, Hills, Merrill and Jefferson, and—

Q. And the thin green line depicts what? [622] A. The enrollment of those three schools from the years 1962 through 1968.

Q. Now, with respect to the red lines, what does the thick red line depict? A. It shows capacity for the selected minority schools in the years 1962 through 1968.

Q. What does the thin red line depict? A. It shows the enrollment in those minority schools for the same period of time?

Q. Now, first of all, Doctor, directing your attention to the Anglo schools depicted on Exhibit 346, and first of all, the thick green line, does that indicate any increase in capacity at those three junior high schools over the time period depicted? A. No, it does not.

Q. Does it indicate an increase in the student enrollment at those three high schools? A. It does.

Q. What was the student enrollment, approximately, in 1962 as shown by Exhibit 346? A. Approximately 3,800.

Q. And by the year 1968, Doctor, what had that enrollment increased to? A. About 5,000.

Q. Now, drawing your attention to the minority schools, [623] Doctor, was there any change in the capacity of the minority schools over this time period? A. Very slight increase in 1966.

Q. Do you recall what that increase related to? A. The addition at Smiley.

Q. Now, with regard to the enrollment at these selected

minority schools, Doctor, what was the enrollment in 1962 as depicted by Exhibit 346? A. About 5,100.

Q. And what was the enrollment as of 1968 in these minority schools? A. Slightly less than 4,500.

Q. Now, again referring to Exhibit 346, Doctor, in each instance there is a gap, is there not, between the thick line and the thin line in each color? A. There is.

Q. What does that gap represent? First of all, with respect to the green line in the Anglo schools, what does—take the year 1964, for example. A. In 1964 the enrollment in those Anglo schools was about 4,500 compared to a capacity of about 4,000.

Q. So there was an over enrollment then of approximately 500 students? A. That's correct.

Q. Now, what was the situation at that point in time [624] at the minority junior high schools? A. In 1964 the enrollment in those minority schools was approximately 5,000 students, while the capacity was 5,500.

Q. Is there then a relationship depicted in Exhibit 346 between the undercapacity of the minority schools and the over-enrollment at the majority schools? A. Yes.

Q. What is that relationship? A. By and large the number of students exceeding the capacity in the Anglo schools was about the same as the number of seats available in the minority schools for those same years.

Q. Now, you have already given us the data as to 1964. Is the situation the same in 1966 as depicted by the exhibit? A. Yes, roughly.

Q. What was the overcapacity or the over-enrollment at the Anglo schools in 1966? A. About 1700.

Q. What was the degree or the number of undercapacity for the minority schools in that year? A. About 1,000.

Q. Pardon me? A. About 1,000.

Q. And in the year 1968, what was the over-enrollment at the Anglo schools? [625] A. About 1,000.

Q. And what was the under-enrollment at the minority schools? A. About 1,000.

Q. Doctor, do you know whether during the years 1962 through 1968 there were any new junior high schools built by the School District No. 1? A. Yes, there were.

Q. When was the first such school built? A. John F. Kennedy was built in 1966.

Q. Do you recall what the capacity was of Kennedy when it opened? A. About 2100, the combined junior high and senior high school. It would be about 1,050 for just the junior high.

Q. Then was there another junior high school opened in 1968? A. Yes.

Q. What was that? A. Hamilton.

Q. And do you recall what the capacity of Hamilton was? A. 1200.

Q. Now, is there another junior high school currently under construction or authorized? A. Yes.

Q. What is that? [626] A. Place.

Q. Do you recall what the capacity of Place will be? A. 1200.

Q. Do you recall when Place is scheduled to open? A. 1971.

Q. Doctor, you have on the podium in front of you what is in evidence as Defendants' Exhibit D, which we have been referring to as the Gilberts Plan. A. Yes.

Q. The Gilberts plan was published in what year, Doctor? A. 1968.

Q. Is there a projection shown in the Gilberts plan as to their expectancy as to what's going to happen to junior high school enrollment? A. Yes.

Q. Would you tell us, please, what page in Exhibit D you're referring to. A. A written presentation appears on page 13, and graphs showing the membership trends and

estimated trends through the year 1970 are shown on the page following page 13.

Q. Now, with respect first to the graphs which you have just described, what does the graph show as to the projected junior high school enrollment, Doctor? A. That it will remain fairly level for the next several years at approximately 21,000.

[627] Q. And 21,000 was the level as of what school year? A. As of 1966, approximately.

Q. And how far into the future does that projection extend? A. 1970.

Q. Now, is there any narrative on the preceding page describing their estimate of projection? A. There is.

Q. Would you read that, please. A. "School District No. 1, Denver Public Schools, with a pupil membership in 1968 of 96,848 pupils, is coterminous with the City and County boundaries. Enrollment in the schools grew rapidly. 7.4 percent per year during the 1950 to 1960 decade. Less rapidly during the period 1960 to 1965, and now is remaining about constant. Estimates point to a stabilized school membership for the next several years. However, Denver has room to grow, and its school population should continue to increase at a gradual rate. For a number of years the school population in Denver has increased annually at each school level until recently when the citywide elementary membership began to stabilize, secondary school memberships appear to be leveling off since increases in these years are small."

Membership trends are shown in the accompanying graph which I have just related.

[628] Q. Doctor, do we have any other evidence of what in fact has been happening to enrollment at the junior high school level? A. Yes, we do.

Q. Handing you what's in evidence as Exhibit 274, what does Exhibit 274 show with respect to the total junior high

school enrollment? A. That from 1967 to 1968 there was a decrease of approximately 100 students in total enrollment for all junior high schools in the district.

Q. Doctor, I am also handing you what has been marked for identification as Defendants' Exhibit S-1. Can you identify that for us? A. Yes. This is the report of the estimated ethnic distribution of pupils, classroom teachers, and other certified and classified personnel for September 26, 1969.

Q. That is then for the current school year? A. For the current school year.

Q. And these are the School District figures? A. That's correct.

Mr. Greiner: Your Honor, we offer Defendants' Exhibit S-1 at this time.

Mr. Creighton: Your Honor, this might be termed a joint exhibit. It is the update of Exhibit S from the last summers' hearing, giving this fall's ethnic estimates. No [629] objection.

Mr. Brega: No objection.

The Court: It is received.

(Whereupon, Defendants' Exhibit S-1 was received in evidence.)

Q. Referring to S-1 then, Doctor, what has happened to the junior high school enrollment this school year compared to the prior school year? A. In 1969, for this school year, that enrollment is 19,736.

Q. What was it in the prior school year according to Exhibit 274? A. It was 21,599. There has to be then an addition to that of the contribution of John F. Kennedy and Thomas Jefferson.

Q. We're talking now about enrollment? A. That right.

Q. What happened to the enrollment to the junior high

schools between this school year and last school year? A. It appears to have decreased.

Q. By about how much? A. A few hundred students.

Q. Now, with respect to the elementary school enrollment, Doctor, which will eventually be feeding into these junior high schools, I am handing you what is in evidence as [630] Exhibit 243. What does 243 show with respect to the total elementary school enrollments in the District? A. 243 shows that the elementary school enrollment in Denver has been declining every year since 1963.

Q. What was it, for example, in 1963? A. In 1963 the elementary enrollment was 57,199.

Q. What was it in 1968? A. 54,586.

Q. Referring to S-1, what is it this year? A. This year it is 54,498, or a drop of about 100 students.

Q. Next I am handing you, Doctor, what has been marked for identification as Plaintiffs' Exhibit 247. Can you identify that for us, please. A. Yes. That is a depiction of the enrollment versus the capacity for all junior high schools in the District from 1962 to 1971.

Q. What is the source of the enrollment and capacity data on Exhibit 347? A. The enrollment—the capacity information came from the same source as the preceding exhibit, namely, Exhibit 24, and the enrollment information came from previous exhibits that have been submitted here.

Mr. Ris: No objection.

[631] Mr. Brega: No objection.

The Court: 347 is received.

(Whereupon, Plaintiffs' Exhibit 347 was received in evidence.)

Q. Doctor, calling your attention to Exhibit 347, first of all, the thick green line on that exhibit depicts what? A. Capacity.

Q. Now, in 1968 you show the overall capacity of the junior high schools increasing; is that correct? A. That's correct.

Q. And what accounts for that increasing? A. The building of John F. Kennedy in 1966.

Q. Pardon me. I misspoke. It's the year 1966? A. Yes.

Q. And then you show another increase in capacity in the year 1969; is that correct? A. That's correct.

Q. What does that depict or reflect? A. That reflects an increase in capacity of junior high schools coming from the building of Hamilton.

Q. And then finally in 1970 you have projected another increase in capacity in the junior high schools. That reflects the opening of Place; is that correct? A. That's correct.

Q. Now, the thin green line on Exhibit 347 depicts [632] what? A. Shows the enrollment in all junior high schools in the District in 1962 to 1968.

Q. Now, in 1966, Doctor, is there a gap between the the thin green line and the thick green line? A. There is.

Q. Does that gap denote overcapacity or undercapacity at that point in time? A. Undercapacity.

Q. By approximately how many spaces? A. I would say about 500.

Q. So in 1966 there were 500 seats not utilized in the junior high schools? A. That's right.

Q. What was the situation in 1968 with regard to enrollment versus capacity? A. A slight increase in the gap. The capacity exceeding the enrollment by this time by about 600 students, I would judge.

Q. Now, Doctor, if we were to extend the thin green line based on the data which we have now contained in S-1 as to the actual 1969-70 enrollment, would there also be an excess of capacity for this chool year? A. There would.

Q. And yet, Hamilton was also opened during that time period; is that correct? [633] That's correct.

Q. So the capacity was increased even further? A. That's right.

Q. And so the underutilization was increased even more; is that correct? A. That's correct.

[634] The Court: When did the trend reverse? In '66?

The Witness: About '66, when the enrollment started to turn down.

The Court: They probably had all these new schools in the planning or development stage, land acquired and so at that point?

The Witness: Well, except for Hamilton, which I would say was built in '68. Its planning must have come at a time when the projection of enrollments was pretty clear at that point.

The Court: But, up until '66, there was an upward trend?

The Witness: That's right.

The Court: And apparent need for additional capacity?

The Witness: That's correct.

Q. Was that true, Doctor, when they were planning Place? A. No, sir.

Mr. Ris: I am going to move to strike that. He hasn't testified as to when they were planning Place.

Q. When were they planning Place?

Mr. Ris: If you know?

The Court: Do you know?

The Witness: As to when they planned the space?

[635] Mr. Greiner: Place.

Mr. Ris: Place.

The Court: Place Junior High School.

A. I am not certain.

Q. So, the enrollment started dropping off in 1966? A. Yes, it did.

Q. Do you know whether they were planning Place in the year 1966? A. I can't—

Mr. Brega: I believe he already said he didn't know, and that would answer the question.

The Court: True.

Mr. Greiner: All right. We will find out from the other witness, Your Honor.

The Court: All right.

Q. Dr. Bardwell, I have placed here on the board Exhibit 390, purporting to show elementary schools undercapacity by more than ten percent in the year 1968. Was this exhibit prepared by you? A. Yes, it was.

Q. And what is the source of the data depicted on Exhibit 390? A. The exhibit showing pupil enrollment. In fact, Exhibit 243.

Q. Now, what do the blue circles—

[636] The Court: 243?

The Witness: 243, yes.

Q. What do the blue circles purport to depict on Exhibit 390? A. The blue circles show those schools that have a predominantly minority enrollment that are undercapacity by more than ten percent.

Q. And then what do the red circles purport to depict? A. The red circles are—show the locations of those schools which are predominantly Anglo in 1968, but were undercapacity by more than ten percent.

Mr. Greiner: Your Honor, we offer Plaintiffs' Exhibit 390.

Mr. Ris: May I ask what your criteria for determining minority or Anglo for this purpose?

The Witness: Yes, simply the racial composition of that school in 1968 according to the principal's reports, whether or not that enrollment was greater than 50-percent Anglo or not.

Mr. Ris: Well, now, your previous definition was that it was Anglo at the elementary level if it was over 90-percent, wasn't it?

The Witness: Our definition here for this purpose was to indicate—I am not talking about segregated schools. I am simply talking about the predominant ethnic characteristic [637] of that school in 1968. It has nothing to do at all with probability analysis.

Mr. Ris: Well, we have been discussing all the rest of the morning Anglo-minority by these percentages you previously testified to. You are abandoning those percentages on this exhibit and this is solely on the basis of 50-percent Anglo?

A. That's correct, just a predominantly Anglo or minority school.

Mr. Ris: All right. So we have that understood. Also, you are lumping Hispano, Negro, orientals or any other ethnic group in the non-Anglo?

The Witness: As minority.

Mr. Ris: For this purpose?

The Witness: That is correct.

The Court: You don't have any objection? It has been offered, I take it?

Mr. Greiner: Yes, Your Honor, it has.

Mr. Ris: So far as we know, it is accurate.

Mr. Brega: No objection.

The Court: It will be received, Exhibit 390.

(Whereupon, Plaintiffs' Exhibit 390 was received in evidence.)

Q. Next, Doctor, I will call your attention to the first overlay, which has been designated as Exhibit 390-A, [638] and ask you what 390-A purports to compare? A. It shows the transportation pattern for the elementary schools between various areas of the school district and the individual receiving schools for 1968.

Q. Doctor, what is the source of your transportation data? A. The transportation data was obtained from the principals' reports to the transportation department in 1968.

Q. And the red lines depict what? A. Simply show that a certain number of students were transported from one area of the city to a particular school.

Q. Pardon me, Doctor. The red lines, do they have anything to do with numbers? A. They have nothing to do with numbers. They just simply show that—show the existence of certain students being transported between various geographical areas of the city.

Mr. Greiner: All right, Your Honor, we offer 390-A.

The Witness: I might add—

Mr. Greiner: Just a moment, Doctor.

The Witness: All right.

Mr. Ris: May I ask a couple of questions?

[639] *Voir Dire Examination by Mr. Ris:*

Q. Mr. Bardwell, I have got a document that is not an exhibit and it purports to be a transportation report for a five-year period, and I believe this was made available to you under discovery, was it not? A. You mean this? Q. Yes. A. Yes.

Q. And in this is a chart, membership report of pupils from other subdistricts or outlying areas? A. Yes.

Q. Is this chart the basis for that overlay? A. That is, yes.

Mr. Ris: Frankly, we haven't had an opportunity to check against the chart, but for present purposes we don't know that it is not accurate, so I can't object on that ground. We can probably check it over the noon hour, so I presume it can be admitted at this point, and if we find anything wrong with it over the noon hour I will take it up in cross-examination.

The Court: All right.

Mr. Brega: I object. It is not material. The transportation has not been set forth for any particular reason and the particular schools don't show anything except [640] a generalization by this witness.

The Court: This is designed to show the extent to which there is transportation furnished?

Mr. Greiner: That's correct, Your Honor, and also to depict the sending and receiving areas of that transportation, and the combination of 390 and 390A—my next series of questions will simply bring out the fact that there are students being transported past schools which are undercapacity to schools further distant.

The Court: That's the purpose of this, then?

Mr. Greiner: Yes, Your Honor.

The Court: Overruled, it will be received.

(Whereupon, Plaintiffs' Exhibit 390-A was received in evidence.)

Direct Examination by Mr. Greiner (Continued):

Q. Now, Dr. Bardwell, you said that the blue circles on Exhibit 390 depicted what? A. Those were the—those are the schools that have more than a 50-percent minority enrollment and are undercapacity by more than ten percent.

Q. And the red circles are the Anglo schools which have more than ten percent overcapacity? A. Undercapacity.

Q. So that all schools shown—

[641] The Court: Are you maintaining here that the transportation is used to maintain segregation, that transportation is employed in order to avoid integration?

Mr. Greiner: The latter, yes, Your Honor, that certain students are bused past schools with space in them to schools further distant.

The Court: The inference you draw is that it would be more feasible to drop them off?

Mr. Greiner: At the closest school.

Mr. Brega: If the Court please, we are doing that under the preliminary injunction.

Mr. Greiner: This is 1968, of course. This is prior to the preliminary injunction.

Mr. Ris: Is the direction of travel indicated there at all?

Q. Can you answer that, Doctor? A. Yes, one can infer that because the receiving points of any one of those lines must wind up at a school, so that would be the terminal point of that transportation route.

Q. There is no arrow as such on each line? A. There is no arrow.

Q. Doctor, could you leave your stand there for a moment and go over to the exhibit?

For example, Doctor, with respect to Moore Elementary [642] School, do you find that? A. Yes, Moore Elementary School.

Q. Now, the red dot indicates— A. It is predominantly Anglo, using the criterion of 50 percent, and that it is more than ten percent undercapacity.

Q. Are there some students from Northeast Denver depicted there being bused into Moore? A. Yes, this is Smith Elementary School and these students shown by this somewhat spider web set of lines emanating from Smith show the students, groups of students, that are being transported out of Smith to various schools in the area.

Q. Now, does the red circle, Doctor, show the underutilization of Moore before or after the busing shown from Smith? A. After.

Q. So, there is some busing from Smith, and yet there is still some capacity at Moore, is that correct? A. That's correct.

Q. Now, is there yet more busing from Smith depicted on Exhibit 390-A? A. There is.

Q. Does some of that transportation go right past Moore Elementary School? A. That's right.

[643] Q. To what schools? A. Here would be a case in which this longer line from here to here represents the transportation from Smith to Doull. This transportation, for example, from here to here, shows the transportation from Smith to McKinley.

Q. For example, the transportation from Smith to McKinley, that goes right past another underutilized Anglo school, is that correct? A. That's correct.

Q. What is that school? A. It happens to be Steele.

Q. All right, and there is transportation down to Asbury School, depicted by a line? A. That's correct.

Q. Does that transportation also go past underutilized Anglo schools? A. That's correct.

Q. I think you can resume your seat, Doctor.

Now, Doctor, did the data which you studied, which was the basis for 390-A, did it also depict the numbers of students being transported? A. Yes, it does.

Q. And have you created an exhibit which purports to geographically show the numbers of students being transported on a scale? [644] A. Yes.

Q. And is that Exhibit 390-B? A. Yes.

Q. And what then is the source of the information depicted in 390-B? A. The same source, the principals' reports on transportation to the transportation department.

Q. Now, the yellow lines on 390-B depict what? A. The yellow lines show the transportation of students from minority schools to various parts of the district, and the green lines show the transportation of students from predominantly Anglo areas of the city to the receiving schools.

Q. I note, Doctor, there are differences in the thicknesses of the lines on Exhibit 390-B, is that correct? A. Yes.

Q. What does a thin—is there supposedly represented there some comparison in terms of numbers? A. Yes, the thinner the line, the smaller the number of students in a group going to a receiving point, and the thickness of the line indicates the extent of the number of students in roughly a linear fashion so that, if we take a particular yellow line, one of the very thin ones, as representing, let's say, 50 students, then by comparing that to another line whose thickness is twice as large, then [645] that would indicate the transportation of 100 students.

Mr. Greiner: Your Honor, we offer 390-B at this time.

The Court: Is this as of the year 1968?

The Witness: Yes, that's right.

Mr. Ris: I don't know how it can be checked. We have no objection to it as of now.

Mr. Brega: We make the same objection as to 390-B, Your Honor.

The Court: 390-B will be received.

(Whereupon, Plaintiffs' Exhibit 390-B was received in evidence.)

Q. Doctor, I call your attention to the yellow lines which emanate from Northeast Denver, and you testified that those yellow lines depict what? A. Those yellow lines indicate the transportation of minority students to various parts of the city.

Q. Now, there is a large, thick yellow line up here in the northeast quadrant of Exhibit 390-B. A. Yes, sir.

Q. And that depicts transportation into what school? A. Garden Place.

Q. Now, the green lines down here in the southeast quadrant of Exhibit 390-B depict what? Transportation of Anglos? [646] A. Yes.

Q. From one Anglo school to another? A. No, from areas of the city into Anglo schools that are receiving school. Generally, these are from annexed areas that do not have at the present time a school.

Q. Does some of the transportation indicated in green also reflect the transportation of Anglos from overcrowded Anglo schools? A. That's correct.

Q. Now, looking at Exhibit 390-B, Doctor, are the numbers of minority students being transported, say, the batch size of the minority students being transported, comparable in any manner to the batch size of the Anglo students being transported?

Mr. Ris: I am sorry, what size?

Mr. Greiner: Batch.

Mr. Ris: B-a-t-c-h?

Mr. Greiner: Yes.

Mr. Ris: I don't know what that means.

Mr. Greiner: Just the size of the group being transported.

A. In the case of the minorities' so-called batch, as you call it, it is considerably smaller than the batch for Anglo students.

Q. We don't know from Exhibit 390-B how many buses [647] are involved in any one of those lines? A. No, we do not.

Q. So there may be a single bus that transports a group of students to several schools, is that correct? A. It could be, yes.

Q. But the thickness of the line does depict the number of students that are actually received in the receiving school, is that correct? A. That's correct. I might add in anwser to your previous question—

Mr. Brega: Just a moment. Now, you have answered the question. If he wants more, he will ask it.

The Witness: All right.

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[648] * * *

Q. Dr. Bardwell, before leaving Exhibit 390-B, does Exhibit 390-B show the average number of students per group in this busing? A. Yes, it does.

Q. And can you read the exhibit from where you're sitting? A. Yes, I can.

Q. For the minority students, Doctor, what was the average number of students in the minority student group? A. Twenty-nine.

Q. And what was it for the Anglo students being bused? A. Sixty-seven.

Q. Now, that 29 figure as to minority students—

The Court: What kind of grouping is this?

Q. How did you compute that, Doctor? A. If one determines a total number of students that were in a bused group, add all of those up and then divides by the number of groups involved, then this would be equivalent to saying on the average there are about 30 minority students as a group that are being bused from one location to another.

Mr. Ris: May I ask—is that the same as a batch?

[649] The Witness: A batch. All right.

Q. Dr. Bardwell, is there a large group of minority students being—or students at least being bused into Garden Place? A. Yes.

Q. Do you know whether or not those are in fact minority students? A. Most of them are minority students.

Q. Where do they come from? A. They are coming from the Stapleton project north of the city and are being bused into Garden Place.

Q. And that's a housing project up here? A. Yes, it is.

Q. Is that group of 500 minority students included in this 29-per-group average? A. They are.

Q. And if you took those 500 out, what would the group average be? A. The average batch size this time would be dropped to a figure very close to ten.

Q. All right now. Does Exhibit 390-B also show the total number of minority students being transported in 1968? A. Yes.

Q. And what is that figure? A. 1,184.

[650] Q. And have you computed the percent of the total minority population therefore being bused in 1968? A. Yes, approximately 6 percent.

Q. And then with regard to Anglos being bused in 1968, Doctor, what is the total number of Anglo students being bused? A. 4,369.

Q. Now, have you computed a percentage or a proportion of the total number of Anglo students who are riding buses? A. Yes.

Q. What is that? A. 13 percent.

The Court: The percentage of Negroes being bused—this is minority or just Negroes?

The Witness: The minority would include the—

The Court: The Hispanos?

The Witness: —the Hispanos as well.

The Court: What is that percentage?

The Witness: The percentage was 6 percent. Six percent and 13 percent.

The Court: You say they were moving them from Stapleton to Garden Place?

Mr. Greiner: The Stapleton housing project.

The Court: Oh.

Q. Dr. Bardwell, have we been furnished with racial [651] and ethnic data for the school year 1961-1962, first of all? A. Yes, we have.

Q. And is that data reflected in Exhibit 398? A. It is.

Q. And then we have also been supplied by the defendants with racial and ethnic data for the 1962-1963 school years? A. We have.

Q. Is that depicted in Exhibit 399? A. It is.

Mr. Greiner: Your Honor, we would offer 398 and 399 at this time.

[652] Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: Very well, 398 and 399 are received.

(Whereupon, Plaintiffs' Exhibits 398 and 399 were received in evidence.)

Q. Dr. Bardwell, I would like to next call your attention to a question of the dropout data concerning the minority schools, and handing you what has been marked for identification as Exhibit 400 and Exhibit 400-A, can you identify first for us Exhibit 400-A? A. Exhibit 400-A is an explanation of definitions and calculations for dropout studies which are conducted by the Colorado State Department of Education.

Q. And by whom is 400-A published? A. By the Colorado State Department of Education, Division of Guidance Services.

Q. Would you identify Exhibit 400, please. A. 400 is a summarization of the dropout information for September 1968 for Denver's junior high schools and Denver's high schools, published by the Colorado Department of Education.

Mr. Greiner: Your Honor, at this time we would like to offer Exhibits 400 and 400-A.

Mr. Ris: If the Court please, with respect to 400 and 400-A, we admit the authenticity, that these are documents [653] from the Colorado Department of Education.

As to the accuracy, there has been no foundation laid as to the accuracy of any of the columns of figures that are on here, and for that reason we object to Exhibit 400.

Mr. Brega: Your Honor, we make the further objection that the information contained in the exhibits is not shown to be material or probative in this issue.

Mr. Griener: Your Honor, if I might comment on the objections, first of all, Exhibits 400 and 400-A have been given to the defendants quite some time ago. I thought that they were going to check the accuracy of the figures, but they apparently have not.

Secondly, as to the probative value of the exhibits, the dropout data is offered to show two things: One, the extremely high dropout rate which obtains in the minority junior and senior high schools, approaching at sometimes rates of some 80 or in excess of 80 percent, and, secondly, to compare those dropout rates, Your Honor, in the minority schools with the dropout rates, which are much lower, which pertain in the predominantly Anglo schools.

In our view, it is simply another indicia of the educational opportunities which are afforded by the minority schools.

The Court: Does this 400-A contain any comments about the matter you mentioned?

[654] Mr. Greiner: It is strictly explanatory as to how the State—what formulas the State uses in computing the figures which are reflected in Exhibit 400. There is no editorial comment.

Mr. Brega: May I ask if these two exhibits are taken out of the descriptive report by the State?

The Court: Have you seen them?

Mr. Brega: Yes, but I can't tell—

The Court: This is a narrative type report, or this is a columnar type of report containing figures and information.

Mr. Brega: Well, have these been taken out of the annual Colorado report filed?

The Witness: Both of these are given as separate documents by the Colorado State Department of Education for anyone who wishes them.

Mr. Brega: The record should also reflect that I have never had a copy of those shown to me before. We further object.

Mr. Ris: I also direct the Court's attention to the fact Exhibit 400-A is dated 1963 and Exhibit 400 is dated 1968, and there is nothing to tie them together.

Q. Are the formulas in 400-A still used today? A. Yes.

Mr. Brega: I will object to that. That calls for [655] hearsay.

The Court: What's the source of your information on that?

The Witness: Those two pieces of information were gotten from the technical people at the Colorado State Department of Education, and the definitions

and calculations used in computing the dropout rates for all the schools in the State, that document relating to how they calculate the dropout rates, the definitions of the dropout rates, have been in existence since 1963, and the document is still distributed on that basis as their current method for calculations.

The Court: Very well, the objections will be overruled and 400 and 400-A are received for whatever value they might have. I confess that their materiality is somewhat limited, as I see it.

(Whereupon, Plaintiffs' Exhibits 400 and 400-A were received in evidence.)

Q. Directing your attention first to Exhibit 400-A, does 400-A describe the formula for calculating both a projected dropout rate and an annual dropout rate? A. Yes, it does.

Q. Now, referring your attention to Exhibit 400, does that exhibit also reflect calculations of an annual dropout rate and a projected dropout rate? A. It does.

[656] Q. Doctor, what is a projected dropout rate? A. Projected dropout rate is designed to answer the question, as an example, what percentage of our seventh graders would drop out before completing high school if the holding power conditions that exist that year continued?

Q. Is the projected rate then a cumulative rate? A. It is.

Q. What about the annual rate? A. Annual rate is simply based upon the dropout data for that particular year.

Q. Referring then, Doctor, to Exhibit 400, what is the projected dropout rate for Cole Junior High School in 1965? A. 12.6 percent.

Q. And what senior high school does Cole feed into, do you know? A. Manual.

Q. And what is the projected dropout rate for Manual in 1965? A. 64.8.

[657] Q. Now, Doctor, using those two dropout rates, can you advise us as to what—out of a hypothetical 100 students entering the seventh grade at Cole, how many of them might be expected to graduate from Manual?

Mr. Brega: Your Honor, I would like to make a further objection on that and that even assuming the validity of the exhibit we don't believe this is anything more than speculation.

The Court: Well, I have indicated that, but I think their relevancy is quite limited because there are many other factors that can explain dropouts, I mean, obvious ones, other than the quality of the school or, as you say, its power to hold the student individually. But, I am going to take the evidence anyway. It may shape up.

A. If you take a hypothetical 100 students beginning Cole Junior High in the seventh grade, at the end of that junior high school experience these dropout data would say that there would be approximately 87.4 of those children that would graduate so to speak from Cole. Then, upon entering Manual those that are left, 87.4, we would expect 64.8 percent of those 87 students to stop out before completing Manual. The net effect of this would be that of the 100 students beginning Cole in the seventh grade, we would find that but 31 percent or 31 of those students would be graduated from Manual.

[658] Q. Now, Doctor, does Exhibit 400 also depict the

dropout rates at Anglo schools as well as minority schools? A. It does.

Q. Doctor, I am handing you what's been marked for identification as Plaintiffs' Exhibit, first of all, 219, which purports to be a boundary map. Can you identify it for us, please? A. Yes, this is a map showing the boundaries in 1961 for Cole, Morey, Baker, Byers, Gove, and part of Hill Junior High Schools, together with the option zones of attendance.

Mr. Greiner: Your Honor, the authenticity of Exhibit 219 has been stipulated to. We will offer it in evidence at this time.

Mr. Ris: No objection to 219.

Mr. Brega: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 219 was received in evidence.)

Q. Doctor, you mentioned the optional areas. Could you describe them, please, and—as they are depicted on 219? A. Yes. On the north there is an optional area between Morey and Cole, roughly bounded by 17th Avenue and 22nd Avenue, and between York and the downtown area. On the west there is an optional area between Baker and Morey bounded roughly by Broadway and, oh, Clay Street. On the south there [659] are two optional areas, one between Morey and Byers; another between Morey and Hill; and on the extreme east there is an area that is an optional area between Gove and Morey. This depicts then the attendance areas for these schools around Morey in 1961.

Q. Doctor, have you computed the capacity of the junior high schools, Morey, Byers and Cole? A. Yes.

Q. I hand you what's been marked for identification as Exhibit 224 and ask you if you can identify that. A. 224 is a chart showing the capacity utilization in 1961 and 1962 for Morey, Cole and Byers.

Q. And what is the source of the data reflected on Exhibit 224? A. In the case of capacity for each of these schools, that has been taken from Exhibit 24. With regard to the enrollment in 1962 for Morey, Cole and Byers, this was taken from Exhibit 20. For 1961 the enrollment for these same three junior high schools was taken from another exhibit that has just been introduced.

Q. And that was either 397 or 398? A. That's correct.

Mr. Greiner: Your Honor, we would offer Plaintiffs' Exhibit 224 at this time.

Mr. Ris: No objection.

[660] Mr. Brega: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 224 was received in evidence.)

Q. Dr. Bardwell, in 1961 what does Exhibit 224 show the capacity to have been at Morey Junior High School? A. At Morey, 1200.

Q. And what was the capacity at Byers that year? A. 1200.

Q. And what was the capacity at Cole that year? A. 1,725.

Q. Now, in 1962, Doctor, were there boundary changes proposed with respect to these three junior high schools? A. Yes, there were.

Q. Have you prepared an overlay exhibit which reflected the boundary changes which were ultimately adopted? A. Yes.

Q. And what is your source of that information? A. The source of this information is again Exhibit 20.

Mr. Greiner: Your Honor, at this time the plaintiffs would offer Plaintiffs' Exhibit 220, being the overlay showing the proposed boundary changes.

Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: Very well. It will be received.

[661] (Whereupon, Plaintiffs' Exhibit 220 was received in evidence.)

Q. Doctor, would you describe for the Court, please, the boundary changes proposed, which are depicted on Exhibit 220? A. Considering first the northern area on the north of Morey, the optional area that was there before, it was proposed to assign the students from there to Morey. In addition to that, on the north of that optional zone, having the width of about four blocks, that area was also proposed to be assigned to Morey, the optional area on the west.

The Court: This north was the—an optional area with Cole?

The Witness: Yes.

The Court: And on the west it was—

The Witness: On the north of that optional area was an area that had previously been assigned to Cole. And that's roughly between 22nd Avenue and 26th Avenue.

Q. That is the area immediately north of the northern cross-hatched area? A. That's correct; on the west the

area that was formerly optional between Baker and Morey, the proposal was to assign that directly to Morey.

Mr. Ris: Just a moment. Could we straighten that out, please, Mr. Bardwell. I think you said that extended [662] from Broadway to Clay Street. It is actually from Broadway to Elati; is it not?

The Witness: Well, it's a rough boundary.

Mr. Ris: Well, Clay Street is clear on the other side of the river.

The Witness: Excuse me. It is Elati.

A. The southern portion, the optional area between Morey and Byers, the proposal was to assign that optional area entirely to Byers. In addition, the area that was optional between Morey and Hill, except for a small pocket on the east, it was proposed to assign that to Byers. In addition to that, a two-block strip between 6th Avenue and 8th Avenue from approximately Race Street to Broadway, the proposal was to assign that to Byers. That area had formerly been in Morey. Then, there was a small area just east of Cheeseman Park, which contained about eight blocks, which was formerly Morey. The proposal was to assign that also to Byers.

Q. Now, Doctor, have you also prepared an overlay reflecting the census data as to the racial composition of the areas which were assigned, first, from Cole to Morey, and then the areas which were assigned from Morey to Byers? A. Yes, we have.

Q. And what is the number of that exhibit? A. The number of this exhibit is 220.

Q. Now, what is the basis for the racial information [663] contained on that exhibit? A. These data were taken from the enumeration statistics of the census in 1960.

Mr. Greiner: Your Honor, we offer Exhibit 222, being the overlay.

Mr. Ris: Merely stating that the figures on here were taken from the census data is certainly not a sufficient foundation. We object to it for that reason. If he had census data applied to each one of those blocks, if that's what his—if that's what he determined, fine, let's get the foundation in. If he's using something else, we'd like to know. But, just saying he got it from the census data is not sufficient.

The Court: All right. We will ask him to explain a little more.

Q. Can you explain, please, Doctor, to the Court and counsel, how, first of all, the blue area depicted on Exhibit 222 was calculated?

Mr. Ris: Which is that?

Mr. Greiner: That's the northern area.

A. If we examine the data from the Bureau of Census by enumeration districts and these enumeration districts are very small, usually six-block areas, for each of those small enumeration districts there are certain kinds of racial data and economic data. Those data were used in compiling the [664] percentage non-white in 1960 for the area on the north of Morey and on the west; those areas that were directly assigned to Morey.

Q. Now, Doctor, the blue area which you have just described, that's not broken out by particular enumeration districts, is it? A. Not on this exhibit, but it was compiled from the use of enumeration districts.

Q. Is the percentage given there for the blue area an

average? A. It is an average for all the enumeration districts that are included here in blue.

Q. And how is that average computed? A. By simply assuming the total number of non-whites in those districts that comprise this area and dividing that by the total number in all enumeration districts for 1960.

Q. And then how did you compute the percentage reflected in the yellow area on the south of Morey in this overlay? A. Exactly the same way.

Q. You took the racial composition of— A. Of each enumeration district, and, of course, weighted that by the total number of people in each enumeration district, and that gave us then the average for that yellow area on the south that was assigned to Byers.

Mr. Greiner: Your Honor, we would again offer [665] Exhibit 222.

Mr. Ris: May I voir dire, please?

The Court: Yes.

Voire Dire Examination by Mr. Ris:

Q. Now, your figures, Dr. Bardwell, pertain to the people who were going to be reassigned by the subdistrict boundary changes as of the opening of school in September, 1962, right? A. Yes.

Q. And you were using no figures from 1962 at all, is that correct? A. That's correct, not to draw those boundaries.

Q. You were using 1960— A. 1960.

Q. And you made no studies, no determination, as to what population mobility there was between the 1960 census and Sepember, 1962? A. We did not.

Q. Secondly, this north part, particularly from 17th Avenue to 26th Avenue, was an area in transition, was it not, at that time, or do you know? A. What do you mean by in transition?

Q. Racially, that it had been predominantly white, or portions of it; the northern portions and southern portions [666] of that area were transitional to a certain extent from white to black. A. That is correct.

Q. But you did not investigate and had no figures available to you as to what transition had taken place in the two and a half years or the two years between the census and September, 1962? A. No, we did not.

Q. Also, in that area, were you aware that from block to block there was a very substantial difference in many instances racially? A. Oh, absolutely.

Q. That was not reflected except by enumeration districts? A. That's the smallest possible subdivision for statistics one can get, so in that sense we have not shown it enumeration district by enumeration district, but the average has been compiled on the basis of those enumeration districts.

Q. I understand, but you have no data as to the exact racial composition, block by block, at that time. A. Not block by block.

Q. Also, your enumeration district did not correspond with this particular area north of 17th Avenue either, did they? You had some that were entirely within the area but you had others that overlapped on the north and west? [667] A. In the case of north and west, there were a couple of enumeration districts which were not co-extensive with the boundary there. These are very few in number. And in the case of the southern portion, in the entire enumera-

tion district, it was white, so to assign any part of it would be perfectly correct to assign all of it white.

Q. But insofar as to what extent there had been a change from white to non-white during the two-year period, you have no idea? A. No.

Q. Also, did you attempt to determine to what extent the non-white were Hispano? A. One can get an estimate of that. It is not an official publication that you—I mean, these are not contained officially within the statistics of the enumeration district data, no.

Q. So, you have no figures then as to what these minorities consited of or the non-whites consisted of? A. Oh, yes, what they consisted of—Negro and Oriental. Non-white does not include Hispano.

Q. It does not? A. No, it does not.

Q. Well, in many of your figures here today you have used Hispano as being equivalent to non-white, have you not, minority? [668] A. No, sir, this is the first time the term non-white has ever been used in any of our exhibits, and the reason that one is forced to use that is that this is the only information from the enumeration district data from the Bureau of Census which pertains to a particular minority..

Q. Just so we have our terms correct, Dr. Bardwell, in some of your figures this morning, when you were talking about Anglo and minority, did minority in those instances include Hispano? A. Minority includes Hispano, that's correct.

Q. So, for some purposes Hispanos are minorities and other purposes they are Anglo?

Mr. Greiner: I object to that as mischaracterizing what the witness' testimony has been. The wit-

ness now is testifying as to what the census data terminology is, not our exhibit terminology.

The Court: We will let him answer.

Q. Will you answer the question now, please? A. Will you repeat it?

Mr. Ris: Will you read the question?

The Reporter: "So, for some purposes Hispanos are minorities and other purposes they are Anglo?"

A. (Continued) As far as the Bureau of Census material is concerned, they are classified as whites.

Q. I am talking about your testimony generally from [669] when you started testifying this morning. A. The testimony this morning includes in the minority category, not nonwhite minority. Hispanos.

Q. But, now, is there any distinction between Anglo and white? Maybe we better determine this. A. Well, the Bureau of—

Mr. Greiner: Pardon me, Your Honor, in what respect?

The Court: His mind.

Q. In his mind, or in your testimony at any time? A. Yes, the white category in the Bureau of the Census does include Hispano and—of course, if that information were available separately, it would have been broken down. It is impossible to do here. In the case of the school district data, that information is much more detailed and it is possible then to go ahead and talk about Anglo students as not including Hispano.

Mr. Ris: We object to Exhibit 222 for the reason that there is insufficient foundation to show that the racial background on this exhibit is based upon sufficient foundation as of September, 1962.

Mr. Greiner: Your Honor, in view of the fact that the racial composition north of Morey in 1960 was in a state of transition, I believe that all the voir dire has established is that this exhibit understates the minority composition of the area north of Morey, and if it is inaccurate, it is in fact [670] inaccurate in favor of the defendants.

Mr. Ris: That may be counsel's conclusion, but that's not the evidence, and we are only going on what's in evidence before the Court.

The Court: Objection overruled. It will be received.

(Plaintiffs' Exhibit No. 222 was received in evidence.)

Direct Examination by Mr. Greiner (Continued):

Q. Dr. Bardwell, have you also prepared an exhibit which purports to depict the ethnic composition of Morey, both before and after the boundary change? A. Yes, we have.

Q. That's Exhibit 223? A. Yes, that's correct.

Q. And what is the source of the data included or reflected on Exhibit 223? A. The source of the data on Exhibit 223 are estimates made by us as to the enrollment at Morey and its racial composition in 1961, at the time of the boundary change. These were derived from a study of the enumeration districts themselves.

Q. And can you explain to the Court how that estimate was derived? A. Yes, detailed statistics on the age group

of children living in the enumeration districts which were assigned to [671] Morey and those assigned to Byers, the calculations using those age group data—

Q. What was the age group, Doctor? A. The age group data in this case is ten—the whole group is ten to fourteen.

Q. And then what was done with that age group data? A. That age group data then were classified according to whether the census indicated it was a nonwhite or a white. That's all we could get. Further, imposed upon this were certain data that were available, not by enumeration district, but by census tracts, which gave the Spanish-surnamed population for that area.

Q. These census tracts are larger georgraphic areas? A. The census tracts are larger.

Q. Anything else that was taken into account in compiling this estimate? A. No, that's all.

Mr. Greiner: Your Honor, we at this time offer Exhibit 223.

Voir Dire Examination by Mr. Ris:

Q. I am sorry, Dr. Bardwell, did you say that these percentages are from enumeration districts of the cenus? A. Yes, they are based upon the enumeration districts from the census, that's correct.

[672] Q. These are broken down by Negro, Hispano, and Anglo? A. That's correct.

Q. Will you tell us how you got this then, when the last exhibit we were discussing had only White and non-White? A. It was possible for the construction of Exhibit 222, in showing the racial composition, non-White and White, for the areas transferred to Morey and trans-

ferred out of Morey in 1962, to come up with a precise indication of what the non-White composition was. However, for purposes of determining the three racial categories or ethnic categories for enrollment purposes, those data are not sufficient, and one has to then use supplemental information from the census obtained by census tract to give us an estimate of what the Hispano or Spanish-surnamed aged population is in that particular area.

The Court: Why do you have to go through all of these round-about—

The Witnes: Well, you see, Your Honor, non-White includes—

The Court: I mean, the school records just didn't—

The Witness: No, that's right.

The Court: —show it at all?

The Witness: And we had to make a similar estimate in 1962 because of the unavailability of the same information.

Q. Dr. Bardwell, 1961, is that for the 1961-62 school year? [673] A. Yes, sir.

Q. And 1962 is for the '62-63 school year? A. That's right.

Q. You have the statistics for that available in your own Exhibits 398 and 399, did you not? A. We had total enrollment.

Mr. Ris: May I have Exhibit 398 and Exhibit 399, please?

Mr. Greiner: I think they are still at the bench.

The Court: Yes, here they are.

Q. All right, referring to the junior high part of 398, is that for the school year 1961 and '62? A. May 1st of that year, that's correct.

Q. It would be for that year, would it not? A. Yes, sir.

Q. And Morey shows a membership of 900? A. That's right.

Q. And with 135 Negroes, or 15 percent, right? A. That's what this exhibit shows.

Q. Well, isn't that your exhibit that you identified before? A. Yes, with regard to membership.

Q. And, so, for '61, then, instead of 12 percent Negro at Morey for that year, it would be 15 percent, according to Exhibit 398? [674] A. Right. I would assert that the exhibit here showing the racial composition of the Morey membership, May 1st, 1962, are hunchback estimates on the part of the principal, not shown by actual count, and, therefore, in order to check the reliability of the school district's estimates of the racial composition at Morey it seemed desirable to get an independent estimate. The independent estimate is 71 percent, as we have shown here, and 12 percent and 17 percent.

Q. And that's why you went and did your assumption and inferences and so forth? A. Yes, sir.

Q. Based on 398, it would be 12 percent instead of 15 percent Negro? A. Yes, sir.

Q. If you also look at the same exhibit, it would be 65 percent Anglo rather than 71 percent Anglo? A. That's correct.

Q. And the range would be 20 percent, which you have Hispano, but actually it would be 15 percent Hispano and 5 percent Oriental? A. That's correct.

Q. Now, with respect to 1962, you offered Exhibit 399 showing racial distribution this morning by your own testimony, did you not? A. I'm sorry, I will have to—

[675] The Court: What's that? The Board of Education—

Mr. Ris: This is a racial distribution by schools and years. That would be the school year '62 and '63.

Q. Do you have that before you? A. No, I don't.

Q. I am sorry, I thought you did. Here it is. A. Yes.

Q. And that is racial data for 1962-63 as of January 24, 1963? A. Right.

Q. And there it shows Morey having a Negro population at that time of 27.99 percent or 28 percent rounded off, right? A. Right.

Q. Instead of 33 percent, according to your figures? A. That's right.

Q. And Anglo is 49 percent rather than 45 percent, right? A. That's right.

Q. And the Oriental and Hispano combined would be 23 percent? A. That's right.

Q. So that would change your curve substantially on Exhibit 223, would it not? A. No.

[676] Q. If you use those figures? A. No, it wouldn't.

Mr. Ris: Well, may we mark this? I don't want to make it your exhibit, but I would like to make it 223-A, just for identification.

Mr. Greiner: All right.

Mr. Ris: Make it 223-A, but make it a defendants' exhibit for identification, please.

The Court: You realize you are going to confuse us?

Mr. Ris: That really wasn't my object, to confuse the Court.

George E. Bardwell—for Plaintiffs—Voir Dire

[677] Q. I now hand you a paper that has been marked Exhibit 223-A, and what appears to be black lines, would be the curve shown here, according to your figures. Right? A. (Nods affirmatively.)

Q. And in red would be according to the reference to 398 and 399? A. That's correct.

Q. And red is substantially more level than the other, is it not? A. Well, in 1961 it was a 65-percent Anglo school by your figures.

Q. I'm not saying that—

Mr. Greiner: Could the witness be allowed to finish the response?

The Court: Do you have something else you wish to say?

The Witness: Excuse me, Judge?

The Court: Do you wish to say something further?

The Witness: Yes, I would.

The Court: Had you finished?

The Witness: No.

The Court: Go ahead.

Mr. Ris: Sorry.

A. The general picture for both of these analyses would show generally the same thing, that in 1961 the [678] composition of the student population was 65 percent by your analysis and 71 percent by mine. In 1962 this, by your figure, would be 49 percent Anglo and mine would show 45. The point of it is that it went from a 65-percent Anglo school at the most conservative to a 49-percent Anglo school—

Q. I understand, but, it's a more level curve than yours, was my question. Is that correct? A. Yours is, yes.

Mr. Ris: Thank you. I offer in evidence 223-A.

Mr. Brega: Just a minute. Are you admitting 223?

Mr. Ris: As to its accuracy, yes.

No, I'm not admitting that. I'm admitting this in contrast with—

Mr. Griener: I'm somewhat confused as to this procedure.

Mr. Brega: We will object to 223 before we get to the A part.

Mr. Greiner: As I understand it, 223 is being offered as part of the voir dire examination on—I mean 223-A is being offered as part of the voir dire examination on Exhibit 223.

Mr. Ris: All right. I'll get back to—I got off the point, I admit, on voir dire examination Yes. [679] But I object to 223 for the reason that there is a wholly insufficient foundation because of all the Mickey Mouse that the witness did with the census figures and the estimates, particularly after his last testimony with respect to the last exhibit, that there was no breakdown as he has shown here, and that it's substantial, and in variance with the plaintiffs' own exhibits that he identified this morning and admitted this morning. So I don't think that there is a sufficient foundation for Exhibit 223.

The Court: Well, I don't see the necessity for it, if the figures are available—

Mr. Greiner: Could I have the witness explain why he didn't believe the available school district figures were in fact accurate, Your Honor?

The Court: Yes.

The Witness: In the first place, the figures for 1962 do not cover the opening of school on September 1st of 1962. And because of that, they show instead the racial composition, estimated racial composition in January of 1963. And, therefore, in order to show the precise character of the change in the racial composition at Morey, it seemed most desirable to construct estimates which were very easy to make and should be quite reliable as of the beginning of the opening of school after the boundary change in September of 1962, and that's precisely what was done.

[680] The Court: Did you check that out; that 223 with the figures that were available in January, 1962?

The Witness: We have had those for many, many months. And in fact, much of our IBM tabulation is based upon the best available data in terms of racial breakdown that we can get for appropriate periods. Here was a case where the time period seemed—it seemed was important; to talk about September of 1962 and those figures simply were not available.

The Court: What is the difference? Are the differences susbtantial?

The Witness: No.

Mr. Greiner: They are illustrated, Your Honor, by 223 as compared to 223-A, which has been created by Mr. Ris.

Mr. Ris: I wasn't under oath, I'll admit.

The Court: I don't see very much variance here, Mr. Brega. It seems to me that they are pretty well in line.

Mr. Brega: My position is not that 223 is better put that 223-A or vice versa. It's that the foundation laid for 223 is not appropriate, by the witness's own testimony in his estimate. It's contrary to his own exhibit which he has offered into evidence. He based other testimony on the exhibit which he now says he didn't think was reliable in [681] certain instances.

Mr. Greiner: I believe that's inaccurate, Your Honor.

The Court: It's a highly educated estimate, if it is an estimate.

We will take it.

(Whereupon, Plaintiffs' Exhibit 223 was received in evidence.)

Mr. Greiner: Could we have a ruling on 223-A also?

The Court: We will take that. That will show as Defendants' Exhibit 223-A, is that right?

Mr. Greiner: That's correct.

(Whereupon, Defendants' Exhibit 223-A was received in evidence.)

Direct Examination by Mr. Greiner (Continued):

Q. Now, Dr. Bardwell, you also have in front of you Exhibit 224, do you not? A. Yes, I do.

Q. In the school year 1961, in other words, the year before the boundary change went into effect, what was the capacity utilization at Morey? A. Seventy-five percent.

Q. And what was the capacity utilization at Morey [682] after the boundary change? In other words, in 1962? A. Seventy-six percent.

Q. And at Byers Junior High School in 1961, what was the capacity utilization? A. Just about 88 percent.

Q. And what was it after the boundary change in the school year 1962? A. Ninety-three percent.

Q. And at Cole Junior High School, what was the capacity utilization in 1961? A. About 104 percent.

Q. And what was it in 1962? A. Ninety-six percent.

Q. Now, with respect to the racial composition of Morey Junior High School, referring to Exhibit 223, what does that exhibit show with respect to the racial composition in 1961 prior to the change? A. Seventy-one percent Anglo, 17 precent Hispano and 12 percent Negro.

Q. And what was the racial composition estimated in the school year—

Mr. Ris: I'm sorry. I'm lost. What are we reading from now?

Mr. Greiner: 223. That famous exhibit.

Mr. Ris: Oh, all right.

[683] Q. —for the school year 1962, Doctor? A. 1962, 45-percent Anglo, 22-percent Hispano, and 33-percent Negro.

Q. What percent of Anglos were there at Morey prior to the boundary change? A. Seventy-one percent.

Q. And what percent after the boundary change? A. Forty-five percent.

Q. Referring to the area between Morey and Byers as depicted on Exhibit 220, the area that was assigned from Morey to Byers, do you know, Doctor, whether or not that area was closer to Morey or to Byers? A. The area on the north—to the north of 6th Avenue, that entire area

that was assigned to Byers was closer to Morey than it is to Byers.

Q. Finally, Doctor, I am handing you what's been marked as Exhibit 221. Can you identify that exhibit for us? A. Yes. This shows the boundaries for Morey and they are adjacent to Cole, Baker, Byers and Gove after the boundary change in 1962.

Q. That simply shows the results after the change? A. That's correct.

Q. What optional areas if any remained? A. The only optional area was the area between Morey and Gove that was bounded by Detroit and—well, the street [684] between St. Paul and Adams.

Mr. Griener: Your Honor, we offer Exhibit 221.

Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 221 was received in evidence.)

[684] • • •

Cross-Examination by Mr. Ris:

Q. Dr. Bardwell, the various computer print-outs that were introduced into evidence this morning—those were all under either your direction or supervision? A. They were.

Q. You prepared the program? A. Yes, sir.

Q. Now, with regard to the probability factors that you discussed this morning and with segregation limits that you used in your selective minority schools and selected Anglo schools, if I recall correctly your segregation limits

were this: with respect to the elementary school, the elementary school was segregated if the Anglos in that school were more than 90 percent or less than 30 percent? A. That's right, sir.

[685] Q. And in the junior high, an Anglo school in your segregation limits was segregated if it had 90 or more than 90 percent Anglos? A. That's right.

Q. Or less than 55 percent Anglos? A. Yes.

Q. And that the senior high school, a senior high school was segregated under your definition if it had more than 90 percent Anglo? A. This is right.

Q. Or less than 60 percent Anglos? A. This is right.

Q. So, if a high school had 55 percent Anglo it was still a segregated school? A. Excuse me. Come again with that question.

Q. I mean, it was an Anglo school. It was not segregated? A. It was not segregated— What was your question?

Q. All right. In a senior high school, a school was Anglo and not segregated if it had at the high school level more than 90 percent Anglo? A. Uh-huh.

Q. If it had less than 90 percent Anglo, then what? A. It would depend on how low it was.

Q. Say it was 85. [686] A. If it was 85, that would not be considered—

Q. It would not be a segregated school? A. That's right, according to that criteria.

Q. For 55, what would it be? A. Segregated.

Q. A segregated school? A. Yes.

Q. If it were 59 rather, it would be a segregated school? A. That's right.

Q. And these figures work both ways, either to establish

it as a minority school or an Anglo school? A. Yes, that's correct. That's quite right. And then, you—

Q. Pardon me? A. Let me explain. Suppose we were to visualize for a moment that students in this school district were in a salt and pepper shaker and that you shook the contents of that at each school according to the number of students that are in this school and, if the composition of that salt shaker corresponds to the districtwide proportion of Anglos, you would expect when you build up each school in that way there would be a random distribution of percentage Anglos at each school. What this analysis then amounts to is that, if we now examine the racial composition percent Anglo at a [687] given school and calculate the probability that that racial composition could have arisen by chance, then these are the figures that we are going to talk about when we talk about probabilities.

Q. But these are the figures upon which you made all of your print-outs, with reference to the elementary school level, the junior high school level and the senior high school level? A. That's correct.

Q. And with those percentages in mind? A. That's right.

Q. Reflecting back over the previous six years? A. That's correct.

Q. When you talk about minority schools and the ethnic characterization or the age of the buildings and so forth, your whole testimony then is predicated upon these percentages when you're talking about 21 Anglo schools and 20 minority schools? A. Yes. I would suspect that whatever criterion was used, whether or not we used teachers, whether we used buildings or other indicia or what might constitute segregation, I don't think our results would be a great deal different.

Q. Well, I am asking you what your basis was for coming up with these various schools? [688] A. That's right.

Q. Now, with referenceto Exhibit 250, do you have that there? That's your pupil ethnic distribution, elementary, print-outs. A. 250?

Q. Uh-huh. A. I'm sorry. I don't.

Q. It's a print-out table, Dr. Bardwell.

The Court: Here it is.

Q. Do you have 250 now? A. Yes, sir.

Q. Now, that's a print-out from your computer, right? A. That's right.

Q. And this shows the ethnic distribution of pupils in your 20 minority schools? A. That's right.

Q. And these are the same 20 schools that you have discussed throughout your discussion on minority versus Anglo, right? A. That's correct.

Q. Now, first of all, this shows a total number of students over in the right-hand column for the various years, 1963 to 1968, correct? A. Correct.

Q. And they vary from a low of 13,270 to a high of [689] 14,972? A. That's correct.

Q. Now, then, you have the percentage breakdown of Anglo and Negro. You do not have Hispano in there anywhere, do you? A. That's correct.

Q. Is it correct then that Anglo in this sense means Caucasian? A. A non-Negro, non-Hispano, non-oriental, according to the classification of the school district.

Q. So then, under Negro do you have solely Negroes? A. That's correct.

Q. You do not have Hispano? A. It is not shown on this chart—on this table. One would have to refer to the preceding exhibit, 249, where the spacing on the computer print-out simply did not allow space to add that information again.

Q. So, in addition, on Exhibit 250, 251, 252, for example—I beg your pardon. 250 and 252, you merely show the Anglo and the Negro and the percentages? A. Yes, that's correct. 249 gives you the comparable figures here for the Hispano in terms of number of students.

Q. Now, referring to your 1968 column, you show the percentages of Negroes in all of the 20 minority schools, right? [690] A. That's correct.

Q. And the percentage of Anglos throughout are all, I think the highest one is 29 percent? A. That's right.

Q. So that come under your own percentage of your segregation limits, that a school is segregated if it has less than 30 percent Anglo at the elementary level? A. Yes, that's right. I might add that, if you look at the entire distribution of the percentages for Anglo and enrollment for all of the elementary schools, there is quite a gap after 30 percent.

Q. So then on all of your maps, rather your print-outs and your charts throughout your discussion of the elementary schools as to pupil ethnic distribution, teacher experience, teacher probation, teach median, teacher ten years and plus, age of schools, acre per hundred pupils, and so forth, it is all based on these figures, right? A. That's correct.

Q. And you do that, going back to 1963? A. That's right.

Q. Now, will you take a look at 1963 on Exhibit 250. A. Yes.

Q. Boulevard School had 40.2 Anglos, is that right? A. That's right.

Q. And that's 14 points above your 30-percent cutoff, [691] is it not? A. But you failed to mention that in 1963 the racial composition of the district itself was far different than the racial composition of the Anglo in 1968 and therefore one would have to go through the entire set of computations again if one were to calculate similar probabilities or similar indicia of segregation for 1963. Our figures here are based upon the selection of schools based upon 1968 data only.

Q. But your representation in your charts and all attempt to show what the relationship was in the 20 minority schools in 1963, does it not? A. This was just a convenient means of identifying the school in 1968 and tracing the behavior of that school over the period of time under analysis.

Q. I understand that, but you did go back to 1963 and on your charts you showed what the conditions were? A. That's correct.

Q. But under your own segregation limits, Boulevard was not segregated, not a segregated school in 1963? A. No. I can't say that, because that segregation limit in 1968 is conditioned by two things: one, the size of the school, the number of students enrolled, and number two, in order to find out where we start subtracting and adding, the amount of deviation depends upon the percentage Anglo composition in any given area.

[692] Q. All right, well, then, in Exhibit 249, you had your total population for Boulevard? A. Yes.

Q. And at that time in 1963, you had 180 Anglo, no Negro, and 287 Hispano? A. Right.

Q. So you knew what your population was? A. That's correct.

Q. Well, then, you are relating 1968 figures on your index or your segregation limit back to 1963 when you had a completely different picture? A. When we analyzed the period 1963 to 1968, the whole methodology here is based upon simply the identification of a school and its segregated status according to probability in 1968.

Q. Yes? A. What that school happened to have been prior to that time is merely for purposes of comparative information as to what happened to those 20 minority schools over that period of time.

Q. May we look at Hallett on Exhibit 250? A. Yes.

Q. In 1963, it had an Anglo population of 66.4? A. That's right.

Q. And it was still above your 30 percent in 1964? [693] A. That's right.

Q. Going back to Boulevard, it was above your 30 percent limit in 1963 and 1964 and 1966, was it not? A. That's correct.

Q. Bryant was above it in 1963 and 1964? A. Correct.

Q. Smith was above it in 1963 and 1964, and Wyatt was above it in 1963, '64, '65 and '66? A. Right.

Q. But you never went back to figure what the segregation limits would be in '63? A. No.

Q. And in fact Hallett was a percentage of 66 Anglo at that time and would probably not have been a minority school under your minority classification, would it? A. I don't know whether it would or not. I have not made the computations for the preceding year. It is very likely that a school may change over that period of time from one condition to another, as it obviously has here.

Q. Well, I would ask you then in 1963 of your 20 minority

schools under your own segregation limits if two, four, six were above your segregation limits, were above your limits in 1963, out of those twenty? A. I haven't counted them up. I presume that would be one—

[694] Q. And five would be above your limits in 1964? A. Yes, sir.

Q. And two in 1965 and two in 1966? A. Yes, sir.

Q. And those schools with those limits at that time were reflected in all your various charts you made? A. They can't be.

Q. Aren't they? Aren't they all twenty—for example, take your Exhibit 263, where you show the experience curve for experience of elementary school teachers, experience in the Denver Public Schools. That's based on 1963, '65, '66, '67, '68 for the same schools? A. Exactly right.

Q. And some of which were not minority schools under your segregation limit in earlier years? A. That's correct.

Q. Let's take a look at the high schools, Exhibit 310, Dr. Bardwell.

The Court: Do you have it? A. I have it.

Q. Find it, sir? A. Yes.

Q. All right, now, this Exhibit No. 310 sets forth the ethnic distribution of pupils in your so-called three minority high schools percentagewise for the years '63 to '68, right?

[695] A. That's right.

Q. All right, now, your overlimit, for percentagewise in high schools—a high school was segregated if it had less than 60 percent Anglo?

Mr. Greiner: For what year? I believe that should be established, if the Court please.

Mr. Ris: '68.

A. '68?

Q. Right, then you denominated those as your three minority high schools and worked back from that and back to '63 in working up your charts and statistics? A. That's correct.

Q. Now, in '63, what was the Anglo population at East High? A. 83 percent.

Q. So, at that point it was above your 60 percent level?

Mr. Greiner: Your Honor, I believe counsel is attempting to add apples and oranges. The witness has testified repeatedly that there is no 1963 range established. I object to the improper characterization of his testimony.

The Court: Well, he may cross-examine. To be sure, he said that he used the year 1968 for making or for selecting the several schools. Rightly or wrongly, he did. I assume this line of questions is designed or seeks to undermine some of his analyses with respect to buildings and teachers.

[696] Mr. Ris: Exactly, yes, sir, that's the sole purpose of it.

The Court: I also assume that these schools, most of them at least, were marginally segregated, or well on their way during these years. I mean, I don't suppose there was substantial—

Q. Well, East High was 82 percent in 1963, the first year in your charts here?

The Court: 82 percent Anglo?

Mr. Ris: Yes, sir.

A. That's right.

Q. And the same year, West was 69 percent? A. But you are omitting again, if I might remind you, that the segregated status of the school is not simply the matter of measuring its percentage Anglo composition in a particular year. It must have two additional ingredients. Number one, the size of the enrollment in that particular year, and also the percentage composition of the entire school district.

Q. Well, that very well may be, Dr. Bardwell, and I don't want to argue. I am just trying to get at your basis, because, for example, in Exhibit 323, where you again have experience of senior high school teachers, you begin with 1964 to show a difference between so-called minority schools and so-called Anglo schools? [697] A. That's correct.

Q. And you start right off with East and West as being two of those? A. Right.

Q. Which were in the year 1964, if we look at Exhibit 310, East was then 71 percent Anglo and West was then 62 percent Anglo, were they not? A. Right. I simply might add that if those schools had been left off, according to your analysis, the gap between Anglo and minority schools would have been appreciably wider than what you see.

Q. Did you run any other programs on anything else omitting those schools? Did you run any programs on your computer omitting those schools? A. I made some calculations, but there were no computer programs.

Q. All right, Doctor, on your various diagrams you have merely shown the curves for your minority schools and your Anglo schools? A. Yes.

Q. You haven't shown any information citywide on any of these? A. No.

Q. Citywide invariably would come somewhere between here? [698] A. That's correct.

Q. For statistical purposes in some of the evidence that has come in here previously, medians have been widely used in comparison with medians. A. Yes, sir.

Q. These various charts that you have shown for ethnic composition, experience of teachers and so forth, have you not done any of those as compared to medians, just the high or the two extremes under your theory? A. No, in fact, it would not be possible to involve a median on most exhibits there, because that happens to be a percent and they just aren't—they don't belong on the same scale, because they would be two different kinds of things, apples and oranges.

Q. But if you showed the all-city on these various charts, the deviation between the average all-city in the minority and the Anglo would be substantially narrower, would it not? A. Quite right.

Q. But, if you were doing this on a statistical basis, on a disinterested basis, you would normally show that on all-city, would you not, on a thing of this nature? A. No.

Q. Say, for the planning office of the City and County of Denver, you show all-city and then extremes? [699] A. No, by no means. It depends upon the kinds of graphical display, the purposes of the analysis. The purpose of that analysis is simply to compare two groups of schools, and that is what was done.

Q. All right, now, Dr. Bardwell, this morning you identified and were admitted into evidence the various printouts that you had before you, from which you made the charts? A. That's right.

Q. Then, as you were testifying as to the approximate percentages you were just reading off the charts, is that

right? A. That's correct. I did not have the others at my fingertips.

Q. Pardon? A. I did not have the other exhibits at my fingertips.

Q. Well, you had them there? A. No.

Q. You didn't? A. I had the charts here. I was reading the figures from the scale on either the left or right and it would have had to be an approximation, let's say, within a half percent.

Q. Well, as I followed you, Dr. Bardwell, I found substantially more than a half percent in some instances with reference to the printouts. Now, the printouts are [700] accurate figures? A. They are.

Q. And if there is a variation between the printouts and the charts you made in a curve, the printouts would govern, would they not? A. Absolutely.

Q. I mean, I could spend an hour going through and pointing out your variances off the charts, but if you will concede that much I will save that much time. A. I hope you can point those out to me so I—

Q. Well, there were some that were 2 or 3 percent off, but as long as we have the other evidence there, we won't take time to do so.

Now, with regard to Your Exhibit 267, which was the teacher experience, mean teacher experience between Traylor and the minority schools, you didn't take into consideration in preparing that chart that any new school that opens is invariably staffed with a certain percentage of experienced teachers as a cadre to open that school? A. That's right, quite but the percentage for Traylor School was far above the percentage existing in the minority groups of schools, and they had been open a very, very long time.

Q. I understand. You know what a cadre is, in opening a new institution? [701] A. Yes.

Q. Now, with regard to your figures pertaining to age of the various buildings, again in that instance you have used averages rather than medians? A. Yes.

Q. Did you compute the medians for those ages? A. Yes, I did, in a couple of instances.

Q. Did you compare any exhibits showing the average as to ages of the various schools, minority and Anglo? A. My comment is that from a statistical point of view the median is an appropriate measure of statistics to be used when the information itself is very highly skewed, and in the case of the teacher data, year after year, those data are very highly skewed. And other information concerning buildings and so forth, the average is not highly skewed and therefore the average is more appropriate.

The Court: It is time for our afternoon recess.

(The court recessed from 3:30 o'clock p.m. until 3:40 o'clock p.m.)

[702] (Following a recess, the trial resumed at 3:48 p.m.)

By Mr. Ris:

Q. Dr. Bardwell, with respect to your statistics on the age of the buildings, you considered only the date of the original construction on those buildings? A. That's correct.

Q. Did you put into your computer any factors pertaining to additions to the buildings? A. I did not.

Q. Did you put into your computer any factors pertaining to the type of modernization to any of the buildings? A. No.

Q. Or as to the type of maintenance performed on the buildings? A. No.

Q. So your figures were solely based on the original construction dates? A. That's correct.

Q. And you didn't attempt to make any differentiation insofar as the factor going into your computer with respect to the area? A. Age of the area of the city?

Q. Yes. For example; the older parts of the city as compared to the newer parts of the city? That didn't go into your computer? A. No.

[703] Q. Nor the fact that Denver minorities very often are clustered in some of the older areas, construction-wise? A. No, that's right.

Q. Now, with regard to your Exhibit 390 and various overlays, you referred to the fact that some of those lines from the northeast, particularly to southwest, went right past other schools that were still under capacity according to your figures? That is, as the crow flies? Right? They would go right past it? A. That's correct.

Q. And you didn't mean that as a bus driver would follow through streets and so forth, that they would necessarily go right past it? That was a figure of speech, is that right? A. That's correct. However, I think that a bus route that would depart very far substantially from an indicated line as the crow flies would probably not be a terribly efficient bus route.

Q. You identified previously some charts you got from the school district. You have gone through many records yourself of the school district, have you not? A. That's right.

Q. You and Dr. Klite worked together in this regard? A. That's correct.

Q. Now, 398, Plaintiffs' Exhibits 398 and 399 show racial distribution of students by various categories and [704]

school by school. You have studied these from time to time, have you not? A. That's correct.

Q. And you found these charts beginning in 1962 and up to the present time in the school records, did you, similar to these? A. Yes.

Q. Showing racial distribution? A. That's right.

Q. And you did not find any charts similar to these from 1961 back to 1947, did you? A. Only for particular schools.

Q. On a very limited basis? A. Very, very limited basis.

Q. Now, with regard to this Exhibit 400, the dropout exhibit, you were referring to the projected dropout rate of Cole for 1965 and 1966 as being 12.6, right? A. That's correct.

Q. Now, two years later, 1967-68, it's down to 7.0? A. I would have to take a look at the exhibit, please.

Q. All right.

Mr. Ris: Exhibit 400, please, Mr. Kerr.

The Court: Here it is.

A. That's correct.

Q. So between the 1965-1966 school year and the 1967-1968 [705] school year, the projected dropout rate from Cole had dropped from 12.6 to 7.0? A. After it increased from 1966 from 12.6 to 13.6.

Q. Then it dropped to 7.0? A. That's right.

Q. And Manual had a similar—went from 64.8 to 66 and then down to 57, right? A. 67. You're rounding it on the short side. It should be 67 percent dropout rate for Manual.

Q. All right, 64.8 from 1965 to '66. The next year up to 66.8, the following year down to 57.0? A. That's correct.

Q. And that's the last figure we have? A. That's correct.

The Court: Those aren't your figures anyway, are they?

The Witness: No, sir. These are the Colorado State Department of Education calculations.

The Court: Did you verify them or check them out? Do you think they're accurate and reliable?

The Witness: I convinced myself that they were reliable in terms of the calculations that were actually made. We did not examine the individual data coming from the individual grades submitted by the school district.

Q. Now I will hand you Exhibit 405, which has previously [706] been introduced and which is a study of Pupil Population, School Boundaries, Transportation and School Buildings dated February 1962. You're acquainted with that volume, are you not? A. I am.

Q. And with regard to your testimony concerning the capacity and attendance at the junior high school construction of new schools, if you would look at page 19, please, that gives the estimated pupil membership at the junior high level within the then-existing school district boundaries before the 1962 boundary changes, does it not? A. That's right, in 1960 actual membership, I don't know when that refers to except 1961.

Q. All right. And this chart gives the adjusted building capacity for each of the schools? A. That's right.

Q. And in the 1961 actual membership? A. That's right.

Q. That projected membership for the various schools without the boundary changes here? A. That's correct.

Q. Then if you will turn to page 31, this gives the adjusted building capacity for the junior high schools with the 1961 actual membership. And does this give the estimated membership for the following years assuming the

proposed [707] boundary changes were made in 1962? A. That's what the title states, yes.

Q. At that time the Byers school—Byers, for example, 1961, had an actual membership of 1,094, right? A. I don't know where you're reading that figure.

Q. 1961 actual membership for Byers. A. 1961 for Byers?

Q. Yes, 1,094. A. Oh, that's right, yes.

Q. And the projected then after the boundary change, 1,122, correct? A. That's right.

Q. And would that remain substantially level, 1966 membership at 1161? A. That's right.

Q. That's fairly level for that number of students, is it not? A. Well, if that's level, then it's also as level if we're talking about 1961 actual membership compared with 1962, because the difference there is only 28 students and in case of—in the case of 1963 to 1963 it is 16 students. From 1963 to 1964 you're talking about 56 students. Seems to me that is the level all the way across.

Q. What is the difference between 1961 and 1962? A. 1961 is 16 students and 1962 is nothing more than [708] 28 students.

Q. And then it goes up to 1138? A. Right.

Q. 1194? A. Right.

Q. And then begins to drop? A. That's right.

Q. And Morey, they anticipated going from 894 with a capacity of 1170 in 1961, right? A. That's right.

Q. And bringing it up to capacity by roughly 1964? A. Yes, that's what these figures show.

Q. And by 1966 it would be over capacity by what? 50 pupils? A. There is considerable difference between the figures that actually took place.

Q. Oh, I understand, sir. A. I just wanted to remind us of that.

Q. But these were the figures that everyone was operating under in 1962, and not on your printouts after the fact? A. Well—

Q. Isn't that correct? A. No, I would have to take issue, simply because if you examine your own report on May 3rd, 1962, with regard to the membership at Morey and at Byers and Cole, they are [709] quite different.

Q. As to the actual membership? A. That's right.

Q. In 1962? A. That's right.

Q. In May? A. In May.

Q. But what we're referring to here is 1961. And, it's a variation between 1961 and 1962. And, this shows a projection for 1962. A. Well—

[710] Q. This shows projection for '62? A. I would assume that 1961 actual membership is that membership for the school year 1961.

Q. What document are you referring to in May— A. 398.

Q. With respect to projections, however, you were aware that they were doing some projecting? A. Oh, yes.

Q. All right, now, your figures are not a projection, but they are looking back and going back to taking actual figures over the subsequent years up to the present time or through '68, is that correct? A. I would like you to repeat that, please.

Q. Well, all I am saying is that the figures, the projections here, are predictions. A. That's correct.

Q. And your figures are putting through a computer actual attendance figures and all information the last five or six years? A. Yes.

Q. And those computers—all I am saying is that the computer printouts were not available to the board and administration in 1962. A. No, but the information they had available in Exhibit 398 apparently was available to the board.

[711] Q. Does that tell anything about what's going to happen in 1963 or 1964 or 1965? A. Of course not.

Q. All right, and the various charts, the various printouts, and then the charts you have made and so forth for the years '63, '68 and so forth, those are after the fact? A. Yes.

Q. As you prepared for this trial? A. Yes.

Q. You mentioned that in the '62 boundary change there was one area east of Cheesman Park that was assigned to Byers. Now, is that the area that was immediately to the south of what used to be known as Mount Calvary Cemetery? A. That's correct.

Q. And is now Botanical Gardens? A. That's correct.

Q. It runs a block and a half, I believe, from 8th Avenue to just a little north of 9th Avenue to where you get to the Botanical Gardens area? A. Yes, that's correct.

Q. And that's the only part that was made—that's what you had reference to when you said an area east of Cheesman Park had been assigned to Byers? A. Yes, in addition to the area on the south.

* * * * *

[719] * * *

Redirect Examination by Mr. Greiner:

Q. Dr. Bardwell, when you selected the schools identified in Plaintiffs' Exhibit 241, the 41 elementary schools, the junior high schools there depicted, senior high schools, their racial composition was the sole criteria that you used, was it not? A. That's correct.

Q. Now, the other exhibits that have been put into evidence based on the computer printouts, they involve such things as percentage of probationary teachers, and those exhibits show that there is a correlation of the percentage of probationary teachers in a school and race, do they not? A. That's correct.

Q. And the same thing holds true, the same correlation with respect to teachers with no prior DPS experience? A. That's correct.

Q. And also teachers with ten or more years' experience, is that correct? [720] A. That's correct.

Q. And schools with high median years experience, there is also a correlation with race, is there not? A. That's correct.

Q. So we didn't start out each time with each one of those categories which I just mentioned and select a new group of schools, did we? A. No, the relationship between these is very highly correlative with race and very persuasive in terms of that subdivision.

Mr. Greiner: I have no further questions.

Mr. Ris: I have nothing further.

Mr. Brega: I have nothing, Your Honor.

The Court: Undoubtedly, you have a reason for using 1968 as the determinative year?

The Witness: It is the most current year.

The Court: Presently, as far as this lawsuit is concerned, right?

The Witness: Yes, this was the whole matter of looking at that school in terms of what would be needed to change its racial composition, based upon probability analysis, was a part of it—in a sense looking ahead.

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Robert L. Hedley—for Defendants—Direct

[752] • • •

ROBERT L. HEDLEY, a witness called by and on behalf of defendants, having first been duly sworn was examined and testified as follows:

Direct Examination by Mr. Creighton:

The Court: Give us your name and address, please.

The Witness: Robert L. Hedley, 1775 South Ames, Denver, Colorado.

By Mr. Creighton:

Q. Mr. Hedley, are you employed by School District No. 1 of the City and County of Denver? A. I am.

Q. When were you first employed by the School District? A. In 1951.

Q. And you have been employed continuously since that time? A. Yes, sir, I have.

Q. What was your first assignment in that employment? A. As a teacher.

Q. Where was that? A. At Cole Junior High.

Q. What was the date of your next assignment? A. 1955.

Q. And where was that? [753] A. As a teacher at Schmitt Elementary School.

Q. Then your next assignment? A. Next assignment was Planning Services at the Administration Building as a teacher on special assignment.

Q. What date was that? Was that in 1961? A. Yes.

Q. And what time of year that year? A. That was in the fall of the year, September.

Q. What were your initial duties when you were as-

signed to Planning Services? A. My initial duties were to help in the preparation of graphic materials for presentation to staff members and board meetings and to assist in preparing reports for Planning Services at that time.

Q. At that time who was your immediate superior? A. Dr. C. E. Armstrong.

Q. And what was his position or title? A. He was Executive Director of Business Services at that time.

Q. Was he in turn under an assistant superintendent at that point? A. Yes, he was.

Q. Who was that? A. Graham Miller.

Q. What was Mr. Graham Miller's title? [754] A. He was Assistant Superintendent for Business Services.

Q. Then did Business Services include at that time Planning Services and Engineering? A. Yes.

Q. And you were in Planning Services part of that time? A. That's correct.

Q. Was that administrative structure changed thereafter? A. Yes, it was.

Q. When was that? A. I believe in 1963 when Mr. Miller retired, that division was split into two parts.

Q. What were those two parts? A. One part remaining Business Services and the other becoming Division of Planning and Engineering.

Q. Were those both headed by the Assistant Superintendent? A. No, they were split. Dr. Armstrong was one Assistant Superintendent and Mr. Ed Olander was the other assistant.

Q. But they were both Assistant Superintendents? A. That's correct.

Q. Both heads of these two departments? A. Right.

[755] Q. And Mr. Olander was head of Business Services, was he? A. Yes, sir.

Q. And Engineering and Planning Services remained then under Dr. Armstrong? A. That's right.

Q. And how long did that administrative arrangement last? A. It lasted until the present time. It's still the same.

Q. And you have been in Planning Services the entire time since you were assigned there? A. Yes, sir.

Q. Was your title or assignment changed since your initial assignment to Planning Services? A. Yes, I have been changed two times; approximately a year and a half as a teacher on special assignment, and then to coordinator for two years, and then to supervisor, which is my present classification.

Q. What year—when did you become coordinator? A. About 1963 or 1964.

Q. And when did you become supervisor? A. 1965.

Q. And that is your present assignment? A. That's correct.

[756] Q. In the summer of 1962 did you have any function or role in connection with the efforts and work of the Special Study Committee? A. Yes, I did.

Q. Briefly what were those? A. We prepared some graphic presentations for the use in their report that they were going to give to the Board.

Q. Did those include representation of census data? A. They did, yes.

Q. Did those ultimately appear in the appendices of the report of that committee? A. Yes, they did.

Q. When you became coordinator what were your basic duties at that point in 1962—or 1963? A. In those years I still maintained the responsibility of preparing graphic presentations, and I also was introduced to the responsibility of furniture program for the Denver Public Schools.

Q. Did you have any responsibility for maps? A. Yes, I did.

Q. When did that responsibility begin? A. In 1962.

Q. And what was that responsibility? A. It was my responsibility to prepare all boundary maps during the summer, but specifically in July, on a base [757] map that was acquired from the City and County of Denver, and to make sure that all changes were made that were directed to be changed, and that all boundary maps were approved by the appropriate official and presented to the schools in various administrative offices for the following school year.

Q. Now, this work was done in July of each year? A. That's correct.

Q. What sort of information aside from the base map that you have mentioned did you use for determining what the boundary map the following year would look like? A. All those changes that were approved and adopted by the Board were put on there.

Q. Put on where? A. On the new map.

Q. Well, how did you get that information? How did it come to you? A. It came to me from my superior, Dr. Armstrong.

Q. Then you prepared the map, did you? A. That's correct.

Q. Did any of your superiors approve this map? A. Yes, sir.

Q. Who was that? A. Through the years it was Mr. Howard Johnson, and the last year it was Dr. Armstrong.

Q. So you prepared the map from information from the [758] head of your department and sent the prepared map back for final approval by the head of your department or Mr. Johnson? A. Uh-huh.

Q. At the time you commenced to prepare these maps, as you have described, in 1962, were there other maps in the files of the District for prior years? A. Yes, there was.

Q. What maps were there? A. I found in the record that we had master copies of the School District's maps for 1960.

Q. Did you have one for 1961? A. Yes, we did.

Q. Well, have you found at any time official maps prior to 1960? A. Yes, I found the 1956 base map, which also included the changes for 1957.

Q. When did you find that map? A. Just, oh—in the past three or four months.

Q. And in 1956 when that map was prepared, whose responsibility was it for preparing it? A. Engineering Services.

Q. And where did you find that map? A. That was in their files.

Q. Could you find any other maps for the period prior to 1960 from Engineering Services? [759] A. No, sir.

Q. And did your Planning Services file show any? A. None.

Q. Now, 1962, when you took on this responsibility for maps, did you do anything further in connection with organizing the records and files of your department regarding the boundaries? A. Yes, sir, I started to maintain a written description of all boundaries and developing those into three sets, elementary, junior and high. And then through the years I had this responsibility, I always kept master maps of each year that were responsible for preparing these maps.

Q. These boundary records—are they kept by you in your department now? A. Yes, they are.

Q. What did you say the annual distribution of each new year's map was, Mr. Hedley? A. Every elementary school, junior and senior high, and the administrative offices.

Q. Mr. Hedley, if you would step down and get a map marked for identification as Defendants' Exhibit AA and mount it on the easel.

Mr. Creighton: Your Honor, is this a suitable place for all concerned? We thought it might be better on this side near the witness stand. Is it suitable with other counsel?

[760] Mr. Greiner: I believe so.

Q. Now, directing your attention to the map marked for identification Defendants' Exhibit AA, did you prepare that, Mr. Hedley? A. Yes, I did.

Q. Was there an official map in existence—is there an official map in existence for that year? A. No, sir.

Q. And that year again is what? A. 1936.

Q. What base map have you used for that exhibit? A. The base map here is a 1956 base map.

Q. Is that the earliest base map you could find? A. Yes, sir.

Q. Have you shown the limits of the School District on that map? A. Yes, the limits in 1936 in the School District in the City and County of Denver is indicated by a red line.

Q. And where do you get that information? A. This information was obtained from our annexation maps, which we received from the City and County of Denver Planning Office.

Q. You keep annexation maps current and complete in your files? A. Yes, sir, I do.

[761] Q. Have you also shown the boundaries of the junior high school subdistricts in 1936? A. Yes, sir, they are indicated by the dark black lines.

Q. Now, is the black line consistent with your modern map? A. Yes, as you will see, when we go through here, they all show in the dark black lines.

Q. Does that base map show schools not in existence in 1936? A. Yes, these schools outside of the District in those years are shown with a red "X" over them. It means they did not exist, and also within the City and County they did not exist, schools and sites.

Q. Mr. Hedley, in the absence of an official map for that year, how have you determined where to place the subdistrict boundaries? A. We have the main 1921-26 Superintendent's circulars that describe the junior high boundaries and what elementary schools they included, and we also used the 1932 elementary boundary line description circulars that were in that same group.

Q. Are they maintained in your boundary books? A. Yes, they are.

Q. These descriptions, are they set forth in words in a descriptive form? [762] A. Yes, they are.

Q. And how are junior high school boundaries defined in the circular you referred to? A. Basically, they say that the pupils that will attend a certain junior high school will be from a certain elementary subdistrict and its optional areas.

Q. Now, did you have any information on the elementary districts then? A. Yes, I did for 1932.

Q. '36? A. '32.

Q. And where was that information? A. That was in the circulars.

Q. Was the 1932 data unchanged until 1936? A. Yes, sir, that's correct.

Q. Then you used the elementary data and the description in the circular to establish the boundaries, is that correct? A. Of the elementary schools, and they in turn helped describe the boundaries of the junior high schools.

Q. Let me interrupt a moment, Mr. Hedley. For the record, I believe you said your "X's" are red. They are in fact what color? A. Excuse me, they are green.

Mr. Creighton: Your Honor, the defendants offer in evidence Exhibit AA.

[763] Mr. Greiner: No objection, Your Honor.

The Court: We will take it. Exhibit AA is received in evidence.

(Whereupon, Defendants' Exhibit AA was received in evidence.)

Q. Mr. Hedley, have you shown in addition to the subdistrict boundaries optional areas? A. Yes, sir.

Q. How many optional areas were there at the junior high level in 1936? A. In 1936 there were thirteen optional areas as indicated here with the blue "Optional" and the schools to which they were optional.

Q. Did every junior high school have an optional area? A. Yes, sir, in this case, they did.

Q. Did everyone have two of them? A. In most cases, they had two optional areas, in some cases three.

Q. Now, Mr. Hedley, up in the upper left-hand corner, in the northeast or northwest corner of the District, what junior high school is that? A. This is Skinner Junior High.

Q. How have you indicated that? A. It is located with the blue line and the rectangular form around the school.

[764] Q. That's just to locate the school? A. Indicate where the school is within that district.

Q. Did Skinner have optional areas? A. Yes, they had two, one in this location here, which was optional between Skinner and Horace Mann, and one down here which was optional between Lake, Skinner and Mann.

Q. A three-way option? A. That's correct.

Q. And those are respectively on the northwest and northeast corner of the Skinner subdistrict? A. That's correct.

Q. Then, moving to Mann, in addition to the Skinner option, did it have others? A. It had this large optional area here to the east, which was optional between Mann and Cole.

Q. And that extended to the— A. The city limits on the north.

Q. And on the— A. 17th here, approximately 17th Street.

Q. And was the river involved in that boundary? A. Yes, this river is indicated here.

Q. And then moving on to Cole. A. Located here.

Q. What other optional areas besides the Mann area did it have? [765] A. Cole had these three optional areas: Here, one between Cole and Smiley; this one, three-way, Cole, Smiley and Morey; and this one, which was optional between Cole and Morey.

Q. Those are generally on what side of the Cole district? A. This would be on the east and on the south.

Q. Then, Cole, Smiley—this brings us to Smiley. In addition to the Cole option, what other optional area did

Smiley have? A. We have this large optional area here between Smiley and Gove.

Q. Generally, on what side of the Smiley district? A. It was on the southeast side of the district.

Q. And did that extend to the city limits? A. City limits, taking out Lowry Air Force Base.

Q. You have eliminated the Lowry area from your boundaries? A. That's correct.

Q. Even though it was technically in the city limits? A. Right.

Q. Then, Smiley optional to Gove, move to Gove—did Gove have other optional areas? A. Gove was here. Gove had this optional area between Morey and Gove, besides this large one here.

[766] Q. And that generally was on what side of the Gove district? A. This was south, and then the small one down here, which was optional between Morey, Gove and Byers.

Q. That was south of the river? A. South of the river, yes.

Q. Does that indicate that the mandatory Gove area was quite small compared with its total size? A. Yes, that area was approximately this location.

Q. And because of the distance to the bench, please outline the total boundaries of the Gove area, including its optional areas. A. Including its optional areas, it would be this area here.

Q. Then, the Gove-Byers optional leads us to—or, rather, Gove-Morey leads us to Morey. Did it have other optional areas? A. Yes, as indicated before, we had the optional between Morey and Byers, Morey and Gove, and Morey and Cole.

Q. Then, moving on to Byers, in addition to the one you mentioned with Morey, what others did Byers have? A. Byers had the one that was optional between Byers and Grant, and then the three-way, Baker, Byers, and Grant.

Q. Was there another one for Byers that you previously mentioned? [767] A. Just the small one here.

Q. Then I think you have mentioned then that Grant had two optional areas that year. A. Yes, Grant had this one with Byers, and then the three-way with Baker, Byers and Grant.

Q. And that leads to Baker. Did Baker have any other optional areas? A. Baker was here, and they had this large optional area to the west that was optional between Lake and Baker.

Q. Generally, across the Platte River? A. That's correct.

Q. Extending to the city limits? A. To the city limits on this side.

Q. All right, would you please get before us on the other easel, Mr. Hedley, Exhibit AB?

Mr. Hedley, this purports to represent what subject and what years? A. This is a senior high school boundary map for 1936.

Q. What is your source and method for the preparation of that map? The same as the 1936 junior high map which is AA? A. Yes, sir, they were. We want to determine—

Q. Excuse me, Mr. Hedley, the circular which was the source for junior high maps, how does it describe the senior high boundaries? In terms of what? [768] A. Those attendance areas for the senior high would include those junior highs and their optional areas and name the

junior high schools that would attend that senior high school. In some cases, it gave elementary schools.

Mr. Creighton: Defendants offer Exhibit AB.

Mr. Greiner: Could I inquire of Mr. Hedley, Your Honor, as to whether there are any estimates containing Exhibit AB?

The Witness: No, sir, there is not. It is directly from the circulars.

Mr. Greiner: Were there any estimates on AA?

The Witness: No, sir.

Mr. Greiner: We have no objection, Your Honor.

The Court: Exhibit AB is received.

(Whereupon, Defendants' Exhibit AB was received in evidence.)

Q. Mr. Hedley, have you adopted the same convention on AB as on AA with respect to showing the city limits and, therefore, the School District limits, the red line, and the same convention with your green "X's" as to the schools that were not in existence at that time? A. Yes, they are the same.

Q. And you are consistently using a black line to delineate the subdistrict boundaries and the optional portions thereof? [769] A. That's correct.

Q. How many high schools were there in 1936? A. There would be five high schools.

Q. And how many optional areas were there? A. Basically, there were six optional areas.

Q. Do you have a different convention here for locating the high schools? A. Yes, I have circled the high schools with the blue marking that you see here.

Q. Taking North High School, how many optional areas

did it have? A. North had this optional area here and this one to the east, between North and West, North and Manual.

Q. And moving on to Manual, in addition to the one with North, did it have another? A. Yes, it had this optional area here, East and Manual.

Q. Generally to the south and east. A. To the east, that's correct.

Q. And that takes us around to East. Did it have any other optional areas besides the one with Manual? A. Yes, it had the one with Manual and also one with East, West and Manual; and East, West and South, on the south and west of the district of East.

Q. And that moves around to South. Did it have any other optional areas? A. Yes, it had the one to the north that was optional [770] between South and West, and the one we mentioned before, East, West, and South.

Q. And, finally, completing the circle, West has how many? A. Had this one here, North and West. This one, East, West and Manual; and the West and South.

Q. And it had yet another, didn't it, that year with South and East? A. This one here. It actually had four.

Q. Yes. A. No, the three, this one, this one and this one—total of four.

Q. Yes. All right, Mr. Hedley, would you bring out Exhibit AC and will you put it over AB, so that AA and AC will be side by side?

Mr. Hedley, directing your attention to the map marked for identification Defendants' Exhibit AC, which is labeled, "Junior High, 1955," did you prepare that? A. Yes, sir, I did.

Q. And did you have an official map for 1955? A. No, I did not.

Q. What is the base map for that? A. The base map is the 1956 base map.

[771] Q. You used the base map for the year immediately following; is that correct? A. That's correct.

Q. Now, how did you go about, Mr. Hedley, preparing a map for 1955 using the 1956 base map? A. We used the 1956 junior high map to construct our boundaries for 1955. We also used our boundary line description books with the information that was available there and in some cases Board minutes.

Q. Now, do your boundary books show any change, for example, or—what change if any is shown in your boundary books and by these two maps in the—

Let me withdraw that question, Mr. Hedley, and ask you first—Did you use the same dimension of black line to delineate subdistricts and— A. Yes.

Q. —and optional boundaries? A. Yes.

Q. Are optional areas especially represented on this particular map? A. The optional areas on this map are shown in the cross-hatch and underlined—with the schools underlined in blue.

Mr. Creighton: The defendants offer in evidence Exhibit AC.

[772] Mr. Greiner: May I inquire, Your Honor.

Voir Dire Examination by Mr. Greiner:

Q. The western boundary, Mr. Hedley, of this optional area between Cole and Smiley—you show—what streets are these? A. These are not streets. They go down alleys here. This is Franklin and High. This is Columbine district, and this at that time was the Adams Street district—The line we were discussing is Franklin, and the line going

down the middle of the block between the two streets and on the north here—we get to 29th and 28th, and it splits that block.

Q. And then just north? A. Then it goes over and splits this block between Race and High, and then it goes down the middle of the street up here.

Q. What is your source for that line, that western line? A. This was in 1936 circulars—it indicated that the Adams Street, which is Harrington here and Columbine district was optional district between East and Manual, and Cole and Smiley. And the line has remained the same.

Q. You looked at what between 1936 and 1955? A. School Board minutes, which indicated that there were no secondary changes in this area.

[773] Q. So Exhibit AC then depicts the western boundary as it was in 1936? A. That's correct.

Mr. Greiner: No further questions. We have no objection, Your Honor.

The Court: AC is received.

(Whereupon, Defendants' Exhibit AC was received in evidence.)

Direct Examination by Mr. Creighton (Continued):

Q. Now, Mr. Hedley, comparing Exhibit AC which is the junior high situation in 1955 by your map and Exhibit AA which is the 1936 situation, nineteen years earlier, were there any changes in the Cole-Smiley junior optional areas? A. This small change here in 1955 is all Morey-Cole. And here, there was an optional area between Cole, Morey and Smiley.

Q. Any other changes in the— A. The east end of the Adams Street district then which was extended out here beyond the Park Hill Golf Course was cut back to Colorado Boulevard, which included the Park Hill Golf Course.

Q. And by 1955, Mr. Hedley, were there optional areas in all four quadrants of the city? A. Yes, sir.

[774] Q. Where were they? A. Skinner Junior High has two optional areas between Horace Mann and Skinner. This one between Lake and Skinner, and the one that we have mentioned working around Gove. Gove had this one that was optional between Morey and Gove. This one—Morey and Gove. And, then Morey had one optional between Morey and Byers, and this one, Morey and Cole that we mentioned. And this one was Morey and Baker. This optional area was Byers and Merrill at that time. This optional area was Byers and Kepner. This one was Baker, Byers and Kepner. This one was Baker and Lake.

Q. Count up the number of separate optional areas. A. I think there were eleven.

Q. That's in 1955? A. That's correct.

Q. Now, Mr. Hedley, would you get in front of us Exhibit AD and let's put that over AA so that we have AC and AD side by side.

Directing your attention, Mr. Hedley, to the map marked for identification Defendants' Exhibit AD, did you prepare that? A. This was—

Q. Did you prepare it? A. I prepared the map, yes.

Q. Did you have an official base map for that? [775] A. Yes, this was the official base map in 1956.

Q. Now, have you changed the delineation of boundaries from the base map? A. They are still indicated with the dark black line here.

Q. That's the line that—that line has been widened but of course not the location? A. That's correct.

Q. And aside from that change, what other changes have you made to the base map, that is, have you added orange lines for example? A. This actually is a new boundary line here indicated by an orange line.

Q. The orange lines then indicate new boundaries? A. Yes.

Q. What point in time? A. This was in January 1956.

Q. And the arrows—the blue arrows indicate what? A. This means that Hill, a new school, opened in January of 1956, and it means these areas were assigned to Hill. These areas were assigned to Gove here.

Q. On that date? A. That's correct.

Mr. Creighton: The defendants offer Exhibit AD.

Mr. Greiner: No objection.

[776] The Court: Very well, AD is received.

(Whereupon, Defendants' Exhibit AD was received in evidence.)

Q. Now, Mr. Hedley, referring to Exhibit AD, was Hill a new junior high school at that point? A. Yes.

Q. And that was January 1956? A. Correct.

Q. What former subdistricts—junior high subdistricts yielded territory to make up the Hill district?

Mr. Greiner: Could we have it identified in point of time, please, Your Honor?

The Court: I think we are in 1956.

Mr. Creighton: I believe we're in January.

The Witness: January of 1956.

A. The southern part of the Gove district which was here in 1956 is assigned to Hill, and this small part of the Morey district which was the Ellsworth Elementary subdistrict was assigned to Hill. Then this northern part of Gove above the black dotted line which was Smiley is now assigned to Gove. And, that part south of the black dotted line was in Gove and it still is Gove.

Q. What were generally the west and south boundaries of Hill when it opened in January 1956? A. The south boundary here was the river and city [777] limits, which is the Town of Glendale here, and approximately Cook and Steele Streets on the west.

Q. How about the east? A. On the east it was the city limits again taking out Lowry Field.

Q. And on the north? A. On the north, approximately 17th Avenue here up to 11th Avenue here.

Q. What do the black lines mean? A. The dotted black lines indicate the boundary in 1955 which appears on that map.

Q. You're referring now to AC? A. Yes, sir.

This dotted line here (referring to AD) was the optional area between Gove and Morey.

Q. You're referring to the arrow south of the Hill site? A. This is correct.

Q. Now the new Gove line indicated in orange you said generally—how did it run? A. The northern line is up here. It came down Montview and then down to 17th Avenue and out to and includes the Ashley district.

Q. Ashley elementary? A. Ashley elementary school.

Q. Now, Mr. Hedley, according to your records and files, [778] are those the only junior high changes made at that point in time, namely, January 1956? A. Yes, that's correct.

Q. Please bring out Exhibit AE.

You now have Exhibit AE on the easel along with AD, do you not? A. That's correct.

Q. Directing your attention to Exhibit marked Defendants' Exhibit AE, did you prepare that? A. Yes, sir, I did.

Q. Does it purport to represent junior high school boundaries in September of 1956? A. That's correct.

Q. You had an official base map for that year, did you not? A. I did.

Q. And have you again made the subdistrict boundaries in solid black? A. That's correct.

Q. And have you again indicated optional areas by hatching in blue lines? A. That's correct.

Q. Now, have you carried over to this map AE, the January 1956 changes appearing on Exhibit AD? A. Yes, we indicated the dotted orange line as to those [779] changes that were made in 1/56.

Q. By that do you mean January 1956? A. That's correct.

Q. And does this show other changes effective prior to September 1956? A. Yes.

Q. What is that? A. This change here—the optional area between Cole and Smiley, this area west of York Street, was assigned to Cole Junior High, part of it being Smiley; part of it being the optional area between Morey and Cole.

Mr. Creighton: Defendants offer in evidence Exhibit AE.

Robert L. Hedley—for Defendants—Voir Dire

Voir Dire Examination by Mr. Greiner:

Q. With respect to the Cole-Morey optional zone, Mr. Hedley, is any portion of that estimated? A. This area here?

Q. Yes. A. No, sir.

The Court: This was given to Cole? This had been an optional area?

The Witness: This was optional here. From the dotted line south through here was optional between Morey and Cole. This area was optional up here between Cole and Smiley. Both [780] areas were given to Cole.

Q. This red line here depicted that runs— A. That's a new boundary.

Q. That runs on what street? 22nd? A. 21st.

Q. And that corresponds with this black line on Exhibit AC? A. Yes, extended through there.

Mr. Greiner: No objection.

The Court: Very well, Exhibit AE is received.

(Whereupon, Defendants' Exhibit AE was received in evidence.)

[781] The Court: That wasn't related to the opening of Hill, was it?

The Witness: That was not, no, sir.

The Court: It was the Gove and Smiley boundary changes that you have already described that came out of the Hill opening, I take it?

The Witness: That's correct.

Direct Examination by Mr. Creighton (Continued):

Q. All the changes, Mr. Hedley, shown on Exhibit AE occurred between January and the following September, the same year, is that right? A. That's right, all these changes occurred in 1956.

Q. Mr. Hedley, let's set down the junior high maps, for the moment, and get at Exhibit AF. A. (Witness put exhibit on easel.)

The Court: Any objection to AF?

Mr. Greiner: We would like to take a look at it, Your Honor. We didn't have copies of these.

The Court: All right, go ahead.

Mr. Creighton: I would like the record to show, Your Honor, that as fast as these were prepared, counsel came over and looked at them at the workshop where they were in preparation.

The Court: Well, we will give him another peek [782] at them.

Mr. Greiner: Just one question, Mr. Hedley. The western portion of the optional zone down in the southwest corner of this optional zone between East and Manual, how did you determine the western boundaries of that?

Mr. Creighton: Excuse me, counsel is referring to Exhibit AF?

Mr. Greiner: Yes.

The Court: Right.

The Witness: We referred to the 1951 elementary boundaries, Wyman School.

Mr. Greiner: And what was the basis for concluding that there was a coextensiveness there?

The Witness: Usually, in the past, that the boundary lines would always follow the same boundary line of an elementary school, so we just estimated that that's what it followed.

Mr. Greiner: So, that line then is an estimate?

The Witness: That's correct.

Mr. Greiner: It is not reflected in any board minutes?

The Witness: That's right.

Mr. Greiner: With that understanding, Your Honor, we have no objection to AF.

The Court: Exhibit AF will be received.

[783] (Whereupon, Defendants' Exhibit AF was received in evidence.)

Q. Mr. Hedley, does Exhibit AF then purport to show the senior high school boundaries in 1955? A. That's correct.

Q. And what base map did you use? A. This is a 1956 base map.

Q. And it shows three senior high optional areas, does it not? A. That's correct, this one here optional between East and Manual, this one optional between South, East and West.

Q. And what's the north line of the South-East-West option? A. This line here is 6th Avenue and the small optional area here between South and West.

Q. And what's the south line of the three-way South-East-West option? A. This is it, Cherry Creek.

Q. So, it extended from 6th on the north down to the Cherry Creek and all the way out to the city limits? A. That's correct, taking out Glendale.

Q. Then there was a relatively small one? A. Small one here between South and West.

Q. Let's get before us, Mr. Hedley, one we formerly [784] discussed, which is Exhibit AB, and let's put it alongside. A. (Witness put exhibit on easel.)

The Court: Is that the year '35?

Mr. Creighton: '36, Your Honor.

The Court: '36.

Q. Mr. Hedley, if we put Exhibit AB alongside Exhibit AF, can one compare the senior high schools and their optional areas as between 1936 and 1955? A. That's correct.

Q. Has the optional East-West-South area persisted during that period? A. Yes, it is basically the same, except the city limits in this particular area.

Q. In '55? A. Has been extended in 1955, where it was here in 1936.

Q. And how about the optional area between Manual and East? How do they compare? A. Here in 1955, it was smaller than it was in 1936, this area here east of Colorado Boulevard being dropped off and this area west of this area being diminished to this line that we indicated a while ago.

Q. And the— A. The other—

Q. Mr. Hedley, the first portion of the optional [785] Manual-East you mentioned as being taken off the same as the junior high, and that is the Park Hill Golf Course area? A. That's correct.

Q. All right. Now, Mr. Hedley, if you will set down those two exhibits and please bring up Exhibit AH. I beg your pardon, AG, and please put AF alongside it.

Directing your attention to the exhibit marked for identification Defendants' Exhibit AG, Mr. Hedley, did you prepare that exhibit? A. Yes, sir, I did.

Q. And did you have an official map for that year? A. This is the official base map, 1956.

Q. Have you again made the subdistrict lines in solid black? A. That's correct.

Q. And have you added anything else to that base map, official map? A. We have shown the changes that took place in here.

Mr. Creighton: Defendants offer in evidence Exhibit AG.

Mr. Greiner: Did you find the board minutes, Mr. Hedley, that show the change in the boundaries in the East-Manual optional area which are illustrated between a comparison of AG with AF?

[786] The Witness: I believe the board minutes indicate that it gave this optional area, described optional East and Manual, said all other areas west of this area and York Street would be assigned to Manual.

Q. And that's depicted by a dotted line on AG, is that correct? A. Yes, that's the old optional part.

Mr. Greiner: We have no objection, Your Honor.

The Court: It will be received.

(Whereupon, Defendants' Exhibit AG was received in evidence.)

Q. Well, now, we can set those down, Mr. Hedley, and move on to AH, please.

The Court: Is that the last one?

Mr. Creighton: I regret to say we have a number more.

The Court: During the recess, why don't you show these all to Mr. Greiner and we will receive the whole works and we don't have to go through this.

There is no point—do you want to do it?

Mr. Creighton: We have a litle comment, much less on the later maps.

The Court: You can comment all you wish. I do not see why they should be all identified, if you can agree.

Mr. Creighton: We will discuss it.

[787] The Court: We will take about a twelve-minute recess.

(The Court recessed from 3:27 o'clock p.m. until 3:45 o'clock p.m.)

[788] (Following a recess, the trial resumed at 3:50 p.m.)

The Court: Can we receive all of these maps?

Mr. Greiner: Your Honor, we have reviewed maps AF, AI, AJ, AK, AL, AM, AN, AO, BA, BB, BC, BD, BE, and BF, and while we may have some minor differences of opinion as to the correctness of some of those, that can be brought out on cross-examination. And subject to that, we have no objection.

The Court: Very well, we will receive all of them.

(Whereupon, Defendants' Exhibits AF, AI, AJ, AK, AL, AM, AN, AO, BA, BB, BC, BD, BE and BF were received in evidence.)

The Court: What are we supposed to infer? That these boundaries are historical and that they are long-standing—

Mr. Creighton: Yes, sir.

The Court: Since 1935, at least; and that they have no diabolical significance at all? Is that it?

Mr. Creighton: These maps are offered to show the history of—

The Court: Or, have I overstated it?

Mr. Creighton: I think that's a fair statement, Your Honor.

May we proceed, Your Honor?

The Court: Yes.

[789] *By Mr. Creighton:*

Q. At the recess, Mr. Hedley, we were discussing this Exhibit AE, which is the junior high map for 1956 showing the situation that September and showing changes made since the previous year.

Mr. Hedley, let me show you Plaintiffs' Exhibit 333, which is the Superintendent Oberholtzer's recommendation to the Board of Education on June 20th of 1956 and showing the board action thereon. Did you refer to that portion of the board minutes among others in preparing these maps? A. Yes, sir, I did.

Q. Does that show the board action which changed among other things the optional Smiley-Cole area effective September that year? A. That's right.

Q. And does that Exhibit 333 also show that that proposal was made in January of 1956 along with the proposals shown on this Exhibit AE affecting Hill and Gove and Smiley on the side? A. That's correct, both propo-

sals, at the same time, one effective one time and one the other.

The Court: May I see that?

What's the exhibit number?

The Witness: Exhibit Number AE.

The Court: Do you want this back?

Mr. Creighton: No, Your Honor. I don't need it [790] now.

Q. Mr. Hedley, you can be taking down the junior high maps.

Mr. Creighton: Your Honor the balance of the A series, AH through AO, of course has been received and on two or three of these we would like Mr. Hedley to comment.

The Court: Surely. You go right ahead.

Q. Mr. Hedley, calling your attention to Exhibit AH, does that show the senior high boundaries in 1960? A. Yes, they do.

Q. Were new high schools opened that year? A. Three new senior high schools, George Washington, Thomas Jefferson and Abraham Lincoln, all opened in September, 1960.

Q. Does that show the location of those new schools? A. (Indicating.) George Washington, Jefferson, and Lincoln.

Q. And does it show the areas assigned to those new schools? A. Yes, this area designated—

Q. That is shown by what? By your blue arrows? A. Yes, these arrows here.

Q. And your orange lines indicate the new boundaries

that were established in connection with those schools, does it? [791] A. That's correct.

Q. Very well. Set that aside, please.

The Court: Now, all of this had to go to East and South before? Lincoln had been West, is that right?

The Witness: Yes, sir.

Q. What high schools were directly affected by those openings, Mr. Hedley? A. I expect South was affected by Jefferson and East by Washington. The dotted black lines here indicate the old boundaries between East and South. And when George Washington was opened, this was the boundary established; all of this area fed into Washington. This optional area, C, which was optional between East and Washington. This area in the south district was cut off here and this area went to Thomas Jefferson.

Q. Was that a junior-senior high school at first? A. Yes, sir; this was the old boundary line here between South and East. And the optional area, D, West, Lincoln and South—this area indicated by this orange line is the new Lincoln Senior High.

The Court: Well, South had had a part of that Lincoln?

The Witness: Yes, sir, the south boundary went over into here. This area was optional at that time and now the new boundary is here.

[792] The Court: Thank you very much.

Q. Now, just leave those there, Mr. Hedley. We will just move from one easel to the other as we go.

Exhibit AI shows, doesn't it, junior high boundaries in 1961? A. That's correct.

Q. And all of this series from now on that I have previously mentioned, Mr. Hedley,—these are official maps? A. These are all official maps.

Q. And you have added on the official maps certain legends, have you not? A. Correct.

Q. On this Exhibit AE, your blue lines with the tails marked with an arrow indicate what? A. These areas were annexed to the city during that year and then they were assigned to that particular school, this being Kunsmiller and this being Merrill, and this was the boundary change indicating these two were assigned down here to this district, which was Hill.

Q. All right. And that year, in 1961, the junior high level—how many optional areas were there across town? A. I think we still have—twelve.

Q. Exhibit AJ, Mr. Hedley, shows junior high boundaries in 1962 the following year, do they not? [793] A. That's correct.

Q. And again the same legend that you have shown boundaries—boundary changes and annexations? A. Right.

Q. And this shows a total of how many boundary changes at the junior high level that year? A. We have one here, this would probably be considered one, three, four, five, six, seven, eight and nine.

Q. And broken down by individual areas, even more than that? A. Yes.

Q. You have how many arrows there showing changes? A. These are school assignments, three here; four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen—nineteen.

Q. Nineteen boundary changes at the junior high level in 1962? Did that occur in all parts of town? A. Yes.

Q. And there was one annexation there? A. Right. College View was annexed and assigned to Kunsmiller.

Q. Let's move on to Exhibit AK. AK shows senior high boundaries in 1962, the same year as the previous exhibit, does it not? A. That's correct.

[794] Q. And how many separate boundary changes occurred at the senior high level that year? A. Eight.

Q. And there was one annexation there then? A. Again, College View, which went to Abraham Lincoln.

Q. On the maps, AJ and AK, taken together, show the boundary changes at the secondary level effective in 1962, is that right? A. That's correct.

Q. Let's look at AL.

The Court: These are junior highs in 1965?

The Witness: 1963.

Q. I think, Mr. Hedley, you could move AL over so we can see AM.

[795] Q. I first call your attention to Exhibit AL. That is a junior high map for 1963, is it not? A. That's correct.

Q. Again, it shows annexations and boundary changes since the previous year? A. Right, new annexations, one boundary change.

Q. How many annexations were there? A. There were one, two, four, five, six, seven, eight, this one being small, and nine.

Q. Is that the last one Inspiration Point? A. That's correct.

Q. Now, directing your attention to Exhibit AM, now, this shows junior high boundaries the following year, 1964, does it not? A. That's correct.

Q. And, then, what were the boundary changes that year? A. We had one boundary change down here.

Q. That's between what and what? A. Between Thomas Jefferson and Merrill Junior High. And a boundary change here between Hill and Gove. The optional area to Gove, and a boundary change—you remember this was all optional—was put into three schools, to Cole and to Smiley, to Gove, this part being Gove before and now to Smiley, and this part being Gove before and now to Smiley.

Q. All right. Let's move that aside and show AN, which [796] is the senior high situation for the same year, 1964. A. 1964, that's correct.

Q. And you have the same annexation, of course, that year? A. That's correct.

Q. And how many boundary changes, senior high level, that year? A. This boundary change here, which was this part East and this part was optional before.

Q. You are referring generally to the Ashley district? A. That's right.

Q. And that was put where? A. Into George Washington.

Q. What about the optional area north of City Park, at the senior high level? A. The optional area here was split into two schools, and this part to the west going to Manual and this part on the east going to East. This was a boundary change with these two areas going to East.

Q. Now, following the secondary changes in 1964, Mr. Hedley, were there any optional areas left? A. No optional areas were assigned to definite schools.

Q. At both levels? A. That's correct.

The Court: This is Exhibit—

[797] The Witness: AN.

Q. All right, let's put up AO, please. This is a junior high map for 1965, is it not? A. Correct.

Q. And was there a new school that year? A. John F. Kennedy was new that year.

Q. Is that a junior-senior high school? A. Junior-senior high school.

Q. So that had twelve grades in the area shown? A. That's correct.

Q. And how many annexations were there effective that year? A. There was one, two, three, four—these are small,—five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen.

Q. Fourteen annexations? A. Montbello—

Q. Was there a deannexation? A. Yes, the Fort Logan area was deannexed that year.

Q. All right, Mr. Hedley, let's set these down and get out the B series.

Mr. Hedley, this whole B series, BA through BF, are official maps, are they not? A. That's correct.

Q. And in particular, Exhibit BA shows elementary [798] subdistricts in September of 1959, does it not? A. That's correct.

Q. Did you actually have a map which spoke as of that date? A. No.

Q. What did you work from? A. This was constructed from a 1960 base map.

Q. And did you merely eliminate the changes which were effective that year? A. Yes, we eliminated three new school areas to show the way it was in 1959, September.

Q. Now, move that aside and let's show Exhibit BB alongside. Exhibit BB shows elementary subdistricts in September of 1960, does it not? A. That's correct.

Q. And that's an official map for that year? A. Right.

Q. What have you added to that? A. The three new schools, elementary, opened up that year. This one here, Denison and Barrett and Fallis.

Q. And in orange you show there are new boundaries? A. New boundaries indicated in orange.

Q. Those schools were in all parts of the city, is that right? A. Yes.

[799] Q. Denison being on the— A. Southwest, on the city limits here.

Q. And Fallis being— A. On the east city limits.

Q. Now, referring to Denison, are you familiar with the sites of the schools in the city, Mr. Hedley? A. Yes, sir.

Q. Is it part of your responsibility to be familiar with schools and their sites? A. That's correct.

The Court: Just where is Denison located?

Q. Describe it by street, please. A. Jewell here to the south and Yates on the west side here, and it is a vacant lot to Sheridan on the west, Yates being on the east, Jewell on the south.

Q. Sheridan is the city limits? A. Yes.

The Court: Will this serve the extreme southwest?
The Witness: Southwest area, right here.

Q. And from these two exhibits, Mr. Hedley—

The Court: Where is Traylor?

A. Traylor was not in at that time, sir.

The Court: I mean, where would it be in relation—
Th Witness: It is here.

The Court: I see.

[800] Q. In annexed territory to the west? A. That's correct.

The Court: All right.

Q. What subdistrict was the Denison district carved out of? A. Force and Doull. This part north of the dotted line was in Force. The part south was in Doull.

Q. All right. Were there any changes in optional areas that year, since the previous year? A. The optional area here became part of the Barrett district.

Q. Previously, the portion of the Barrett district on BB beneath the dotted line have been optional? A. Optional between Barrett and Park Hill.

Q. How many other optional areas were there in at that time? A. One, two, three, four—nine.

Q. Nine? A. Yes, sir.

Q. The next year, 1960, how many did you have? A. Nine here. There would be nine here and ten here, because we eliminated "I" here.

Q. It is your testimony that in 1959, in the fall of the year, there were ten optional areas? A. Yes, sir.

[801] Q. And nine the following year? A. Correct.

The Court: There have been before Barrett was built ten, is that correct.

The Witness: That's correct, sir.

Q. Now, please move BB over and show BC. BC shows elementary districts the next year, does it not? A. 1961, that's correct.

Q. And you have shown in the usual form the changes since the previous year? A. That's right.

Q. And annexation? A. That's right.

Q. And annexation, of course, would be the same as shown on the secondary maps, would they not? A. Yes, they are, except they were specially assigned areas, so there were no arrows drawn.

Q. What do you mean by specially assigned area at the elementary level? A. Students living in this area, when it was annexed, were accommodated at the nearest school with available space, transportation provided.

Q. So that unlike at the secondary level, Mr. Hedley, the specially assigned areas will go to a number of different schools? [802] A. That's correct.

Q. And how many boundary changes were there effective in 1961? A. This would be considered three, two different schools.

Q. How many arrows do you have, is my question. A. Sixteen.

Q. In 1961?

The Court: There were sixteen at this place in that year?

The Witness: Yes, sir.

Q. And are they all over town? A. Yes, they are.

Q. And how many optional areas were in existence that year?

The Court: There had been ten the year before?

The Witness: Eleven this year. There were nine in 1960.

The Court: Nine?

The Witness: There were eleven here.

The Court: Two more created?

The Witness: That's correct. Well, actually, there were three, the Ashland-Columbia, Valverde-Barnum, and Lincoln-McKinley.

Q. And you have shown those new optional areas by underlining the legend? [803] A. That's correct, "J" being Ashley-Columbine and "K" being Valverde-Barnum and the Lincoln-McKinley being "L".

Q. So the new optional areas in 1961 you have not shown on the map proper but on the legend, is that right? A. That's correct.

Q. All right, let's go to BD. Exhibit BD shows elementary subdistricts in the fall of 1962, does it not? A. That's correct.

Q. And were there any annexations that year? A. The whole College View annexation, but the school was annexed with the annexation.

Q. The school came with that annexation? A. That's correct.

Q. How many arrows indicating changes do you have in 1962? A. Thirty-two.

Q. Are those all over town? A. Yes, sir.

Q. Were there any new optional areas created that year? A. No, sir.

Q. Optional areas that year are lettered and shown in the legend? A. That's correct, A, B, C.

Q. So that there were three optional areas that year?

The Court: Added to the others?

[804] The Witness: No, total of three.

The Court: Just a total of three?

The Witness: That's correct.

Q. And those three were where, Mr. Hedley? A. A was optional between Harrington and Columbine; B between Park Hill and Stedman; C between McKinley and Lincoln.

Q. All right, and those optional areas are generally in all parts of town? A. Yes, north and south.

Q. All, right, let's move on to BE.

The Court: Where did you say they were, just two in northeast Denver?

The Witness: A, B and C, north and south.

The Court: Okay, go ahead.

Q. Now Exhibit BE shows elementary subdistrict boundaries, September, 1963, does it not? A. That's correct.

The Court: This is BE?

Mr. Creighton: Yes, Your Honor.

The Witness: BE.

Q. And in the legend do you show the optional areas? A. Yes, optional A, B and C again.

Q. Same three from the previous year? A. Same three from the previous year.

[805] Q. Were there annexations that year? A. Yes, this West Bear Valley, Bear Valley Heights, Centennial Estates, or Centennial Acres, this, south and north, and this.

Q. Again, those were assigned to various schools and transportation was used? A. That's correct.

Q. To provide them with the schools? Does that show just one boundary change? A. One boundary change here. It was from Eagleton to Barnum, south of 6th Avenue.

Q. And west of the Platte River? A. That's correct.

Q. All right, the next map is BF. Mr. Hedley, this shows elementary subdistrict boundaries, 1964. A. That's correct.

Q. And do you show in the usual way your boundary changes and the new boundaries? A. That's correct.

Q. Would you please count the number of arrows indicating separate boundary changes? A. Nineteen.

Q. Are you including those in the south part of town? A. Excuse me, 21.

Q. All right, and those changes occurred in the north [806] part of town and the east part of town and the south part of town. A. That's right.

Q. Finally, BF. A. This is BF.

Q. Let me ask you about optional areas, Mr. Hedley. The legend doesn't show optional areas. This is 1964? A. That's correct.

Q. Were optional areas done away with? A. They were all assigned to specific schools.

Q. And the same thing happened at the secondary level that year? A. That's correct.

Q. All right. that's the last of your elementary series.

* * * * *

[840] * * *

GEORGE L. BROWN, JR., a witness called by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Greiner:

The Court: Please give us your name and address.

The Witness: George L. Brown, Jr., 3451 East 26th Avenue, Denver, Colorado.

By Mr. Greiner:

Q. Mr. Brown, when did you move to Denver? A. June of 1950.

Q. Subsequent to June of 1950 were you employed by The Denver Post? A. I went to work for The Denver Post in June 1950 as a staff writer.

Q. Can you describe what you did in that capacity? A. My first duties as a staff writer for the Post involved a series of surveys and studies of both the minority [841] and the majority communities to make some determinations of racial attitudes; whether or not there was a feeling of racism in the majority communities, and what the minority communities believed about the majority and what sort of attitudes generally there were in the total community.

Q. You wrote a series of articles? A. Yes.

Q. When were those articles published, do you recall? A. First series in 1951; another in 1952, '53, '54, '55, and then skipped a couple of years, in 1957.

Q. Now, in June of 1955 did you assume political office? A. Yes, I was appointed to the House of Representatives in June of 1955.

Q. What area did you represent? A. At large. The total community of Denver.

Q. Then did you subsequently run for election to the House of Representatives? A. No, I ran for election to the State Senate in the primary in September of 1956. And then was successful in the general election to the State Senate in November of 1956, again, elected at large from throughout the city.

Q. Then have you subsequently run in subsequent elections for the Senate? A. I was re-elected at large in 1960;

elected in 1964 from a district of northeast Denver without opposition in [842] either the primary or the general, and re-elected to represent that same general district in 1968, again without opposition.

Q. Now, in the course of your political representation, Senator Brown, have you had occasion to meet with members of the black community? A. Yes, on numerous occasions.

Q. Have there been any major issues which have come to your attention from the black community? A. I think the primary concern throughout my whole political career and also during the time that I was writing for The Denver Post, in the black community was the availability and opportunities for an equal education experience for black youngsters. This has always been in my opinion the primary concern. We had occasions when we talked about housing and about employment, but also the main issue running through it was education.

Q. Now have you had or do you not have children in the Denver Public Schools? A. Yes.

Q. Can you describe where those children went to school? A. My first daughter attended school first at Wyman when we lived at 1870 Vine. We moved to 3120 Steele Street in 1957. My daughter attended a few days at Columbine and then since we lived in an area that was an optional for Columbine and Park Hill, she started being bused to Park Hill. [843] She then attended for a brief period of time school at Whittier and then at Smiley, East High School, and now in college.

The other youngsters, one of them started at Barrett and went there two years and then was transported by bus under the open enrollment to Carson School. The next

youngest attended both Barrett and Carson. And the youngest has always attended Carson.

[844] Q. That was under, first, limited open enrollment? A. First, limited open enrollment, and then under the voluntary open enrollment, and then this year under whatever they call this scheme.

Q. Now did you participate, Senator Brown, in any of the discussions surrounding the proposed boundary changes between Manual and East High Schools in January and February of 1956? A. Yes.

Q. Can you tell us, Senator Brown, what the attitude of the community was toward Manual when first opened in 1958?

Mr. Brega: I am going to object to that as calling for speculation and conclusion of the witness, Your Honor.

The Court: I am inclined to agree. I don't know how he can sum it up in that manner.

Mr. Greiner: Well, Your Honor, I think—

The Court: It is conclusory. He is not really giving his observations. If he wishes to relate any particular conversation for circumstantial value, why, he could do that.

Mr. Greiner: Well, Your Honor, I think that there are two points here. One is that I believe the foundational questions have established that this witness has been intimately involved in knowing and receiving the views of his constituents, even, first of all when he was gainfully [845] employed as a reporter. That was his job, to go out and seek what the community was thinking.

Secondly—

The Court: Does this pertain now to the boundary changes?

Mr. Greiner: Yes, Your Honor.

The Court: Only?

Mr. Greiner: And what we will establish, Your Honor, I think, is a clear exception to the hearsay rule, because what we seek here to establish is a state of mind.

The Court: Oh true, if you have got the conversations, but this is second degree or three degree hearsay, because he is seeking to sum up a community attitude, you know, himself, and give it to us, and it is a time of evidentiary matter that can be absorbed by any lay person. And so I think he ought to give us the details, rather than his own conclusions as to results of his survey.

Mr. Greiner: All right.

Q. Senator Brown, you recall when the new Manual opened in 1953? Did you have any discussions with members of the black community? A. Yes.

Q. Which revealed their attitudes toward the new Manual? A. Yes, a number of discussions with various people, who had at that point great pride in the fact that Manual was—

[846] Mr. Ris: Just a moment, if the Court please, I think the answer is becoming nonresponsive, and he is again drawing generalities as to what the various people may have said. We will object to it on that ground.

The Court: Well, we have had some evidence that there was a great deal of pride in the building

of this new building and hope and aspiration with respect to its becoming a good educational institution. I don't know who gave it now, but I think we did have some.

Mr. Greiner: I think it is also in the exhibit entitled, "The New Manual," Your Honor, which is in evidence.

The Court: So, he may go ahead so far.

A. (Continued) Numerous discussions expressing great pride in Manual and certainly the expectations of what it would become as an educational institution.

Q. What were the factors mentioned to you? A. Factors in regard to the pride and the reason why?

Q. Yes. A. A feeling that it was, one, a new facility, that it would encourage faculty persons from throughout the majority community to want to teach there. It would give the school administration an opportunity to better furnish a quality curricula. It would give an opportunity for the school administration to help build within the youngsters attending that school a kind of pride that hadn't always been there in [847] the past.

Q. Now, by January of 1956, Senator, had you had any further conversations regarding the new Manual, and, if so, what did they indicate?

Mr. Ris: Object.

Mr. Brega: Object.

The Court: Sustained; you are going to have to get more definite than that if it is going to be of any value to us.

George L. Brown Jr.—for Plaintiffs—Direct

Q. Senator Brown, did you in fact have subsequent conversations regarding the community's attitude toward Manual? A. Yes, in January of 1956, there were a series of meetings in the black community, where persons were expressing concern that Manual was not living up to what had been expected, that in fact the school administration by the drawing of boundary lines was tending to make Manual exactly what it wasn't hoped that it would be. We met in a series—like I say, a series of sessions. On January 10, 1956, a group of state representatives met, after having learned that the school administration had planned some boundary lines for Manual and East and Smiley and Cole, which is our opinion would have two effects of segregation. It would affect the—it would segregate the black students in Cole and Manual, segregate the white students in East and Smiley.

Q. Did the representatives—

[848] Mr. Brega: Just a minute. Your Honor, I move the answer be stricken on the objection previously made that it is a conclusion of the witness and speculation.

The Court: Overruled.

Q. Did those representatives subsequently write a letter?

The Court: You mean state representatives?

The Witness: Yes, sir.

Q. Subsequently write a letter addressed to the Denver School Board, Senator Brown? A. Yes, sir.

Q. I hand you what has been marked for identification as Exhibit 338-A, and ask you if you can identify that as

the letter written. A. Yes, that is the letter that was written by us and signed by us, addressed to Mr. Isadore Samuels, who was then president of the Denver School Board.

Mr. Greiner: Your Honor, we offer Exhibit 338-A.

The Court: Have counsel seen it?

Mr. Greiner: Yes.

Mr. Ris: We agree to the authenticity of that.

The Court: May I see it, please? Do you object to it being received in evidence?

Mr. Ris: No, sir.

The Court: All right, it will be received.

[849] (Whereupon, Plaintiffs Exhibit 338-A was received in evidence.)

Q. Senator, there is in evidence Exhibit 338. Was Exhibit 338 written is response to Exhibit 338-A? A. Yes, it was, and addressed to me, signed by Mr. Frank A. Traylor, who was vice-president of the Board of Education at that point, who indicated that he was responding to the communication from us because of the illness of Mr. Samuels.

Q. Now, you mentioned a concern about this proposed boundary change, Senator Brown. What were the factors which you were considering personally? Were you making any comparison at all, for example, between Manual and East?

The Court: Are you going to introduce this other one?

Mr. Greiner: It is in evidence, Your Honor.

The Court: Oh, is it ?

A. I am sorry?

Mr. Greiner: Read the question, please.

Mr. Ris: It is a leading question. Could we have it rephrased, please?

Q. Senator Brown, what factors were you considering, if any, with respect to the comparisons between Manual and East? A. Yes, we have looked at the fact that Manual had not [850] received the more experienced teachers, as had been hoped. The quality of the curricula had not improved in comparison with other high schools. The dropout rate was still high and declining. Even the name had its negative connotations, and there was a strong feeling in the black community that Manual was being regarded by the Administration as a substandard secondary type school, that the quality schools were in the other parts of the city, and that comparison seemed to stand out very markedly when you looked at Manual and East.

[851] Q. Now, what then was the concern, Senator Brown, about a proposed boundary change between Manual and East? A. We had looked at Manual when it was called new Manual and had watched the drawing of the new boundary line about a block east of the school and had recognized that this took into no consideration the fact that Manual was not going to be filled to capacity when East High School to the east and south was already at a hundred percent capacity. It said a lot of negative things to the black community. It said here, that that was an effort to make sure that Manual remained the black

school and that as few as possible numbers of black children would be admitted to East.

Q. Now, that was in 1953; is that correct? A. 1956.

Q. When Manual opened— A. 1953, yes, when they established the boundary. Then in 1956 the new drawing of the boundaries was only a few blocks still to the east, obviously with no regard to the very factors that Mr. Traylor had listed in his letter as to the reasons for the drawing of the boundaries.

Q. Do you recall what the north-south street was at which the eastern boundary was proposed? A. York.

Q. Do you recall whether or not, Senator Brown, there was any dividing line at that time between the white and black [852] communities? A. Yes, and this gave us added support to our feeling that it was an obvious effort to keep Manual as a black school.

Q. Where was that dividing line? A. About York Street. There were very few families east of York at that period of time, although it was an indication that the black community was moving that way and indications to us that the line would be expanded as the black community filled in those neighborhoods.

Q. Now, where were you living at the time of the proposed boundary change? A. In 1956 I was living at 1870 Vine.

Q. And that is an area southwest of City Park? A. Yes, southwest of City Park.

Q. Was that an optional area, do you recall? A. Yes, and much to my concern, so much that I expressed it to Dr. Oberholtzer—

The Court: Optional in what respect?

Q. Between what schools? A. Optional, that youngsters could go either to East or Manual High Schools.

And, I expressed a concern because in that same optional area which was drawn in as an old box, the only two black elected officials in Denver lived there. And it said to us that they were saying to the black community, "We're [853] going to fix it so that your elected officials can escape from what we consider obviously a bad—"

Q. Who was the other elected official? A. Mr. Elvin Caldwell who lived at 21st and Race; city councilman.

Q. Now, did you attend any meetings, Senator Brown, first of all, in the black community— A. Yes.

Q. —where alternatives were discussed as to the then proposed boundary change? A. Yes, a series of meetings in the black community in early January. I attended a meeting at the Glenarm YMCA where we invited members of the School Board and School Administration to attend to give us first hand the kinds of things that Mr. Traylor later said in his letter and also to allow us to present the alternates that Mr. Lorenzo Traylor and Mr. Lajean Clark had drawn up with quite a bit of work and time.

Q. Do you recall what those alternate proposals were? A. Yes, it was to extend Manual east, north of City Park.

Q. That would be east of York Street? A. Yes, over to Colorado Boulevard, at least, and maybe even further. The logic was that the bus lines that ran from that direction all went down west right past Manual. The only bus connections to East at that period of time were [854] either you went to Colorado or you walked over to 22nd or you went to York and you transferred in both cases. It just seemed logical that the flow of traffic and the movement of people would have been from that direction into Manual. It was also shorter than over to East. The ob-

vious reason for not drawing it was that the families that lived in that area then were predominantly white.

Q. What, if anything, was discussed concerning the capacity utilization of the two schools? A. It was pointed out that even in 1956 Manual still was under capacity and East was over, and that the optional areas and everything did little or nothing to improve that situation. Yet, in his letter—the letter from Mr. Traylor—he had indicated that the lines were drawn because of the overcrowding of some schools and the availability of room in others. And this line didn't fit either requirement.

Q. Now, do you recall then a meeting that was held in the cafeteria at Manual High School? A. Yes.

Q. When did that take place? Can you place it in point of time, for example, with reference to Exhibit 338-A or 338? A. Around—I'll have to think through this now. It was prior to—No, it was after the letter. After the letter.

Q. After you had written the letter A. Yes.

[855] Q. Was it after you had received the response which is 338-A? A. Yes.

Q. Was it still in the month of January, do you recall? A. Yes, still in the month of January, and the Board had not taken any action in one way or the other in regard to the boundary lines.

Q. Now, there was a Board meeting on January 18th of 1956, as I recall. Is it your recollection that it was prior to that meeting? A. Yes.

Q. Now, do you recall who was present at that meeting? From the School Administration? A. Mr. Peter Holms. I don't remember whether it's doctor or mister Henderman; Dr. Oberholtzer; Frank Traylor. I don't remember

what other school administration people were—I think there were some.

Q. Was Lorenzo Traylor at that meeting? A. Lorenzo Traylor and Lajean Clark, both with very elaborate sets of maps that made a lot of sense.

Q. Were you present at that meeting? A. Yes.

Q. Can you describe for us what occurred at the meeting? First of all, how many persons were in attendance? A. Oh, several hundred. I can't remember the exact [856] figure anywhere close. The cafeteria was filled with persons from the black community who were obviously concerned and felt that the school ought to do more consideration before adopting the proposal that had been given to the School Board by the school administration.

Q. Did the members of the school administration explain the reasons behind the proposed change? A. Yes.

Q. What did they say, do you recall? A. They used the same kind of reasoning about long-term considerations when drawing their plan; that they had to look to the future; they had to look to what the future population and the student population and the like, and where they might be able to place schools in order to come up with their lines. And it completely wiped out any thought about looking at the situation as it then was and then—and trying to do some things that made a lot of sence for the youngsters who were in school right then.

Q. Well, in the long term as they described it, did they project that Manual would be filled to capacity? A. I'm sorry. I don't recall.

Q. Anything else that you recall from that particular meeting? A. A number of us went from there with the strong belief that once again the school administration

and the School Board [857] had demonstrated beyond doubt that there was little concern about drawing any kind of pattern then or in the future that would help create an integrated school situation in Denver.

Q. Now, did you subsequently then attend a meeting at the Administration Building? A. Yes.

Q. When did that meeting take place? A. A few days after the one at Manual. I met with some of the same people and I think Lois Heath was also at that one.

Q. She was a member of the School Board? A. A member of the School Board. And, once again, we went away with the same feeling; that we were wasting our time and that some people would be a lot happier if we just decided to give up and not come back. It was also during that series of meetings—a clear indication to me that the School Board wasn't about to do anything until as late as possible in that school year, recognizing that whatever the community could muster by way of disagreement with what they would do, would probably die out over the summer months since the School Board went into recess and wouldn't meet again until sometime in September.

Q. Now, during this same period of time—and by that I mean January, February, March of 1956—were there meetings taking place in the black community? [858] A. Throughout the black community, and as more and more—

Q. Did you attend those meetings? A. A number of them. As more and more people because aware of what was happening and aware that their dreams for Manual certainly were not going to be realized, and I think a lot of us reached the same position that I had, that selfishly we had to come up with a plan that would bring white

youngsters into Cole and into Manual or else there would never be a quality education program there. We could talk about it and work for it but until there was some incentive for the School Board wanting to do something about it and put money in facilities and whatever else is necessary—needed for a quality program, that they would never do it unless we were able to mix the youngsters of all colors.

Q. Why did you equate the presence of white youngsters with quality education? A. At that stage of the game I had not had the benefit of having attended several conferences where I later learned from experts in the field. But, at that stage it was strictly selfish. I felt that if black youngsters were to get a full opportunity for an equal educational experience, that the only way they would get it would be that there would be white youngsters there who would be taken care of and as a result of them being taken care of the black youngsters would also have the same opportunity of being taken care of.

[859] Q. Now, during that same period of time, Senator Brown, were you aware of any change in attitude with respect to the realtors who were selling property in that area? A. Yes.

Q. Did you receive a telephone call? A. A number of telephone calls.

Mr. Brega: Just a minute. I am going to make a preliminary objection, Your Honor. I believe the question itself calls for a hearsay answer.

The Court: Well, he said he received a phone call. We can go on and check it out a little further at least, and see what he's getting at.

Q. You said you received a series of telephone calls? A. Yes, we lived at 1870 Vine. We were the first black family to move into that neighborhood. And shortly after we moved in we started receiving calls from realtors, people from real estate agencies indicating to us—

Mr. Brega: Just a moment, Your Honor. I'll object to any conversation on the other end of the telephone call.

The Court: What do you propose to show?

Mr. Greiner: I propose to show, Your Honor, that at the time these boundary changes were being discussed in the community, that the real estate activity was such that realtors were calling people living in that neighborhood, including Senator Brown, who they didn't happen to know was black, and [860] encouraging them to leave the neighborhood because it was going to be the next target of Negro migration.

Mr. Brega: Well, there is additional objection besides being hearsay—you can't presume that upon the School Board.

The Court: Quite true.

Mr. Greiner: This is simply to give the background—

The Court: I don't believe they are trying to do that.

Are you?

Mr. Greiner: No, Your Honor. Simply—I think it might help the Court in understanding what was going on at that time, what the total picture was.

Mr. Ris: May we join our objection with the intervenors. This is wholly irrelevant.

The Court: Sustained. I feel it is somewhat remote, quite apart from its general and conspiracy quality. And I think also that the evidence is fairly well established that this migration occurred, and when it occurred, and I think it was very apparent that—to everyone in the community, what was going to happen. So I don't think—I don't see that it needs any—

Mr. Greiner: We only offer it, Your Honor, for the point of proximity and for the inference of there in fact being a causal relationship between what the School Board [861] does vis-a-vis boundaries and how that affects the affected community.

The Court: Well, I think—he could testify to what was actually occurring in this community that he has just described, what he saw. I see no reason in objecting to that.

Q. Senator Brown, what in fact was happening in this neighborhood? First of all, I believe you have said you were the first Negro family in that area? A. Yes.

Q. And what happened subsequent to the boundary change? A. More black families moved in. The population at Wyman, which was the elementary school in that area, began to change. The boundary lines in fact were later expanded to put that area into Cole and Manual, even more so. Until finally—

The Court: I think he was really directing his attention to Vine Street, for example,—Why did the white residents start moving out.

The Witness: Yes.

[862] Q. Between Vine and York, essentially? A. Yes.

Q. Then, as I understand it, Senator, in June of 1956, the boundary change was passed, is that correct? A. Yes.

Q. Did you have any meetings with members of the black community to discuss the fact of the change? A. Yes, and, like I say, it was during a period of great frustration and concern, even more so, if that were possible, that the school board had demonstrated again that there was no concern for our feelings or for our desires for integration.

The Court: Let me ask you this, in 1956, prior to January of '56, you had this optional area with the East High-Manual area?

A. Yes, sir.

The Court: What was the effect—and that was eliminated, I assume, by the school board?

Mr. Greiner: Your Honor, I think it might help if he were to identify on Exhibit 204 the optional area where he lived and which he had reference to.

The Court: Well, what I was interested in knowing was whether the elimination of this optional area affected the composition of Manual in any degree.

Mr. Greiner: Well, I think—there are two [863] optional areas, Your Honor.

The Court: Could I ask him, please, about this one particularly?

The Witness: What was the question, Your Honor.

The Court: Whether the elimination of this optional area between East and Manual affected the composition of Manual at all?

The Witness: It merely made it that much more black and it—like I said earlier, the interesting thing is they moved from this one to wipe out this area in here, which had become predominantly black, as optional, so that those youngsters went to Manual. They somehow left this little square—

The Court: Where is that now?

The Witness: And that's the square that goes between 21st, York—and it goes over to Franklin, and there were white families still living in that little square, plus, as I said, the only two black elected officials lived in that square, and—

The Court: That continued to be optional?

The Witness: That continued to be optional, but the other areas that had been wiped out as optional now became predominantly black and now became all Manual, rather than as before optional between the two schools.

The Court: Well, what it resulted in was that [864] certain students who had been going to East had to go to Manual?

The Witness: Some black students who had been going to East now had to go to Manual, and the result was that it still maintained the option for those youngsters who lived north of City Park, who were predominantly white.

The Court: But none of them attended Manual?

The Witness: None of them had attended Manual before. It just gave them the same opportunity.

Q. The optional area, Senator Brown—

The Court: Well, you are not saying that the elimination of the optional area had any significant

effect as far as segregation is concerned? It just was a demonstrated attitude?

The Witness: Demonstrated an attitude and, yes, it did further segregate youngsters, because the youngsters who lived in the area optional before could have gone to East and had a more integrated situation. Now they had to go to Manual, which was not integrated to any degree at all.

The Court: All right, go ahead.

Q. Did you subsequently move from your Vine Street address? A. Yes, in about 1957, we moved to 3120 Steele.

Q. Do you recall what elementary school subdistrict that was in? [865] A. We lived in the optional area for Columbine and Park Hill. The line for Columbine was down the middle of Steele Street and the area east of the line was optional between the two elementary schools.

The Court: Between Columbine and what other?

The Witness: Park Hill.

The Court: Park Hill.

Q. Do you recall what the racial composition of your neighborhood was at that time on Steele Street? A. On Steele Street it was integrated. We were the first black family in the 3100 block. There were black families on the west side of Steele. There were black families living in other areas around us, but as far as our own block, we were the first family into that particular block, and the area was at that point still a number of white families.

I can't tell which was more predominant, but there were still a number of white families with children living in that area.

Q. Do you recall what the racial composition of the neighborhood was immediately east of Steele, say, between Steele and Colorado Boulevard? A. Predominantly white.

Q. Now, this then was an optional area between Park Hill and Columbine? [866] A. Yes.

Q. And do you recall what the racial composition of Columbine was in 1958? A. I don't have those figures, I am sorry.

Q. Do you recall what the racial composition of Park Hill was? A. I can tell—I can say that both schools—that Columbine was predominantly black and Park Hill predominantly white. I don't have the percentages.

Q. And did you have a daughter who was then attending elementary school? A. Yes.

Q. And what elementary school did she attend? A. She went a few days to Columbine and then was bused to Park Hill.

Q. How long did that busing continue, do you recall? A. I suppose until Barrett was constructed and opened. I am not sure.

Q. And that was in 1960? A. Yes.

Q. And then she was assigned to what school? A. To Barrett.

Q. Now, Senator, were there any discussions in the black community concerning the location of the new elementary school which ultimately became Barrett? [867] A. Yes, a number of discussions, because the location—

Q. Pardon me, but when did these first begin to take place? A. In 1959 when we first learned of the school's plans to build Barrett and possibly build a junior high just north of Barrett.

Q. And this was at what location? A. Barrett at 29th and Jackson to Colorado, and the junior high was proposed over on a section of land that was closest to 32nd and Colorado.

Q. All right. What was discussed at these meetings concerning Barrett? A. The size of Barrett indicated, and it was smaller than other elementary schools that were being put up at that time, the size indicated to us that Barrett was going to be predominantly white from the day it opened.

Q. Predominantly white? A. I mean black. I am sorry. From the day it opened. Its eastern property line became its boundary line, and that was Colorado Boulevard. The area that was proposed for it and finally became its area was predominantly black. It was just obvious from the beginning that it was to be another black elementary school and that there would be little or no effort made to draw a line that would draw from its enrollment of white students who lived on the other side of [868] Colorado Boulevard.

Q. That would be on the east side? A. East side of Colorado Boulevard.

Q. Were these concerns made known, Senator, to the school administration? A. Yes, a number of times.

Q. How? A. The meetings with Dr. Oberholtzer, those persons on the staff who had charge of drawing boundary lines, with members of the school board.

Q. Do you have any particular recollection of any meetings which you personally participated in? A. Yes, one in the basement of Lajean Clark.

Q. Was there a representative of the school board there? A. I don't remember.

George L. Brown Jr.—for Plaintiffs—Direct

Q. Do you recall attending any meetings of the Board of Education? A. Yes, a number of meetings during that period.

Q. Was Barrett a subject of discussion in those meetings? A. Barrett was a matter of discussion and usually Mr. Clark very eloquently pointed out all our feelings about what was being planned.

Q. What was the response of the board?

[869] Mr. Ris: Do you have some idea—we are talking now about a two-year period, and we would object unless there is some identification of the period.

Q. Can you identify approximately when these meetings took place? A. Oh, in the fall of '59.

Q. Do you recall how long the subject of Barrett was under consideration by the school board? A. I don't.

Q. I am sorry, I believe you were interrupted, Senator. You were describing what the administration's response at these school board meetings. A. The response was that they couldn't go across Colorado Boulevard because it was a busy thoroughfare. The response was that they had to look at the immediate situation and they had to draw lines to take care of that immediate situation, and, therefore, Barrett was being established and built where it was to handle the immediate situation, which was a complete reversal from what we had been told back in 1956 when they were drawing boundary lines and considering the schools, because at that stage they were telling us that everything had to be a long-range view and that they had to look to the future and it was just—well, as far as we were concerned, a lie, and once again a

demonstration that there was no concern for the real problem.

[870] Q. Did you say, Senator, that the question of Colorado Boulevard as the boundary line was discussed? A. Yes, it was.

Q. And what alternate or alternative, if any, was suggested by the black community at these board meetings with respect to where Barrett's boundary line was to be established? A. Well, first of all, we questioned whether or not Barrett should be built there at all, and then we said, "If this is the case and you have got the land purchased and plans under way, then you should draw the boundary lines of the school on purpose to make it an integrated school on opening day." This was not done.

Q. What would that have required in the way of eastern boundary line for Barrett? A. Some areas across Colorado Boulevard, to the east.

Q. Do you recall, Senator Brown, when the school board published for the first time comparative data on achievement levels in the various Denver Public Schools? A. Yes, I do.

Q. Where there any discussions in the black community concerning the reported achievement levels in the black schools? A. Very much, because the—for the first time, it showed that we had been saying and what we knew would—in fact, we didn't need studies to tell us—is that the [871] black schools were not of the same quality as the white schools, that the teaching, the facilities, the whole ball of wax just wasn't up to par when compared with what was happening in other parts of the city.

Q. Now, do you also recall, Senator, the fact that in about 1964 the school administration began placing mobile units in the schools at Northeast Denver? A. Yes.

Q. Did you participate in any discussions concerning the placement of these mobile units? A. Yes.

Q. When did these discussions take place? A. I think the first mobile units were proposed in March of '64 or were put up in March of '64. At that stage there were none in Northeast Denver. Plans were revealed early that spring about putting some mobile units in Northeast Denver, starting in September, and I think in September of '64 there were roughly—I think there were about twelve throughout the city and eight of them were then in Northeast Denver. This showed us that the school administration was doing its darndest to make sure that space was made available for black youngsters in Northeast Denver, rather than using transportation or what have you as they were using in other parts of the city to take care of youngsters who were already overcrowding facilities or facilities where there were no [872] facilities. At that stage, the black community was reaching that position where we felt that maybe we ought to possibly go along with things like this.

Q. Things like what? A. Efforts to try to improve the number of spaces in the community, once again holding out the hope that with these there would come the other things that go for quality, that maybe we wouldn't have integration because that appeared to be a losing fight, but that we could come up with enough good services, good facilities, good teachers, do away with the teachers that were expressing feelings of serving their time in the Northeast community, that we could do something about the dropout rate, we could do something about bettering the achievement test scores and the like, and certainly hoping to do something about the environment in those

schools, which at that stage was very poor, for a youngster wanting to achieve and wanting to grow in maturity.

Q. Senator, at that time was this feeling in the black community which you have just described uniformly held? A. What do you mean by uniformly? You will have to define that.

Q. Were there any other views in the black community concerning these mobile units? A. Yes, there were obviously people in the community still holding out for integration, still hoping that the [873] fact that there was good faith and nobody was saying that mobile units were a good substituted for good adequate classroom space, but if we didn't get the mobile units maybe the school administration and school board would be forced to do the kind of things which would move those youngsters into situations which would then automatically achieve a better integration in the total system.

Q. What kind of alternates then were those people seeking? A. Transportation, obviously, as a means, and I think as probably the only means—well, not the only, because we were also then talking about some redrawing of boundary lines, which would also have the same effect between schools that were on the fringes of the black community, and in those two strips, hoping to bring in effect more integration.

Q. Now, you will recall also, Senator, that the policy of limited open enrollment was implemented in 1964. A. Yes.

Q. Now, do you recall any discussions in which you participated concerning the community's reaction to limited open enrollment?

Mr. Bis: If the Court please, we are going to object to this. He has already indicated on this

other matter that there were varying opinions and various thinking by the community, and I think the Court can even take judicial notice [874] of that, and unless we get into the various categories of opinion held by the community, I don't think it is proper or right for this man to attempt to say that there was one expression or one feeling within the community that applied to everything there. It just isn't the facts of life.

Mr. Greiner: Well, Your Honor, I believe that would be an appropriate subject for cross-examination, if counsel thinks there was a division in the Community.

The Court: I think it is pretty difficult for him to just generally paint a picture of what the reaction was. It puts them at a disadvantage in terms of cross-examination.

I would suppose that only a few really saw the significance of it, anyhow, and perhaps analyzed it to a degree that they saw some infirmities and limitations. I mean, I just don't see where it has much probative value.

If he could describe what he observed, what he saw, what the system undertook to do and what it failed to do, he could do that as an observer.

I think the objection is it is an effort to psychoanalyze the community at any particular time, and say, "Well, this was their attitude," you know. Who can do this?

And it is not competent evidence.

Mr. Greiner: All right.

The Court: And in this kind of a case, I think [875] there should be some liberality about receiving it. You know, I don't think we ought to have a

strict adherence to the Rules of Evidence and I have indicated that, but it is kind of difficult to justify receiving evidence which is of this type.

Mr. Greiner: Fine. We can certainly take that route, Your Honor.

The Court: One witness says, "Well, this is the community attitude." I would suppose that, if it is like many other community attitudes, and I'm not referring to the black community, the vast majority of the people don't have any attitude at all. They just kind of—until it becomes more acute and starts hurting them, they just are kind of—you do have the vocal minority. They have viewpoints, because they are interested. That's about how it works ordinarily. I don't know. I would suppose that is about the same here, maybe.

Q. Senator, did you have occasion to observe after limited open enrollment was implemented, first of all, what was happening with respect to Negro participation in the limited open enrollment program? For example, did you yourself participate in it? A. Yes, the limited open enrollment started in 1964, at about the same time that the school board eliminated all optional areas. It then became a vehicle for allowing two [876] things to happen, neither of which called for or had anything to do with integration.

Mr. Brega: I am going to object to this, Your Honor. There hasn't been any foundation laid that he has any knowledge other than his own particular case. If he is going to try to summarize—

The Court: He has been making surveys all these years. That's how I think he can describe what he

saw, and he has been vitally interested in it. He is a community leader. I don't see why he can't tell what he observed.

The objection will be overruled. Go ahead.

Mr. Ris: May I join in that objection and also point out to the Court that his own testimony was that his last survey was 1957, and this is some seven years later?

The Court: Well, he didn't say he retired from interest in it at that point? I didn't notice that he did.

Anyway, we will note your objection. Go ahead.

A. (Continued) Still remaining a member of the black community in 1964 and still an elected official, at that stage still a writer for the Denver Post, I saw that many white people were using limited open enrollment as a vehicle of escape. They may then have lived in a district or a neighborhood where there was a predominantly minority school, but they could use limited open enrollment to transport their youngster to a school far removed from that locality.

[877] It also had the effect among black families in that limited open enrollment, since the student had to furnish his own transportation, was restricted to those parents who could afford to send their youngsters, and this meant that if black families were to participate they had to fall into that middle income, more affluent category. The youngsters from the poorer families were then forced to remain at the all-black school, so, in effect, this further diluted the population or the enrollment of the black school, in that you then not only had youngsters being segregated by color but also for a large degree by economics, and it, in my opinion and obviously from the results, showed that those schools were that

much worse off than they had been before limited open enrollment was started.

[878] Q. Now, did you also have occasion—You may recall, Senator Brown, that the program of voluntary open enrollment was instituted, I believe it was in January, 1968. Did you have any occasion to observe the operation of the voluntary open enrollment program? A. Yes. I had had an opportunity in 1967 to attend a race and education conference in Washington, D.C., sponsored by the U.S. Civil Rights Commission, and talked with school representatives from other cities that had started voluntary open enrollment plans and had listened to how their administrations had done positive kinds of things in working with the families in the minority areas; working with the families at the receiving schools; working with teachers at the receiving schools; working with the students at the receiving schools; counseling and the like. None of this was really done in Denver.

There was no encouragement. In fact, a number of parents were counseled against taking part in the voluntary open enrollment—

Mr. Brega: I'm going to object to that and move that it be stricken unless he was present or can show some basis for having this knowledge other than hearsay himself.

The Court: He said he was there, didn't he?

The Witness: Yes, parents were talking to me at this stage.

[879] Mr. Brega: That's what I object to, Your Honor. Unless he was there—

The Court: What is this leading to? That's the important consideration, I suppose.

Mr. Greiner: I think the question, Your Honor, really goes simply to the administration's support or lack of support for its own program of voluntary open enrollment; what the administration did and did not do with respect to the implementation of voluntary open enrollment, and my next question would bring out that the witness—

The Court: Where did he get the information? From what he saw?

Mr. Greiner: Well, the information on the possible program came from this conference which the witness has described which took place in Washington.

The Court: True.

Mr. Greiner: My next question will establish that these ideas were then presented to the school board.

The Court: All right. Go ahead.

Q. Have you finished describing, Senator, the types of supportive programs which you learned about in the Washington, D.C. conference? A. With the exception of one other. We were told that where those schools had community relations divisions, those divisions were strengthened; the persons working in those [880] divisions were given more authority to move into schools and to help in difficult decisions.

Q. All right now. Subsequent to your return from Washington—the Washington conference, Senator, did you have occasion to discuss what you had learned at the conference with represenatives of the school board? A. Yes.

Q. Can you identify for us when that happened? A. The spring—early in 1968. Mrs. Noel was there. Fred Thomas was there. And we discussed with—I can't remember exactly who all took part in all the discussions but I had

some discussions with Dr. Gilberts. I had one discussion with Howard Johnson. I was present when Mr. Thomas made some remarks before the school board. I'm not sure of the date of that.

Q. Would that also have been early in 1968? A. Yes, I'm sure it was.

Q. Well, in the course of these discussions, were the supportive programs which you have described, described to the school board? A. Yes. In fact, I brought back with me all the papers that had been presented there at that conference and I turned them over to members of the school board; asked that they read through them, and return them to me when they were finished. I know Dr. Amesse read them all. I don't [881] know who else on the school board took advantage of the fact that the papers were available and that they could have read them.

Q. Well, what was the board's response, if any, to your suggestions? A. There was no—nothing that I can testify to that was really done in that positive fashion to make this program a value—voluntary open enrollment work for integration. There were— In fact, I think the main thing is, it wasn't so much as what was done as what was not done at that stage.

Q. And then subsequent to the implementation of voluntary open enrollment, Senator, do you recall the circumstances surrounding the passage of Resolution 1520, 1524 and 1533, starting first with the passage of the Noel resolution? A. Yes.

Q. Now, did you have occasion to discuss with members of the black community the resolutions both—well, first, when they were being proposed? A. Yes.

Q. And what was the nature of these discussions? A. Some of the black community expressed great desire to give

the school administration one more chance at integration. There were others in the black community who had already fallen off of that wagon of reason and had [882] decided that there was no hope. But during that stage of the game they took the position that they would say nothing, hoping to give Mrs. Noel and members of the school board who felt likewise an opportunity to maybe get a positive program going.

Q. Now, were these the same attitudes reflected, if you know, Senator Brown, with respect to the school board election which followed the passage of these resolutions? A. Yes, the black community felt that two candidates were running in support of integration and decided that these would be the two candidates that they would support and endorse. Again, that faction of the black community that had given up on integration decided to remain silent, to give some support but not to do things that would cause the other side to have any kind of incidents or the like that they could use to first push their position. The election results showed overwhelmingly that the black community wanted integration because those two candidates carried very heavily in Northeast Denver.

Q. What then did you observe as the effect of the results of that election? A. For the first time in my residence in Denver, the black community responded more as a unit than ever before, feeling that, if there was to be anything done for their youngsters, they had better get out and make sure it [883] was done. For that vast number of people that Your Honor talked about earlier who fit into that category of apathy with little or no concern, began to come out in the black community and to stand together, and there were several thrusts then that were started: first, there were black citizens who felt that they had to

do something to demonstrate to the rest of Denver what they could have had had they voted for integration and transportation and whatever else was needed for it, and started putting together hopefully plans for what they called a free school, a school that could demonstrate what could be accomplished. The advantages of an integrated situation. Then there were those who felt that this took care of—and by the way, there were people working in all areas, too, then there were those who felt that this took care of only some of the youngsters, that the bulk of the black youngsters were going to be put into the neighborhood school situation There were going to be black neighborhood schools and that "we should do all we could to make sure that the facilities were at the toppest possible grade" That the teachers were the best possible teachers; that black administrators were used to the utmost in Northeast Denver, hoping to get as much as possible out of integrated—I mean out of neighborhood black schools

Then there was still a third thrust of those [884] citizens who felt that "Okay, you can go your way on those other two routes, but the only way that we can be assured of getting those things in our schools is outside the established system of a school board and a school administration, completely separated from the community" And they started working, hoping to bring about community control at those schools where there would be people elected to the school board in those vicinities There would be better utilization of parents in controlling what happened to their youngsters.

Then there was still a fourth thrust of those persons who said, "To heck with the whole system; to heck with their school building; the only answer for many youngsters today who are already forced out of the system is that we come up and create something that is not integrated; that is black—

that is black pride only." And these were the store front type operations.

In all cases, in all four cases, integration was not the outstanding factor anymore in the black community. In all cases they were hoping to build on a feeling of black pride and to instill a sense of wanting to achieve in black youngsters.

Q. After the election, Senator, can you say whether or not there remained from your observations and from your description of these four movements, did there remain any [885] longer an attitude in favor of integration? A. A very small part. I think the black community—those who doubted the existence in Denver of white racism no longer had such doubts. Those who felt, however, again the same feeling that a number of us had had many years ago, that the only way that those youngsters were going to get it was to be in a situation where there were white youngsters there, too, so that as an indirect benefit they could get it because it was given to the white youngsters. And then those that were holding out for integration and still saying that's the only way possible.

Q. Well then, Senator, you have been describing in your testimony a period which began in the early '50s and really ended in March or April of 1969. During that period of time do you recall any gestures by the school administration which in your mind demonstrated the administration's concern for the equal educational opportunities for minority children? A. Numerous indications of concern for white youngsters. I frankly cannot honestly point to any cases where the same concern was given to youngsters who were black or brown. No, I can't, not really.

Q. What about the three resolutions which were passed? A. Passed under duress; passed only after the black com-

munity, with a number of good white friends, standing and [886] demanding that noses be counted; passed even knowing that some members of that school board who supported it were going to probably suffer when they came up for reelection, as they did; passed at a time when there were obvious efforts being made to see what they could do even then to circumvent the results. Because, as plans were drawn to implement those resolutions, there were obvious shortcomings in them. For example, we went to Dr. Gilberts and asked that "If you're going to come up with a plan of integration under these resolutions, why not go to some school other than Barrett, because Barrett is located in a middle-class black community? Why, also, not include those youngsters who went to Gilpin?" And in this way, so far as we were concerned, have a more meaningful kind of plan for integration. So that, even though the school board passed the resolutions, I am not able to point to any real strong positive indication to the black community or those of the white community who favored it that this was the—what they really wanted to do.

Q. And then after the board election even those resolutions were rescinded? A. Yes. And it's during that same period of time when we asked about why not Gilpin. It's rather hard for those of us in the black community to accept what is told us as to the reasons why things aren't being done. We were [887] told that Gilpin could not be a part of a plan of integration because the school administration didn't have enough buses to transport those youngsters in a cross-transportation situation. We asked that they immediately go out and look to the private community, look to other areas for the possibility of leasing buses. So, if this was the only reason for not doing it, then maybe by leasing and purchasing and looking at the federal govern-

ment for buses, that maybe they could make the program that much more desirable for us.

We were told in a few days that this wasn't possible; that there just weren't any more buses available in Denver.

I was very interested to read after someone unfortunately burned buses, that they could find 23 in the community to take up for that lack.

Mr. Ris: Objection. This has no significance to this.

The Court: Sustained.

Mr. Greiner: We have no further questions.

* * * * *

[980] * * *

Lois Heath Johnson, called as a witness by the defendants, being first duly sworn, on her oath testified as follows:

The Court: Take the witness chair, please, and please state your name and address.

The Witness: Lois Heath Johnson, 1955 Glencoe.

The Court: You may proceed.

Mr. Ris: Thank you, sir.

Direct Examination by Mr. Ris:

Q. Mrs. Johnson, we have to establish a few things for the record that we can see. You are the Anglo or white race, are you not? [981] A. Yes.

Q. And do you have any objection to telling us how old you are, please? A. Sixty-four.

Q. Prior to being known as Mrs. Lois Heath Johnson, were you known as Mrs. Lois Heath? A. Yes.

Q. Under that name, were you a member of the Board of Education, School District No. 1, Denver, Colorado? A. I was.

Q. Did you go to school as a youngster in Denver? A. Yes.

Q. What school did you go to? A. Well, I went to Broadway Latina School, which has long been gone, and I went to Thoren Gove Junior High School and South Denver High School. I graduated from there.

Q. You graduated from South High? A. Yes.

Q. Did you have a college education? A. I went to the University of Denver and graduated there.

Q. In what year, with what degree? A. 1927 with a A.B.

Q. What was your major and what were your minors? A. I had a double major, one in sociology and one in [982] English. History was a minor.

Q. Following your graduation, were you employed? A. At the Colorado General Hospital.

Q. What did you do at Colorado General? A. I was a medical social worker.

Q. Over what period of time? A. Approximately three years.

Q. Could you outline your history since then as to what you have done outside of the home? A. Well, I left Colorado General Hospital upon my marriage and when I had a family I was not a full-time worker at any time, but I did volunteer social work straight from that time and through World War II. During World War II I was at American Red Cross in charge of the volunteers in what was then called The Home Service Department.

Q. Is that the Denver Chapter of the Red Cross? A. The Denver Chapter. Later it became the Metropolitan

Chapter and I was involved with the organization of the total volunteer group there. I did volunteer work at Catholic Charities at one time. After my first husband's death, I went back to work and I became an employee of Head Start in Denver.

Q. What year was that, please? A. That was in 1965, '66, I think.

Q. In what capacity did you serve under or within the [983] Head Start Program? A. Well, I was a social worker and then was assigned as head social worker to the public schools group.

Q. What did you do, very generally, in that position? A. Worked with the supervision of other social workers and in organizing the program for the parent groups.

Q. All right, how did you happen to get into the school board matters, just generally? A. Well, I had been working with Red Cross and as a fund raiser, and in this manner became rather well known, I suppose, in the community, and I had been active civically, and a group of people asked me if I would run. They called it a citizens' committee at that time.

Q. Were you interested in education? A. Yes, but I had never been actively involved as a teacher or in this manner.

Q. Do you have some children? A. Two, a boy and a girl.

Q. Were they educated in the Denver Public Schools? A. Denver Public Schools.

Q. What schools did they attend? A. Park Hill, Smiley and East.

Q. Where do you now live? A. 1955 Glencoe.

Q. That's in the Park Hill area? [984] A. Yes.

Q. How long have you lived in the Park Hill area? A. All of my adult life, and I grew up there, too.

Q. When did you assume—strike that, please.

Were you subpoenaed to appear here today? A. Yes, I was.

Q. When did you assume your duties on the Board of Education? A. 1951.

Q. In May of that year? A. In May.

Q. And how many terms did you serve? A. Two full terms, twelve years.

Q. Terms of six years each? A. Six years each.

Q. Did you ultimately become president of the board? A. Yes.

Q. What years were you president? A. The last two years, '62 and '3.

Q. Did you hold any other office in connection with your service on the Denver School Board? A. I was vice-president of the school board before I was president, and I also was state president of the school board association.

Q. What year was that? And for what term? [985] A. Well, I was on—I think I was the president of that association for four years, just prior—I was still on it when I left the board.

Q. Now, when you went on the board, what did you do to acquaint yourself with the school district and some of the current problems? A. Well, I—

Q. How did you get oriented? A. Well, I had only been familiar with the schools that my children had and were attending, and I felt that it was very necessary that I know the schools in Denver, so the first year that I was on the board I did visit every school and visited classrooms and looked at plants and lighting and total facilities of each school system, or school building.

Q. Did you ever look in on any classes? A. Oh, yes, many classes, all kinds.

Q. Did you actually sit in on any classes? A. I sat in on them.

Q. Did you get acquainted with any teachers and faculty? A. Teachers and principals, custodians.

Q. Did you use substantial time—shouldn't use that word—did you spend a great deal of time in doing all this? A. It took a full year.

[986] Q. At that time, how often did the board meet? A. Well—

Q. Regular meeting sessions? A. There was a regular meeting once a month.

Q. Is that true in the summer also? A. As I remember, yes.

Q. All right. A. Yes, I know that, yes.

Q. You had special meetings on occasion? A. And we had to have special meetings.

Q. In connection with your meetings, did you hear from the public from time to time on various matters? A. Very definitely. They were encouraged.

Q. During the twelve years you served on the board, Mrs. Johnson, was there any one occasion or more than one occasion in which a pupil was denied the right to attend a neighborhood school at any level, either elementary or secondary— A. Never, to my knowledge.

Q. By reason of his race or color? A. Never.

Q. Was there ever any complaint made by any pupil or by the parents of any pupil that a child was not allowed to attend a school of the subdistrict where he lived by such a reason, race or color? [987] A. Never.

Q. When you got on the board, will you tell the Court, please, what the policy then was in 1951 with respect to having furnished to you statistics and analyses of any na-

ture with respect to racial composition of schools? A. Well, we did not receive this and did not expect to.

Q. Did you have any statistics or charts or anything of any nature which would give you the numbers—either the numbers or percentages of the Negroes in any one particular school? A. No.

Q. Or of Anglos? A. No.

Q. Or any other minorities? A. No, sir.

Q. Were you furnished any data or information with respect to racial or ethnic composition of neighborhoods? A. No.

Q. Whether they were co-extensive with the subdistrict or not? A. No.

Q. Or any areas, if they were even smaller than a subdistrict? A. No.

[988] Q. This, of course, was before Brown against the School Board? A. That's right.

Q. The Supreme Court decision in 1954 after you went on? A. This is right.

Q. As you sent on the board, what was the policy of the board generally as to the neighborhood school principle? A. Well, at that time we all had the feeling that a child should grow from a family situation into a neighborhood situation and that the neighborhood school policy was a good one.

Q. Was that the accepted policy when you went on the board? A. Yes.

Q. Did it remain such during the entire time you were on the board? A. Yes.

Q. Did you learn whether that was a policy that extended pretty much beyond the Denver school system? A. This was pretty much true all over the United States.

Q. How did you learn that? A. Well, I attended na-

tional school board meetings with other people from all over the country.

[989] Q. When you first went on the board in 1951, you said you were just considering the children. What do you mean by that? A. Well, it was my feeling and I think this was true of all the members of the board that we represented all of the children and all of the parents in the city.

Q. Were you aware of the—were you informed after you went on the board as to the constitutional requirements of Colorado with respect to school districts? A. This is right.

Q. During the period that, or when you went on the board, was there any classification of pupils by race or color? A. Not to my knowledge.

Q. In the establishment of boundaries or changing of boundaries on older schools, was that an element of your thinking at any time? A. This was not a consideration.

Q. Now, when the Brown case was decided in 1954, was that considered by you as a member of the board as to its applicability to Denver?

Mr. Greiner: Your Honor, I would object. I don't believe the witness has been qualified to interpret the Brown case.

The Court: Well, she may state as a fact whether [990] they ever considered it.

A. Thank you. It was our feeling that in Denver where we had never had segregation—

The Court: I think the only question, Mrs. Johnson, is whether you ever considered it, so far.

A. (Continued)—yes.

Q. And what was your conclusion with regard to t
effect of the Brown case insofar as the Denver school sy
tem was concerned and your activities as a member
the board? A. That it was not applicable.

Q. Was this also discussed at various meetings you a
tended? A. Yes.

Q. Was this discussed at National meetings you attende
A. Yes.

Q. Do you know whether an opinion was obtained fro
the Denver School Board attorney? A. One was.

Q. Do you know what that opinion was? A. That it d
not apply.

The Court: What did that opinion say?

The Witness: That it did not apply to our situ
tion as we were, as we existed.

Q. Do you remember or can you tell us the fir
few [991] years you were on the board, say from 195
when you went on the board until 1955, if there were a
changes in boundaries of any substantial nature of a
nature that was taken by the board, any action taken
the board? A. You mean boundaries of schools?

Q. Yes. A. Of course, the city was growing treme
dously at this time.

Q. What effect did that have on the board? A. We
we were in a very difficult situation to have enough cla
rooms for all the incoming children.

Q. Why was that? A. Because so many people—t
population had grown so and it was particularly growi
in two areas, in the southeast and southwest areas.

Q. And that was due to newly annexed areas? A. Th
is true.

Q. You were required to take on these newly annexed areas? A. We were.

Q. At that time, the board had no say as to whether they should be annexed or not? A. No.

Q. All right. But from the period from '51 to '55, do you recall of any board action to change boundaries of [992] existing schools within the old area of Denver? A. I cannot recall that.

The Court: What years did you say?

Q. '51 to '55. A. I can't remember whether there were changes at that time or not, but I—well, I shouldn't assume, should I?

Q. Well, if you recall any, we want to know. If you don't— A. I cannot say that.

Q. At this time, would you state to the Court what the procedure was with respect to changes of boundaries at the elementary level? A. Well, there were certain things that we knew the staff would consider and, after their consideration, they simply worked within that consideration.

Q. Did the board take formal action on elementary boundary changes? A. Yes.

Q. Or was that basically the superintendent's— A. Well, it was basically done by the superintendent, but action was ratified.

Q. Would he report to the board? A. This is right.

Q. Was there a different procedure with regard to [993] secondary schools? A. Yes, sir.

Q. Tell us what the difference was and how the secondary school boundaries were handled. A. Well, this was very carefully studied with many considerations. We considered, first of all, the school population, the trends in the popula-

tion, and we tried to have these trends considered for a period of time into the future, because—

Q. Projecting ahead? A. Yes, projections.

Q. All right. A. And transportation, safety of children, available rooms, all of these things were part of our consideration.

Q. You considered geographical features? A. Yes.

Q. Man-made features? A. Yes.

Q. Such as what? A. Well, when the highway came through, the Valley Highway came through, we had to consider this.

Q. All right. When you referred to transportation, were you referring to public transportation? A. Public transportation, primarily.

Q. Was building capacity in adjacent areas important? [994] A. Very. If we had vacant rooms, we had to use them.

Q. What about feelings of the community in connection with boundaries? A. From the time I went onto the board, this was always invited. We wanted to know what the community was thinking.

Q. Why was that? A. Well, we are representatives of the people, and we had to know what they wanted.

Q. And how would you learn of the feelings of the community? A. People were invited to come into our meetings and we would go out to private meetings, too.

Q. Did you attend many meetings during— A. Many.

Q. During your period on the board? A. A great many.

Q. Now, in considering the potential change in boundaries, for example, Mrs. Johnson, would you consider all of these factors or elements? A. Oh, yes.

Q. Was there any formula that you could say as to the ultimate weight of these factors, one factor should have

a weight of ten, another of twenty, another of five and so forth? [995] A. No, no, what was the best for the youngsters was the only formula that we were interested in.

Q. It was a decision-making process, considering all these various factors, then? A. That's right.

Q. Was there a difference in the weight given to some factors, say, between the elementary school and the weight you'd give to the same factor in a high school? A. I don't think I understand that.

[996] Q. Well, for example, a traffic situation. Would that make some difference? A. Yes, little children—you had to be much more careful. But even so, you had to consider traffic problems for big children, too.

Q. You had to consider more than merely building capacity and pupil membership, is that correct? A. That's true.

Q. Was that true in every instance? A. This is true in every instance.

Q. From time to time did you receive any documents from the staff of the district which were called staff proposals? A. Yes.

Q. What is meant by a staff proposal? A. Well, for instance, in your boundaries, if after they had been studied they would be presented to us and these boundaries were suggested would be an included part of these things.

Q. Would you— Pardon me. A. Where we had to have new buildings, all of this was part of it.

Q. Was this a constant thing that was going on? A. Constant, yes.

Q. And why did this have to be a constant feature? [997] A. Because of the influx of people that were coming into Denver. Denver was growing tremendously at that time.

Q. Was every staff proposal that was made rubber stamped and enacted? A. No, they were studied very carefully.

Q. Some enacted or adopted and some were not? A. Some were and—

Q. And some were adopted or adopted as amended? A. Some were adopted and some changed and modified and then adopted.

Q. Do you recall that in 1956 Hill Junior High opened? A. Yes.

Q. What effect did that have with respect to the necessity for boundary changes? A. Well, of course, every time you build a school this involved not just the people that were right there but the surrounding schools, surrounding territories. And so this involved changes at—such as Gove, and—I believe Morey was involved. It involved a great area.

Q. Is it true that it involves not only the immediate area and the schools surrounding it, but it could have a dominant effect beyond that? A. That's right.

Q. Was this true in this instance? A. It was true in every instance.

[998] Q. Do you recall receiving a staff proposal about in January of 1956 with respect to a large number of boundary changes? A. I don't remember the dates.

Q. But you remember receiving a staff proposal? A. Yes.

Q. Arising due to this—that Hill was opening? A. Yes.

Q. And could you tell us whether all of these various proposals or all the various parts of these proposals were related? A. Well, yes, they were.

Q. When these proposals were made public, were mem-

bers of the public again invited to express their opinions concerning the same? A. Yes, we had hearings.

Q. Do you remember whether all these proposals were adopted at the first meeting? A. Well, I would doubt that they were.

Q. Do you remember what happened at that first meeting when they would be voted upon in January of 1956? A. No.

Q. Do you remember whether part of the proposals involved a strip just west of York Street and between Cole and Smiley, Manual and East? This is going back a long time, [999] I know, but if you could to the best of your recollection— A. I'm not sure if this was when it was involved or not. I know the area you mean.

Q. Do you recall attending some meetings regarding the Manual boundaries? A. Yes.

Q. And again to refresh your recollection, new Manual was opened in 1953? A. That's right.

Q. So this would be about—well, early 1956, not quite three years later; two and a half years later? A. Yes.

Q. Do you recall at that time various discussions concerning the boundaries of Manual? A. Yes.

Q. Do you remember attending some meetings in this connection? A. Yes.

Q. Do you remember where those meetings took place that you attended? A. Well, I attended all kinds of meetings in the school and in homes, all over.

Q. In connection with this particular boundary? A. This particular boundary?

Q. You remember Mr. George Brown at that time? [1000] A. Yes, he attended some of them.

Q. Now, at that time in attending these meetings, could

you tell us whether you as a member of the board— Well, let me rephrase that.

Q. In attending these meetings, what did you find as to the attitude of the people living in the community who attended and expressed their opinions? A. Well, there were many different areas and many different kinds of suggestions that were made. But, it was difficult to find a spokesman for the total area. There were just too many voices.

Q. Were you able to find anyone who you thought spoke for the majority of the people in the area? A. No.

Q. Did you find that there was any substantial agreement among all the various people that attended these meetings that would represent the majority of the area? A. No. Quite diversified.

Q. At that time did you have any documentation from the school staff with projections? A. Oh, yes. We were constantly having projections four and five and six years ahead.

Q. Did you have with respect to this particular boundary change? A. Of course. Again, the city was growing so rapidly [1001] that even projections were not always as accurate as we liked to have had them.

Q. Now, even the figures and the projections you had— did they have any breakdown at all by race or ethnic composition of the areas? A. No.

Q. Or of the schools? A. No.

Q. Or of the neighborhoods involved in the change? A. No.

Q. At these various meetings did anyone come forward with any racial or ethnic statistics that you thought you could rely on or at all? A. I'm not sure; if people in the

community told us of their race, groups and ethnic breakdowns, I'm not sure of that.

Q. You had no figures from school census or— A. I had no reliable figures I could accept.

Q. Now previously you mentioned various factors that you normally considered in evaluating whether a boundary should be changed or not. A. Yes.

Q. Did you consider all those various factors in this instance? A. Yes.

[1002] Q. Was your ultimate aim in making these—in making any change—what were you trying to accomplish when you were considering a change? A. The best possible learning situation for the young people that we were trying to serve.

Q. Was your ultimate decision in making the boundary change in 1956 between Manual and East based upon this, then, the various factors you considered? A. This was our attempt.

Q. Did you have any racial or ethnic motivation in mind to desegregate anyone? A. No.

Q. Now, Mrs. Johnson, were you active in considering the construction of Barrett Elementary School? A. Yes.

Q. Was it East 29th and Jackson Street? A. That's right.

Q. In the area of ground involved, what boundaries—what were the boundaries generally? A. Well, Colorado Boulevard and— Oh, dear—down two blocks.

Q. Jackson? A. Jackson. Uh-huh. And from 28th.

Q. 29th to 32nd? A. I'm not sure of the boundaries.

[1003] Q. Do you know how long the school district had owned that property? A. It had been held when I went on the board.

Q. It was already owned? A. It was already owned.

Q. Mrs. Johnson, what's been the policy from your experience on the board and your knowledge of the board activities with respect to site acquisition, and looking ahead? A. Well, again, they tried to— At this time we were trying to project the needs of the community within a reasonable time, five, ten years.

Q. My question is generally to site acquisition. A. Well, this is it.

Q. I'm sorry, go ahead. A. And to try to serve the community that would be surrounding it.

Q. Were you on the board when the site at 6th and Monaco was acquired? A. No, but when it was sold.

Q. Do you know of any property that was owned by the board during your tenure of office and the other site which was used east of Colorado Boulevard out in the Hallett area, and the Smith area? A. For what purpose?

[1004] Q. That was being held for school—a possible school site? A. There may have been some elementary areas held in there. I'm not sure. There was nothing large enough for a high school.

Q. Was there anything large enough for an elementary school, say, east of Barrett?

Mr. Greiner: I believe the witness has answered that question, Your Honor.

The Court: We will give her another chance.

A. East of Barrett? I don't know. I can't answer that.

Q. Were you on the board when other high school sites were acquired? A. Oh, yes.

Q. And in projecting those, where did you locate these and why? A. Well, of course, out in the southwest and southeast area which was growing so very rapidly, we

were having to have areas annexed because we could see where the community was growing and schools were built upon newly annexed land.

Q. You were virtually at the city limits at both Thomas Jefferson and Kennedy, weren't you? A. That's right.

Q. Now, getting back to Barrett, if we may, please— [1005] when was the planning done or even commenced with respect to Barrett Elementary School? A. As I remember it, about three years before we were having this terrific influx at Columbine and Harrington and we knew we had to build or do something about it. And I think it was about three years before that the projections began.

Q. About 1957? A. That's right.

Q. Do you know when the school was finally authorized? What year? A. Oh, I can't give you the date.

Q. And it was constructed then so as to be ready for occupancy in 1960? A. That's right.

Q. Were you aware of the change in the racial composition in your area north of the city, in the area north of City Park during this period of time? A. This was changing very rapidly. I knew, because I lived there.

Q. Did you have any statistics, however, during the time of this planning at any specific time as to the racial or ethnic composition of the pupils in that area? A. No.

Q. Did you have anything yourself available to you that [1006] was indicating to you the rapidity of the transition from white to black? A. Figures?

Q. Yes. A. No.

Q. Did you know where the transition—how far it was going to move geographically either east of Colorado Boulevard or east and south? A. I doubt if anyone could have known this exactly.

Q. Did you have meetings with parents and interested people in that area? A. Yes, a great many.

Q. During this period of time was it necessary to make any optional elementary school areas? A. Yes, we had to transport children to other schools.

Q. Do you remember how many were transported to Park Hill? A. I can't remember, but quite a number. A couple of hundred, I would say, but I'm not sure.

Q. Now, did you consider whether you should build another elementary school in this area at all? A. Yes.

Q. And the people who attended your meetings—were they unanimous in the opinion one way or the other? A. No, not unanimous.

[1007] Q. Tell us what the feeling was. A. Well, a great many people wanted the school there and we knew that the children were there without having to be transported at all, so as far as I remember, there were no children who were brought in by busses.

Q. You mean after Barrett opened? A. After Barrett opened.

Q. Was there some opposition to building the school in that spot? A. Yes.

Q. Again, on this occasion, did you find anyone or any one organization that you felt could speak for the majority of the people in the area? A. No.

The Court: It would be surprising if she could, anyway, in any area.

Mr. Ris: I agree.

The Court: I mean, they're not composed that way.

We will take a short recess.

(Whereupon, the trial recessed at 3:29 p.m.)

[1008] (The Court resumed after a recess at 3:45 o'clock p.m.)

Mr. Ris: May I proceed, sir?

Q. Mrs. Johnson, I think one thing that we have not previously discussed is the matter of finances in the school district. A. We were always short.

Q. Well, in your long-term planning, to what extent are they a factor, either— A. Well, rather decisive.

Q. Well, are they a factor? A. We always needed more classrooms than we had money to finance.

Q. You are referring now to capital funds? A. That's right.

Q. And the availability of such funds? A. That's right.

Q. Now, getting to the record, how are such capital funds made available? A. Well, bond issues.

Q. And that required an election? A. This required an election by the people, yes, sir.

Q. So, in planning additional space or any planning involving any substantial expenditures, that was a major consideration? [1009] A. It had to be.

Q. Now, getting back to the Barrett problem—

The Court: Now, whether the electorate would approve the bond issue?

The Witness: Well, of course, that was always a question, too, but after it had been approved, we still—we couldn't always build new schools to replace old schools, because we had so many areas where we had to just put in classrooms.

Q. But every bond issue did require a vote of the people? A. That's right.

Mr. Ris: That was the Court's question, was it not?

The Court: Well, I knew that.

Mr. Ris: Well, I was not sure—

The Court: I said was that a consideration in making their plans?

Mr. Ris: I see. Beg your pardon.

The Court: In making their plans, whether the electorate would consent.

Q. Getting back to Barrett, now, if we may, Mrs. Johnson, would you tell us approximately what period of time or how rapidly the Barrett matter was brought to a head when you made your decision? A. Well, we had to build faster than we wanted to at [1010] that particular spot. The studies were completed, but they were not projected as much as we would have liked to have had them done, because we simply had to have more classrooms.

Q. Now, will you tell us how the decision was made as to the type of building and size of building? A. We used a prototype there—what was the size of the building? I can't tell you that.

Q. Were you building another prototype at the same time? A. Yes.

Q. Where was it located? A. Out further east.

Q. Were you also building at Denison in southwest Denver? A. It was Denison, I beg your pardon. It was Denison.

Q. All right, how was the determination made with respect to the site for Barrett? A. We had land there which had been, as I told you, acquired before I was on the board, and there were enough children right there to fill a grade school, so we used this land which was available.

Q. Now, this site was not in the center of the proposed subdistrict for Barrett, however, was it? A. No children were bussed in.

Q. No, but it was not in the center of the subdistrict? [1011] A. No, it was not.

Q. Did you consider placing it more central? A. Yes.

Q. Did you own any land there? A. We didn't have the land, and we did own this land, so we used it.

Q. Did finances enter into that at all? A. Very definitely.

Q. How? A. Because we had the land and we didn't have the money.

Q. Now, with respect to the setting of the easterly boundary at Colorado Boulevard, would you tell us about that, please? A. Well, at this time, Colorado Boulevard became a central highway into the city, six lane, and thinking in terms of the safety of the children, we couldn't go beyond there in our thinking, and we had children who could safely get to the school that would fill the building.

Q. Even though this school was on one edge of the subdistrict, were all its children within walking distance under your prescribed boundaries? A. I don't believe we transported any children there.

Q. Did you have any racial considerations in mind to keep the whites from Stedman coming to Barrett? [1012] A. No, when that was started there were, I am sure, although I have no statistics, both black and white children in the area.

Q. In the planning stage? A. In the planning period.

Q. Was there a change during the planning period? A. A very radical change.

Q. To what? A. To more black children moving in.

Q. Even before Barrett was built, you mentioned that

Harrington and Columbine were overcrowded. Did you acquaint yourself with the situation that existed there, say, about 1952, when there were some boundary changes made at the elementary subdistricts? A. I am sure I was involved. I think it was a little after '52 that I really met with a great many parents in the area.

Q. You took a personal interest in that yourself? A. Took a personal interest in it.

Q. And various changes were made in boundaries of those schools from time to time? A. That's right, we tried to keep the classes as small as we possibly could, and that involved some boundary changes.

Q. Were there any racial or ethnic considerations in making those changes? [1013] A. No.

Q. Now, after Barrett was filled and occupied—

The Court: Now, Columbine and Harrington—

The Witness: Yes.

The Court: —you say were overcrowded and Barrett was built primarily to relieve this?

The Witness: Yes.

The Court: Well, isn't it true that some students came from east of Colorado Boulevard to Columbine and Harrington before Barrett was built?

The Witness: To Harrington, at one time I think there were children, yes.

The Court: Excuse me, go ahead.

Q. Was that true after Colorado Boulevard became six lane? A. No, and it was not true after—let me think. I am not sure that it was true from the time I was on the board, but there had been a time I believe when that was true. We had new grade schools above Colorado Boulevard that I believe took care of this situation.

Q. Now, after Barrett was occupied, was there then a proposal to build a junior high at 37th and Colorado Boulevard? A. There were considerations of this; no actual proposal.

Q. Was any action taken either to do so or not to do so [1014] while you were on the board? A. We decided not to.

The Court: Can you gentlemen hear Mrs. Johnson all the time?

Mr. Greiner: Fairly well, Your Honor.

The Court: Will you keep your voice up just a little bit?

The Witness: All right, I am sorry.

Q. And can you give us some of the history of that particular incident? A. Will you restate that, please?

Q. Can you give us some of the history with respect to the suggested junior high at 32nd and Colorado and the decision not to construct one at that location? A. Well, it was not an acceptable thing in the community and we did have many hearings.

Q. And those were in '62? A. Yes.

Q. And did you arrive at some conclusion or some feelings within yourself as to what the sense of the community was at this time? A. This is right, we had many hearings.

Q. Now, did this lead to anything else, this particular episode, and the decision that was made? I am thinking particularly— [1015] A. Well, you are thinking of other junior high schools? I mean, the overloading?

Q. No, I am wondering if this had any relationship to the creation of a special study group, the Voorhees Committee. A. Very definitely.

Q. Was this an outgrowth— A. This was a total outgrowth. We felt the total community should be more closely concerned with our planning.

Q. Was there a decision with respect to Smiley Junior High at this time? A. Yes.

Q. What happened there? A. We built on there, made more facilities, and there were some changes in boundaries there, too, that affected the adjoining junior high.

Q. When the new boundaries were established for the three new senior high schools in 1960, George Washington, Lincoln, and Thomas Jefferson, was there any problem either of a racial or ethnic nature? A. No.

Q. Or any complaints at that time of setting the boundaries on racial or ethnic grounds? A. No.

Q. With relation to the overcrowding at Stedman School in about 1963, did you acquaint yourself with that [1016] situation, Mrs. Johnson? A. Well, I was in and out of the school constantly.

Q. Do you recall any proposals or discussions concerning changes of boundaries in the Stedman and Hallett-Park Hill complex? A. Yes, there were some.

Q. And can you tell me what you recall concerning those proposals and the changes made?

Mr. Greiner: Pardon me, Your Honor, but could we have it established for the record that she is still speaking now of when she was a member of the board? She went off the board in '63.

Mr. Ris: I am talking about—I beg your pardon, yes, that's a valid observation.

Q. We are still referring to while you were on the board? A. Yes.

Q. Now, Stedman became overcrowded and there were problems in the Stedman-Hallett area? A. Yes.

Q. Do you recall any proposals being made in 1961, '62 or '63, in that area, for changes? A. Well, there were a great many being made. I can't be explicit.

Q. Do you recall as to whether there were some proposals [1017] made for study by the staff for that area? A. There were.

Q. Were there any changes either made or deferred in that area, 1961, '62 or '63, that were made because of racial or ethnic considerations? A. I can't answer that, if we made them at that time or not. There were changes made in the area, but I am not sure as to the dates.

Q. Well, were they made with racial or ethnic considerations? A. Oh, no, no.

Mr. Greiner: We can't hear.

Q. You will have to speak up. A. Oh, no, I am sorry, there were no racial reasons for changing boundaries.

Q. Or for not changing boundaries? A. Or for not changing boundaries. Can you hear me now?

Mr. Greiner: Yes.

The Witness: I am sorry.

The Court: She is referring to Stedman in '62 and '63?

The Witness: Yes.

Mr. Ris: My question related to '61, '62 and '63, yes, sir, that period.

[1018] Q. Now, there has been some evidence, Mrs. Johnson, that in 1962 there were some boundary changes recommended for the Stedman area with respect to placing

overflow in Smith, Hallett and Park Hill, and that four of those were adopted and three were deferred. Do you recall that particular period? A. Well, there were some deferred because the evidence we had was not conclusive as to what we should be doing. This was the only thing that I particularly remember. What did you—I don't know what you—

Q. Well, these were again—

The Court: You can lead her or call her attention to what you want her to focus on, Mr. Ris. I think we will save some time.

[1019] Q. Mrs. Johnson, I'm handing you Plaintiffs' Exhibit 53, which has previously been admitted to evidence. And these have been admitted to evidence on the basis that these were proposed boundary changes for February, 1962, and apparently were based upon Plaintiffs' Exhibit 52, a study document. A. Yes.

Q. Do you recall the document entitled Exhibit 52? A. Not as 52. I know we had this kind of thing constantly.

Q. Do you recall the specific document? A. No.

Q. Now, it says for study only on Exhibit 52. What is the meaning of that? A. Well, this was for consideration and was the usual way in which these were presented to us. It didn't mean it was necessarily to be adopted just as it was given to us, but for us to study and then question.

Q. And when you received a document as such—such as Exhibit 52, did you study it? A. Yes.

Q. Did you take into consideration the various factors that you previously related? You did consider, in determining where boundary changes should be made? A. Yes.

[1020] Q. And those elementary boundaries which the

superintendent would often take initiative to change and then report to you—did you study these as well? A. Not in depth, as we did the others. But if there was a question I can remember times when parents questioned certain boundaries and then I did study them.

Q. Now, there has also been evidence in the case, if you look at the map, Exhibit 53, that of the seven changes shown there or proposed changes, which again the evidence previously relates back to 52, that the three directly surrounding Stedman were not made at the time and the other ones were. Do you recall that? And the reasons for it? A. As I say, there was considerable discussion at this time and it was our feeling that we were not sure what should be done at that particular moment. And so those changes were not made.

Q. Now, apparently the year following, one of the remaining changes was made and a second one was made in part. Do you recall that? A. No, I don't.

Q. Now, is there any other reason for not having made the three Stedman changes initially that you can recall? A. No.

Q. Is there any intent to segregate the blacks in Stedman and permit the whites to get out of the Stedman [1021] area by this? A. No, this was not part of it.

Q. You're sure of that? A. There was no part of that.

Q. Again, at the time that these—or the situation with respect to Exhibit 52 was concerned, did you at that time, do you recall, have any statistical analysis or evidence before you as to the numbers of Negro children and Anglo children in the various areas? A. No. I didn't—I don't remember this ever occurring.

Q. Now, I would like to direct your attention to another

boundary problem and this relates to Cole, Morey and Byers as a result of a study made in 1962.

I hand you what's been marked as Exhibit 405 and ask you if you recall that particular exhibit? A. I do.

Q. Was this study by you? A. Yes.

Q. Was it discussed at board meetings? A. Greatly.

Q. Were there hearings held on it? A. There were hearings held.

Q. In conjunction with this study did you have any [1022] racial or ethnic breakdown by any areas? A. No.

Q. Either Cole, Morey or Byers? A. No. No statistical reports.

Q. What did you personally know as to the racial and ethnic composition of Cole at that time? A. I knew it was changing. I was in the schools.

Q. What did you know about Morey at that time? A. Well, Morey's population was changing in that it was now becoming more and more of an apartment area and this was making for vacancies. There were smaller numbers of children that were available to the school.

Q. Were hearings held with respect to the changes referred to in Exhibit 405? A. Yes.

Q. And again what considerations were taken or what factors were considered by the board in coming to a decision as to whether any changes should be made in this Cole, Morey, Byers boundaries? A. All of the usual considerations. We considered availability to the children by transportation, safety of the children, rooms available, moneys available, and future trends of the communities.

Q. Was there anything special going on at Morey with regard to capacity ntilization at that time, do you recall? [1023] A. Do you mean our special education classes?

Q. Yes. A. Yes.

Q. At that time was the rating capacity of Morey realistically reflecting what was going on in that building? A. Well, if you mean a special—A special education class was a very special kind of thing. You didn't have the usual number of children in special education in one classroom. Therefore, the space might be occupied and yet the numbers might be much less than you would anticipate in a classroom.

Q. Do you know rated capacity was determined at that time; the formula? A. No, I don't.

Q. Well, then, with respect to the changes made in 1962, changing some of the boundaries between Cole and Morey, Morey and Byers, was there any racial or ethnic discrimination— A. No.

Q. —as a background for that at all? A. No.

Q. Or, any intent to segregate? A. No.

Q. Or any projection by race or ethnic composition as to what would result? [1024] A. No.

Q. Did you know a Mrs. Mildred Biddick? A. Yes.

Q. Was she given a special assignment in 1962? A. Yes, Miss Biddick was brought in to do some special work with regard to minority people in the schools.

Q. Was she put in what is called a community relations department? A. That's right.

Q. Was one of her responsibilities to make some racial and ethnic studies? A. Yes.

Q. So, during your term on the board, was this the first time then that you began to get into the racial and ethnic studies? A. This is right. This and the Voorhees committees were almost simultaneous.

Q. Now, could you tell us what the policy was during the period you were on the board with respect to recruiting

of staff and faculty members from minority groups? A. Well, an awareness was developing within the board that we needed greater understanding of minority people and we were very anxious to have more and more minority teachers in the schools. So we expanded the area in which the people who were doing our hiring operated. And we explicitly [1025] instructed some of our people to go to southern schools to secure qualified Negro teachers for the Denver Public Schools.

Q. Were assignments and transfer matters, matters for board determination? Or were those administrative acts? A. Those were administrative acts.

Mr. Ris: Thank you, Mrs. Johnson.

Cross-Examination by Mr. Barnes:

Q. Mrs. Johnson, you began by telling us that you took, when you came on the board in 1951—you toured in all the schools in the district. Did you get any idea of the racial composition of those schools when you were in them? A. Yes.

Q. Were you able to learn, for example, that some schools were predominantly minority as opposed to others? A. Yes.

Q. And that Cole Junior High was predominantly minority? A. Yes.

Q. And that Manual High School would have been predominantly minority at that time? A. Well, it was getting that way, yes.

Q. And did you also go to Smiley and East during those [1026] tours? A. Yes.

Q. And were you able to determine whether or not these were predominantly minority schools? A. Well, I'm not sure that I did this.

Q. You didn't go there for that purpose? A. I did not go for this purpose, no.

Q. But you were able to look around and see whether or not they appeared to be? A. Yes.

Q. Did they appear to be predominantly minority schools?

Mr. Ris: What year?

Mr. Barnes: 1951.

Q. This was when you first came on the board? A. Yes.

Q. I don't know if I have the answer to the question. A. Yes, I could tell that there were more white children than there were black children.

Q. Calling your attention, Mrs. Johnson, to the events in 1955 and 1956 when the proposal for the boundary change with Cole and for Cole, Smiley, Manual, Hill and East, Hill, Gove and Morey were all being considered, do you recall that there were several meetings of the school board devoted to the consideration of those proposals? [1027] A. I'm sure there were.

Q. Do you recall having received invitations to attend meetings in the community to discuss those proposals? A. Yes.

Q. Do you recall an invitation to attend a meeting on January 17th, 1956, in the Y.M.C.A.? A. I went to the one at the Y.M.C.A. I don't remember the dates.

Q. You don't know whether you went to that particular meeting or not? A. I don't know the date.

Q. I'd like to put Defendants' Exhibit AD on the easel.

The Court: What are you talking about now? 1956? January?

Mr. Barnes: Yes, Your Honor.

Q. This is in evidence, Mrs. Johnson, as a defendants' exhibit illustrating the junior high boundaries in January of 1956. The red line has been indicated as the line for the changes which were made January 18th at the board meeting, 1956, for the Hill and Gove Junior High Schools. Do you recall those changes being made at that time? A. This was with the opening of Hill?

Q. Right. A. I remember the changes were made then.

[1028] Q. And that the other changes involving Cole and Smiley and Manual and East were not made at that time? A. Yes.

Q. And was there any time subsequent to that when Hill and Gove boundaries were further changed in addition to changes that are shown on that exhibit? A. The Hill and Gove, and what else?

Q. Just the Hill and Gove. As I understand it, these changes are the changes—or the changes indicated by the red lines were made at the January 18th, 1956, meeting. Do you recall any subsequent changes in those?

The Court: Why don't you point out the change that you want her to comment on?

Mr. Barnes: I think the answer, Your Honor, that I want is that there were not.

The Court: Isn't there another piece of Gove that was given away along that time—somewhere along the line there?

Q. I'm thinking of the period between January and September, 1956.

The Court: Well, you're asking her whether there was any change at any time?

Mr. Barnes: Yes.

The Court: In Gove and—

Mr. Barnes: Yes; perhaps that's too broad a [1029] question. What I wanted to point out was the period prior to September, 1956, and after January of 1956.

A. Prior and following when? Following the opening of Hill?

Q. And prior to September the following year. A. I don't remember that there was.

Q. During that period there were changes, were there not, with regard to Smiley and Gove and Manual and East? A. I can't remember in detail when these took place.

Q. But you don't remember that at the time that those changes were made they—that there were also additional changes made to Hill and Gove boundaries? A. Well, there were changes to Smiley.

Q. Well, Smiley, East—when the Smiley, Cole and Manual, East changes were subsequently made, you don't recall that there were also additional changes in the Hill and Gove boundaries?

The Court: You mean simultaneously?

Mr. Barnes: Yes.

The Court: I guess you can answer that, yes or no, whether you remember or not, Mrs. Johnson.

A. No.

The Court: You don't remember?

The Witness: I don't remember.

The Court: You don't remember whether there were, [1030] is that correct?

The Witness: I don't remember that there were.

The Court: Okay. Really, it's not a memory test, anyhow, I don't think. I don't know how she could be expected to remember the details of this kind. I mean, why don't you ask her—point up to her specifics and maybe she will remember. Don't you think it would be better—that would be a better way?

You can ask leading questions, you see.

[1031] Q. Well, there weren't any changes—I think we have that point, Your Honor, I won't belabor that one.

The Court: All right, good.

Q. At the board meeting which you recall to have been about in January of 1956, do you remember the presentation by representatives of the minority community that were made that evening? A. I can't say that I remember them by date, no.

Q. Do you remember at any board meeting when these boundary changes, being the Cole-Smiley, Manual-East, Hill-Gove changes, were made, when presentations were made by members of the minority community? A. Yes.

Q. And do you remember that they discussed capacity utilization of the schools involved? A. Yes.

Q. And discussed transportation? A. Yes.

Q. To different schools involved? A. Yes.

Q. And discussed the comparative distances to these schools? A. Yes.

Q. And do you recall that they discussed the fact that the transportation patterns at that time ran down 28th and [1032] 32nd past Cole and Manual as opposed to down toward East? A. Well, I knew this because I live in the area. I am not sure whether I remember that discussion or not.

Q. But you knew that the transportation was direct to Cole and Manual? A. Yes.

Q. From your residence in that area, did you have knowledge of the general racial characteristics of the residential area surrounding Manual High School? A. Yes.

Q. And did you have some idea that that area was predominantly Negro? A. Yes.

Q. And did you have some idea that the area above City Park was either in transition or predominantly Anglo? A. Yes.

Q. Mrs. Johnson, you testified about the neighborhood school policy. What is your concept of neighborhood? A. Well, I have always had the feeling that a child learned a great deal by being able to walk to school.

Q. And your concept is that the neighborhood school policy requires a district within which a child can walk? A. This would be my idea, yes.

Q. Does the Gove boundary line which you see indicated there comport to that idea of the neighborhood school policy? [1033] A. Well, now, you are talking now not about an elementary child but a junior high school child, who is a little more adult.

Q. That's correct. A. And can probably go longer distances.

Q. Is it your idea that the neighborhood school policy does not apply then to junior high schools? A. No—

Q. Or that it is just modified? A. I think this is a modification. A child is growing to learn a larger area.

Q. There is, is there not, considerable distance from this end of the Gove district to— A. Yes.

Q. —to that school? A. Yes.

Q. What about the consistency between the neighborhood school policy and the boundary line for Cole and Smiley which is indicated on Exhibit AD? Cole appears to be four blocks from its boundaries and Smiley more than forty. Does that comport to your concept of a neighborhood school policy?

Mr. Ris: Just a minute, I think that's a misstatement, because he is putting all of the optional area there into Smiley, and so it is not a fair statement of what the map shows.

[1034] The Court: Well, I can't tell from here. Are you including in this forty-block question the optional area?

Q. Perhaps I could restate it. A child who lived within four blocks of Cole could attend Smiley Junior High School under the conditions that are portrayed on that map, could he not? A. Yes.

Q. So that a district neighborhood school policy based on distance is not necessarily in operation there, is it? A. Well, this is part of your open policy of allowing the child to make the choice, or the parents to make that choice.

Q. You testified that you heard several voices at the series of board meetings in early 1956 from several portions of the community and that you were unable to determine, I think, unable to determine what was the majority voice? A. Yes.

Q. Is that an accurate statement? A. This is true.

Q. Were you making an attempt to discover what the majority voice was? Would you have followed it if you had been able to determine? A. I think we were making a very definite attempt to discover a voice.

Q. A majority voice? [1035] A. A majority voice.

Q. And might have been governed by what you considered to be a majority opinion? A. Well, it would certainly have helped and would have been one of the things that would have helped in making a decision.

Q. Handing you, Mrs. Johnson, what has been identified as Plaintiffs' Exhibit 416, have you seen that document or a similar document before? A. Many like this. I am sure I have probably seen this.

Q. Can you state what it purports to show? A. Well, it shows the present capacity of the various junior high schools and the anticipated one within a period of time.

Q. And it is dated April 19, 1955? A. 1955, yes.

Q. When you were on the board? A. Yes.

Mr. Barnes: Exhibit 416 has been stipulated as to its authenticity by the defendants, and we offer it into evidence.

The Court: Any objection to 416?

Mr. Ris: I would like to take a look at it again. Thank you.

[1036] The Court: This is a junior high projection?

Mr. Barnes: Both junior and senior high schools, Your Honor.

Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: 416 is in evidence.

(Plaintiffs' Exhibit No. 416 was admitted into evidence.)

Q. Turning your attention to 416, can you identify for the junior high schools as of that date what the stated capacity of Cole Junior High School was? A. 1908.

Q. And can you state what its projected capacity or what its enrollment was at that time? A. 1401.

Q. So it was under caapcity at that time? A. Yes.

Q. What does it show there to be the projected capacity for Cole Junior High by 1960? A. By 1960, it will be up to 1920.

The Court: What is the date of this projection?

Mr. Barnes: April '55, Your Honor.

Q. So it would have been just at capacity by 1960? A. Yes.

Q. What is the capacity stated for Smiley Junior High [1037] School in 1955? A. Smiley, 1446.

Q. And its enrollment? A. And its enrollment was 1555.

Q. So it was over capacity? A. Yes.

Q. What was its projected capacity by 1960? A. 2,354.

Q. So, it was projected to be expected to be considerably over capacity by 1960? A. Yes.

Q. Now, in your consideration of the boundary changes that were made between Cole and Smiley in 1956, would you not have been able to alleviate that overcrowding which is projected there in Smiley by moving the Cole boundary farther over to the east? A. Well, there were many considerations to be thought about. This was one of them.

Q. But on a strict capacity basis, it would have made sense, would it not, in accordance with those projections to

include more students in Cole? A. Decisions weren't made that way, on one strict basis.

Q. I understand that, and I am not trying to force you to say that they were; but on that criteria alone— [1038] A. This is right.

Q. —we could have moved the boundary farther to the east? A. This is right.

Q. Turning your attention to the second page of the exhibit, which shows high school projections, can you state what the Manual High School capacity is in 1955? A. 1600.

Q. And its enrollment? A. 994.

Q. So, it is considerably under capacity? A. Yes.

Q. And what is the projected capacity by 1960? A. 1615.

Q. So, it would have reached just about capacity by that time? A. Yes.

Q. What is the capacity for East which is indicated there? A. 2462, with a membership of 2468.

Q. So it is already at capacity? A. Yes.

Q. In 1955. What is the projected capacity for 1960? A. 4,257.

Q. Or considerably above what its capacity is? [1039] A. A great deal.

Q. Would it not have made sense then to move the East boundary as well farther to the east to that more of those students could have been taken into Manual High School? A. Well, again, if this is the lone consideration, yes.

Q. You stated, Mrs. Johnson, that one of your considerations was to take advantage of available classroom space, did you not? A. Yes.

Q. And there was available classroom space at both Cole and Manual, was there not? A. Yes.

Q. And by those projections it would not have been taken advantage of until 1960, would it? A. According to this, no.

Q. Was there any reason to not take advantage of it in 1956? A. Yes.

Q. What was that reason? A. We were trying to make projections for the total city. We were trying to keep the children in the same schools for the period in which they should attend that school, and your projections do change within that period of time. You have to consider getting to the schools.

[1040] Q. You testified, did you not, that the transportation which you knew about went directly to Cole and Manual? A. Yes.

Q. So, that considering both transportation and capacity utilization, there were some good reasons for expanding the boundaries of Manual and Cole, were there not? A. Yes.

Q. Now, over the years during the time you were on the board, were there a great many elementary school changes? A. Oh, yes.

Q. Elementary school boundary changes, excuse me. A. Well, yes, particularly in the southwest and southeast areas.

Q. This is just a small point, but are they all reflected in the school board meeting minutes, to your knowledge? A. Yes.

Q. All of the boundary changes that were made? A. Yes.

Q. Considering the construction of Barrett, Mrs. Johnson, is this another example where it was difficult to obtain a consensus of the community? A. Yes.

Q. And would you have followed a consensus, had you

been able to find it? [1041] A. As one member of the board, I cannot answer it.

Q. Would you have personally been guided by what you thought was the consensus? A. I certainly would have been guided.

Q. You mentioned a point about finances and the difficulty of obtaining money to build sufficient classroom space. Would it not have been unnecessary to build classroom space if the spaces at Cole and Manual had been fully utilized? A. No, not on a city-wide projection.

Q. Well, you had some 500 spaces in Manual, did you not, that were empty? A. Yes.

Q. And you had somewhere between two and three hundred spaces at Cole that were empty? A. Yes.

Q. So, it would have made financial sense to use those spaces, would it not? A. Not necessarily. Again, you are having to consider some other factors. You have to consider where the growth of your community was largely coming, and it would mean transporting children great distances, and at that time we did not believe in transporting children so far if anything else could be done, and we had never transported high school children.

[1042] Q. Was it more expensive to transport children than to build new schools? A. Well, it would be a temporary thing, I should think, because those communities were continuing to grow.

Q. Mrs. Johnson, a number of other schools were built during the 1950's in addition to Barrett in 1960 with different capacities than Barrett, were they not? A. Yes.

Q. For example, Bradley was built in 1955 with 960 students, was it not? A. Yes.

Q. And Coswell in '54 for 510 students? A. Yes.

Q. I'm sure you don't remember these exactly. A. No.

Q. But they may sound about right to you. A. right.

Q. And Doull with 950 students and Force in 1956 t 915 students? You have to answer so it goes on the r Mrs. Johnson. A. Oh, yes.

Q. Thank you. And Greenlee in 1952 with 915 stud A. This sounds right.

Q. And Knapp in 1956 with 780 students? A. Ye

[1043] Q. So that Barrett wasn't necessarily bui only 450 students, was it? A. Would you—

Q. It wasn't necessary, based on any precedent i mentary school building, to build Barrett small, was it No.

Q. Now, Colorado Boulevard, which was adjacent playground at Barrett, is not an interstate freeway, A. Well, it is an awfully busy street. It is a six-lane way.

The Court: We will take notice that it is limited access expressway.

Q. All right, I have put on the easel what is ide in evidence as Defendants' Exhibit BF, which repr elementary school boundaries—

Mr. Creighton: 1964.

Q. (Continued) 1964, thank you. Do you recall, Johnson, whether when Barrett was built the Telle Steck districts which are represented on that map h same boundaries? A. I can't answer that.

Q. Do you recall whether Colorado Boulevard south of Barrett down in this area, what are the Tell Steck districts, was more or less busy? A. Colorado

vard south of Barrett—east of [1044] Barrett—Colorado Boulevard—was very busy.

Q. It was busy all the way down from north to south, was it not? A. Yes.

Q. It wasn't a constriction or an increase in traffic that was particularly noticeable near Barrett, was there? A. On Colorado Boulevard?

Q. Yes. A. Well, this was part of the new six-lane highway.

Q. But it comes all the way down past Teller and Steck schools, does it not? A. Well, they were not built at this time.

Q. Teller and Speck were not built? A. They had been built for some time before this was a six-lane highway.

Q. But their boundaries were not adjusted in order to overcome the difficulties of that busy street? A. Again, there are limitations with finances that have to be considered, too.

Q. And your consideration as a board member of ways to avoid traffic hazards—let me restate the question. As a board member, you were forced to consider ways to avoid traffic hazards all over the city, were you not? A. Yes.

Q. And some of the things you considered were stop [1045] lights? A. Yes.

Q. And fences? A. Yes.

Q. And overpasses? A. Well, not at that time.

Q. That hadn't yet been conceived? A. No.

Q. And special zoning, speed zoning? A. This came sometime in this period, I am not sure when.

Q. And all of these might be used to avoid the special hazards of a busy highway that goes through an elementary school district? A. And were.

Q. And were? A. And were.

Q. And could have been used at Barrett, couldn't they? A. Yes.

Q. Turning your attention to the construction of the new junior high school at 32nd and Josephine that was proposed in 1962 and the decision by the board not to build that junior high school, was this again in deference to what was supposed to be the majority view? [1046] A. Well, we were considering this as one of the factors.

Q. Was it a major factor? A. It was one of the major factors. However, also, you have to consider the city line there and the fact that a trunk line of business, a business area, was also developing very rapidly.

Q. That 32nd and Josephine Street site had been owned by the school district for the whole time you were on the board, had it not? A. Yes.

Q. And it was there in 1953 when the new Manual was built, was it not? A. Yes.

Q. Was there any reason why the new Manual was not put out there on that site? A. Well, the new Manual was conceived before I was on the board. I can't answer that.

[1047] Q. If the new Manual had been put there in 1953 when you were on the board, would it have been an integrated school? A. I can't answer that.

Q. Well, you were familiar with the racial composition of that neighborhood, were you not? A. This is true.

Q. It was predominantly white? A. Well,—I can't answer that. You were feeding from two areas.

Q. One area— A. If you were replacing the old Manual, you would be bringing two together and I couldn't answer it.

Q. There would have been a greater degree of integration if you had had the boundaries for the new Manual somewhere out here in Park Hill as opposed to down High and

Williams Street? A. We were not building with integration as our idea, of course.

Q. In the case of a proposed Stedman boundary change, in 1962, were you aware that at that time in 1961 prior to those proposals that Stedman was overcrowded? A. Yes.

Q. How were you aware of that fact? A. Well, we had studies.

Q. You had studies done? [1048] A. We had studies. Here you have shown me studies.

Q. Studies like the one in 406 that applied to elementary schools? A. Didn't you say Stedman? Oh, I beg your pardon. I'm thinking of Smiley.

Would you rephrase your question?

Q. Were you aware that—and I was going to say Smiley—Were you aware that Stedman was overcrowded in 1961? A. Yes, I'm sure we had studies made at that time, too.

Q. And you lived at 1955 Glencoe at that time? A. No, I lived at 2212 Ash Street.

Q. 2212. So you were in the Stedman district yourself? A. Yes.

Q. Were you aware of the changing racial composition of the Stedman area? A. Well, as I was in the school, I'm sure I was.

Q. And was the changing racial composition one of the reasons that you knew that Stedman was overcrowded? A. Yes. I knew that people were moving in, if that's what you mean. There were no studies made showing whether they were black or white.

Q. Did you at that time have occasion to go into Stedman School yourself? [1049] A. Yes.

Q. And did you go into Hallett School yourself? A. Yes.

Q. And Smith? A. Yes.

Q. Were you aware that Stedman was the most Negro school of the three? A. Probably.

Q. Now, you have testified concerning the Morey-Byers boundary change that was acted upon in April of 1962 that you were aware of the changing characteristics of Morey because of the changing apartment composition of the area? A. Yes.

Q. Turning your attention again to Exhibit AD, Defendants' Exhibit AD, which is a junior high school map for January, 1955, do you recall if there is any difference in this optional area between 6th and Speer Boulevard which existed in 1955 and the way it existed in 1962? A. I can't recall.

Q. Do you recall whether or do you know whether that area between 6th and Speer was an area of changing apartment dwellings? A. No, I can't answer that.

Q. You do know that that is the Country Club district, isn't it? [1050] A. I expect it is.

Q. And that's not a district of apartment houses, is it? A. No.

Q. That is a district of fairly stable families, isn't it? A. Yes.

Q. That isn't the area which—to which we would attribute the changing composition? A. No.

Q. In fact, we're talking about the area that's north of Morey, aren't we, when we're talking about the changing of apartment areas, north and west? A. And east. Yes, it was changing east, too.

Q. Do you have any idea of what kinds of people racially were moving into those areas? A. No.

Q. Did you have any idea at the time? A. No.

Q. But you were aware that the character of Morey was

changing. What did you mean by that? A. Well, I simply knew that there were less children because there were more apartment houses where children were not living.

Q. There were fewer children? [1051] A. There were fewer children.

Q. Turning your attention to the recruiting for Negro faculty members, when did the—you testified that the board began to become aware of this need. When did that awareness begin? A. I can't give you a date.

Q. Were you aware of the need in 1951? A. No.

Q. 1952? A. I can't give you a date.

Q. Was it fairly late, like, about 1960 or 1962? A. No, it was considerably before then.

Q. Do you have any idea what the names of the southern schools were which were referred to? A. No.

Q. Do you have any idea what kinds of contracts teachers coming from those schools were given? A. Well, they were given the same kind of contract another teacher would be given. We didn't have different kinds of contracts. Did you mean—

We had some teachers who were—

Q. Were you aware of the fact that for several years teachers coming out of what might have been considered untested schools were given substitute teacher contracts? A. We always were looking for qualified teachers and [1052] I'm sure that these would be the ones who would be given contracts. If there were others who we felt might qualify and yet we had not this real assurance, this may have happened. I wouldn't be able to say yes or no to that.

Q. Were you aware of the need to assign minority teachers in other than minority schools? A. At a certain time we very definitely tried to place teachers in all schools.

Q. There was a period prior to that time when minority

teachers were assigned primarily to minority schools, wasn't there? A. I can't say that to my knowledge.

Q. But you did become aware of a time when it had to be turned around to make a conscious effort to get them out of minority schools? A. We were making a very much more conscious effort to get teachers of all kinds in all schools.

Q. I'm going to turn your attention back to 1955-1956 boundary changes again, Mrs. Johnson.

We talked about capacity utilization. Do you recall how the conflicts between the figures I have given you and the purpose to maximize utilization capacity was resolved? A. Well, many factors were considered. I can't in each instance tell you how each one was resolved. I don't [1053] remember that, no.

Q. What other factors might there have been other than distance, transportation and utilization of capacity? A. Well, for instance, in areas where we had special education —this would take up a certain amount of room even though your pupil ratio was down for that school. As for instance at Morey we had at one time practically all of our special education for a certain age children located there. Now, this looked as though Morey was considerably underoccupied. And yet, actually, it was not so.

Q. The capacity utilization figures which you have take into account special education classes, do they not? A. Yes.

Q. So they accurately indicate the number of empty spaces in those schools? A. No, because there might be five children in a classroom and in another class there might be thirty. This would make it look as though you were not using rooms that were actually being used.

Q. Is it your testimony that space for 500 students ap-

proximately at Manual did not in fact exist because the special education classes in that number took up all that space? A. I don't say all that space. I say this accounts for the difference.

[1054] Q. It could account for the difference? A. It could account for the difference.

Q. Do you know that special education classes were held at Manual at that time? A. Yes.

Q. Do you know how many were held? A. No.

Q. Do you know how many were held at Cole? A. No.

Q. Well, how many children are there typically in a special education class? A. I don't know what the figure is today. At one time we said two percent.

Q. I'm sorry. Maybe I misphrased the question. It's about half the number in a regular classroom? About 15, isn't it? A. Not always.

Q. But it's typically 15 children per special education class? A. It may be a smaller size.

Q. Is it your testimony that all of the extra spaces that were pointed out to exist at Cole and Manual were in fact nonexistent because of special education? A. I don't believe I said that.

Q. Well, what percent of the available space that [1055] was in those schools was taken up by special education? A. I can't give you those figures.

Q. Some of it? A. Some of it, right.

Q. How do you resolve the conflict between the stated criteria for distance and the fact that all of the area above 29th Avenue is closer to Manual that it is to East? Wasn't distance one of your criteria for choice? A. Yes. It was one of the projections.

Q. How did you resolve that conflict? A. I wish I could remember all of the things that went into each of those resolutions. I can't.

Q. Are there any large natural obstacles in that area? A. No.

Q. No train tracks, are there? A. No.

Q. Only the City Park? A. Yes. That would be a natural—

Q. No big gullies or— A. No.

Q. —or things like that? A. No.

Q. No superhighways? A. No.

[1056] Q. How do you resolve the conflict between your stated criteria of public transportation and the actual fact that more public transportation went to Cole and Manual than it did to Smiley and East? A. I can't tell you. It was carefully considered but I can't tell you how this was done. I have forgotten.

Q. Turning your attention to Morey and Byers in 1962, do you recall that Morey was about 75 percent of capacity before the boundary change in 1962? A. It was low.

Q. And that it was about 76 percent the year after the change? A. I don't know those figures.

Q. If that had been the case, would that have been— That's not a helpful question.

How do you resolve the question of distance in 1962? Isn't it farther from those areas above 6th Avenue and 8th Avenue which were actually included in the boundary change to Byers than it is to Morey? A. Distance is not the only factor. This is only one.

Q. Well, assume with me, if you will that the school was underutilized in both years and went from 75 percent to 76 percent capacity utilization before and after the change and that it was farther from this area which was included in the change between 6th and 8th to Byers than it was to [1057] Morey? What other rationalization for the change might have been used? A. I can't answer that.

The Court: At these public hearings, were there speeches made and arguments made to the effect that this did have a segregating effect to change the boundaries in this manner?

The Witness: Yes.

The Court: Were these arguments made when the Barrett School was—

The Witness: Yes, and then there were refuting statements, too, by people in the community.

The Court: I was going to suggest that maybe at this time there was less consciousness on the board members as to the problems. I rather got that conclusion from what you said. That you didn't—You testified repeatedly that you never made a decision that resulted in segregation.

The Witness: This is true.

The Court: Was it a fact that this matter was not really considered in depth in those days?

The Witness: Well, up until the time of the Brown case, it wasn't considered at all. And for some time after that, we felt that we had—that we really didn't have this problem in our community. And it wasn't until shortly before Miss Biddick was appointed and the Voorhees Commission was [1058] established that we had a feeling that the school board had certain responsibilities.

The Court: So the first time you had some awareness of it was when it was pointed out that the quality of education was really perhaps inferior—

The Witness: It might be affected—

The Court: —in these minority schools?

The Witness: It might be affected, and we felt it was time for us to study this.

The Court: This is what impressed the school board members more than anything else?

The Witness: That's right.

* * * * *

[1061] * * *

Cross-Examination by Mr. Barnes (Continued):

Q. Mrs. Johnson, turning our attention back again to the 1956 boundary change I think you testified yesterday that you recall petitions presented by representatives of the minority community, Mr. Lorenzo Traylor or Mr. Lajean Clark or Mr. George Brown, is that correct? A. I remember petitions being presented. I don't remember who presented them nor at which time.

Q. But they were in relationship to those proposed changes, were they not? A. I think so. They presented many petitions at various times and I think there were some at that time.

Q. Do you recall also petitions from white parents? A. Yes.

Q. And were you the recipient of telephone calls and other requests from white parents about those boundary changes? A. Yes.

Q. And so in your attempt to achieve some idea of the consensus of the community, you were considering the wishes of the white parents, as well as minority parents, is that correct? A. This is correct.

[1062] Q. And were you able to— Did the calls which you received from white parents seem to you to reflect the majority opinion? A. No. No, we had many kinds of calls from many kinds of people, but there was more of a consensus. I think. And this is natural.

Q. There was more of a consensus in favor of the changes which were actually made than in favor of something else? A. I can't say that.

Q. What do you mean, there was more of a consensus? A. Well, more—I think more of the white community was in agreement that appeared to be in agreement in the black community.

Q. Now, there were some proposals in 1956 that black teachers would be assigned outside of the predominantly minority schools. Do you remember those proposals by Dr. Oberholtzer? A. Yes.

Q. Do you remember some protests or concern being raised by the Park Hill Improvement Association about those proposals? A. Yes.

Q. Did they come to board meetings and express those concerns? [1063] A. I don't remember that.

Q. The Park Hill Improvement Association at that time would have been an association representing a predominantly white neighborhood, would it not? A. At that time I imagine this was true.

Q. In 1956 and in 1957? A. I imagine so.

Q. So that there was a substantial expression of white concern about the placement of black teachers in white schools in those years, was there not? A. I don't remember that.

Q. I thought you said you— A. I remember that they came and—I don't remember that there was concern about placing Negro teachers in the schools.

Q. Wasn't there some concern by the white community that certain areas of town would be marked out as potential areas for black expansion? Didn't you ever have that feeling? A. Yes.

Q. And "yes," people expressed those concerns to you in phone calls and letters and by petitions? A. Letters primarily.

Q. So you were aware of the fears in the white community as well as those in the black community, weren't you? A. Yes.

[1064] Q. And you were aware that all of this had something to do with race, weren't you? A. Yes.

Q. And at the time that the Barrett proposals were made in 1959 and 1960 did you receive again petitions and phone calls and letters from white parents who were concerned? A. I don't remember that.

[1065] Q. So perhaps you did not receive— A. Perhaps I did. I really don't remember. We were constantly having letters and communications throughout the twelve years I was on the board from parents.

Q. Do you remember any expression of opinion by predominantly white neighborhoods about the Barrett boundary line, expressing the hope that it would be moved east of Colorado Boulevard? A. There was some discussion of this.

Q. There was discussion of it, but were there requests for it by representatives of the white community? A. I don't remember that there were.

Q. And there were requests for it by representatives of the black community, weren't there? A. There were.

Q. And in 1962 when the proposed plans for the new junior high school at 32nd and Josephine was considered, were there protests at that time from the white community? A. There were protests from many people, both by black and white.

Q. And there were a lot more witnesses joining in at that time. were there not, than there had been previously? A. I can't say.

Q. This was a time of increasing general public concern? [1066] A. This is true.

Q. And there were even representatives on the board, white representatives on the board, who began to express some concern about the race problem, isn't that true? A. We were all concerned with the race problem by this time.

Q. Was this a new concern? A. It was a growing thing.

Q. Now, in 1962, the proposed construction at 32nd and Josephine was not carried through. What were the criteria or the factors that were different in your consideration then than in the consideration of the building of Barrett in 1959? A. As I told you yesterday, the very numbers of children, with the pressure that made it imperative for us to build a new elementary school, and we built it where Barrett was located because the children were there. This was nothing that we had to look into the future to see. They were there and they had to be placed someplace.

Q. Well, that same problem existed for the junior high school? A. This is true, but by this time that area had become—by the time the junior high school was really being discussed, the area had become predominantly black. There was a greater awareness throughout the total country of whether or not you should build a school that was completely [1067] black, and the community was being listened to, and we felt that it would not be an acceptable thing in the community.

Q. Isn't it true that by 1962 representatives of the ma-

jority community, the white community, had begun to join in the concern in a major way? A. Yes.

Q. And that's what made the difference between '62 and '59? A. I think this is a total awareness of the total community that had grown.

Q. There were not large community movements in favor of the minority position in 1956, were there? A. Large?

Q. That is, that took in the white community and in which the white community participated? A. I imagine this is true.

Q. It is true that there were not? A. That there were not.

Q. Now, in 1961, turning your attention to the Morey case, do you recall a shooting incident there at Morey, in which a youngster was killed? A. Vaguely.

Q. Do you recall again an expression of white concern and protest about that incident? A. Vaguely.

[1068] Q. This was part of the background, this expression of concern was part of the background, that underlay your considerations in the Morey change, was it not? A. I doubt if this was part of the decision making.

Q. Well, throughout this period you had presented to you on each of the occasions I have raised positions on both sides of the fence, hadn't you? A. Yes.

Q. And those positions couldn't help but make you aware of race as a factor? A. This is true.

Q. So, although you may not have been intentially segregating on the basis of race, you were certainly not ignorant of the fact that there was race concern in these days? A. This is true.

Q. Now, in 1956 I think you testified that you were aware

that the population migration had been moving east across York and across the top of Colorado or across the top of City Park toward Park Hill, is that correct? A. Yes.

Q. That you were aware of that? A. Yes.

Q. And were you aware that the migration was not moving to the south from the Manual area? [1069] A. I—no, I think I was aware that it was moving our direction. More people were coming.

Q. Did you live on the 220 block on Ash at that time? A. Yes.

Q. And when you went downtown, you probably went down 23rd Street, didn't you? A. Probably.

Q. That's the major route to get into downtown from that part of town? A. Yes.

Q. And sometimes you would come home out 17th Street? A. Yes.

Q. You could tell just by looking down the street, 17th Street was predominantly white apartment buildings?

The Court: 17th Avenue, you mean.

A. Seventeenth Avenue.

Q. Seventeenth Avenue, right, that Seventeenth was predominantly white apartment buildings and 23rd was predominantly black? A. Yes.

Q. So, you knew the area around 17th Avenue was a white area? A. Well, it was a changing area, too. It really was. Those large homes just below York Street were being sold—

Q. We are talking about 1955-56. [1070] A. Yes.

Q. Was that area predominantly black? A. I don't know this.

Q. But you could tell the area along 23rd was predominantly black, couldn't you? A. Yes, and I knew the other area was changing.

Q. You have mentioned that you do not recall that there were capacity utilization justifications, with the exception of the special education element that you mentioned or that there were transportation justifications or that there were distance justifications for these 1956 changes, and that you were aware of the racial movement to the east and aware that it was to some extent less emphatic to the south. What possible reason could there have been for moving the boundary only to the east and not to the south? A. I was thinking about this last night, and the projections which you showed me yesterday probably did not include the fact that we were going to build onto Smiley Junior High, did they?

[1071] Q. The projections did not show the building proposed in the late '50s. A. Yes.

Q. No, I don't—I won't testify to what they showed back— A. Pardon me. Well, this would have been a factor in our consideration too.

Q. Is it your testimony then that this building was projected even though it is not shown on the projections? A. Well, I don't know what was projected, but we knew it was going to have to be done.

Q. It was going to have to be done even though there was empty space in Cole? A. Well, with the growth in the community in that area, we were not going to have any empty spaces eventually. Our plans were not for today and tomorrow. They were for five and six years hence.

Lois Heath Johnson—for Defendants—Cross

Mr. Barnes: That's all I have.

Cross-Examination by Mr. Brega:

* * * * *

[1077] * * *

Q. Now, in regard to the boundary changes in 1962 at Cole and Morey and Byers, you publicized your plans to make those boundary changes well in advance, too, did you not? A. Yes.

The Court: What year are you talking about?

Mr. Brega: 1962, Your Honor, at Cole, Morey and Byers.

[1078] Q. And you did that so that the community could come in and express their opinion to you? A. This was always done.

Q. As a matter of fact, the board had no legal obligation to consider the opinion of the community if it didn't want to, did it? A. It wouldn't have been a very wise board if they had not.

Q. But it was your job to establish the boundaries, was it not? A. The decision had been made by us.

Q. But you wanted the community to be involved in it? A. This is right.

Q. Now, at the same time that this boundary change was being proposed in 1962, there were 17 other boundary changes being proposed for the junior highs in Denver, according to Exhibit 405, which is now in evidence. Now, were you people concerned about those other boundary changes too? A. Once you change the boundary of any

one school, it is affecting all the schools, and so we had a concern about all of these changes.

Q. So there were probably people who were in and communicated with you people about those changes too? A. Probably, but probably not in as large numbers.

Q. That's right, because it wasn't as large an area [1079] of change. A. That's right.

Q. But the school board—their attention wasn't centered only on one little area in Denver, was it? A. No, we considered it all.

* * * * *

[1080] Q. And so all of these seventeen changes were considered and you were receiving letters and calls from people about all of them? A. This is true.

Q. About their concern of whether it should or shouldn't be done? A. This is true.

Q. Now, as you were developing this area in the northeast, Denver was experiencing a substantial annexation during these years? A. Yes.

Q. That you were on the Board, weren't they? A. Yes.

Q. Did you have anything to say or approval for the annexations that were made? A. Now, how do you mean this?

Q. Well, when Denver annexed anything, did the Board have the right to say, "No, you can't do it"? A. No.

Q. And when it was annexed, you had the job of putting those children in school? A. Immediately.

Q. As a matter of fact, many of those annexations were taken to court to be contested? A. This is right.

[1081] Q. And yet during this period of time you still had to provide an education? A. That's right.

Q. And Denver was paying the cost, was it not? A. That's right.

Q. And some of the annexed areas were later deannexed by court order? A. That's right.

Q. And then you had to adjust the school back again? A. Yes.

Q. And you didn't have any advance notice really of what the City was going to do next as far as annexation? They didn't tell you a year in advance or two years in advance in where they were thinking about going? A. No, but the City was always very cooperative.

Q. Except, they did it— A. It was done.

Q. And over your objection on some occasions? A. I don't remember our objecting.

Q. So the School Board during this period of time was concerned not only about northeast Denver, but with the annexations in southwest Denver, and the school population there far exceeded the capacity in some of your years? A. This is right.

Q. And you were trying to build new schools out there [1082] at the same time you were building them at Barrett and in the east? A. Yes, sir.

Q. And in southeast Denver, you had the same problems going on at the same time? A. This is right. These were the two areas of greatest growth.

Q. And did you have parents communicating and contacting with you about the facilities in the southwest and southeast parts? A. Constantly.

Q. The same as you were having in the northeast part? A. Yes.

The Court: Why don't you disagree with him, just for a change?

The Witness: He is so right.

Q. What I am trying to show here is that the School Board wasn't just sitting on a little area of Denver and that was the only problem that you had during this period of time. You had finances, you had annexation, and you had capacity growing by leaps and bounds in the schools? A. Yes.

Q. And the projections, some of which you had had shown not to be right because the school population was increasing more than the projection showed? [1083] A. More rapidly, that's right.

Q. Now, when we talk about the teacher situation, as I understand it, the Board of Education approved the appointment of a teacher? A. Yes.

Q. And in April I believe you generally approved the teachers contracting for the next year; is that right? April or May? A. Yes.

Q. As a matter of fact, when this would come in there would be a list of maybe five or six or seven hundred teachers that were presented to the Board at a meeting, would there not? A. There would be.

Q. It said the name and maybe the address, but it doesn't say anything about race or ethnic background, does it? A. No.

Q. And the Board didn't know whether you were approving a white or a black teacher or some other kind? A. No.

Q. At the time that you had resignations, they were always submitted to the Board, were they not? A. Yes.

Q. And you had a substantial turnover in teachers, did you not? [1084] A. Yes.

Q. And these teachers that were submitted, you didn't know what their race was, as far as their leaving the school? A. No.

Q. Or where they had been, really? A. No.

Q. And the teacher problem was a substantial problem, was it not? A. Very grave, all over the country.

Q. You were trying to serve the increased capacity, and at the same time there were not a sufficient number of teachers available for you to—that would stay long enough for them to be permanent? A. Qualified teachers.

Q. Now, did the Board itself have anything to do with the assignment of the teachers throughout the school system? A. No.

Mr. Brega: No further questions, Your Honor.

Redirect Examination by Mr. Ris:

Q. Mrs. Johnson, I would like to ask you if there was one other factor that entered into boundary changes from time to time that we haven't previously discussed, and that involved the frequency of such changes. A. Well, you don't want to change your boundaries every [1085] year, because this is disruptive to the children, so we tried to make our projections for not less than five or six years in advance.

Q. So that no child would be displaced. A. So that a child would not be displaced.

Mr. Ris: Thank you, that's all.

Recross-Examination by Mr. Barnes:

Q. Mrs. Johnson, I think you said when you were planning for the construction of Barrett, you were thinking of taking care of the children who needed help now, is that correct? A. Yes.

Q. And when you were planning for the 56 boundary changes, you were thinking of children who would need help in the future, is that right? A. I think we had a little more time to plan.

Q. You always had both of these considerations in mind? A. That's right.

Q. It wasn't an either/or thing? A. That's right.

Q. The way you balanced these things is in part an attempt to satisfy a majority opinion? A. No, this was not the case.

Q. You solicited a consensus in the community on each occasion? [1086] A. This is true. This was an opportunity for communication between the Board and the community as well.

Q. But you were trying to get community expression on each one of these changes? A. That's right.

Q. Sometimes with regard to present changes and sometimes with regard to future changes? A. This is right.

Q. Did you ever make a decision which you thought was counter to the majority opinion? A. I can't answer that question.

Q. You don't recall ever making such a decision? A. I don't recall doing this.

Q. And the majority opinion was white, was it not? A. If it were stated.

Q. Did you have occasion in 1956 to verify or check or look into the proposals by Mr. Traylor and the investigation and facts that he suggested to you about capacity and distance and other things? A. Yes, we spent a great deal of time.

Q. Did you find those facts to be wrong? A. No.

Q. Did other people present— A. Not always.

Q. Excuse me, I didn't mean to interrupt you. [1087] A. Even when people came in and talked to us, they didn't necessarily have the answer to the problem any more than we did, and they didn't present answers to the problems many times.

Q. Well, in this case, they did suggest changing the boundaries farther to the east, did they not? A. Some suggestions were made.

Q. They suggested a solution which would have resulted in the integration of both Cole and Manual? A. They suggested this be attempted.

Q. They had facts to support their suggestions? A. They had statements to this effect, yes.

Q. Were there representatives of the white community with the same kind of long, detailed factual statements? A. Oh, yes, yes.

Q. What did they show? A. Well, these were the things that we had to weigh. They were not—they were sometimes in conflict and sometimes not.

Q. And you eventually decided in favor of those decisions which— A. We eventually reached a decision on our own.

Q. Talking about the annexations around the city and the other constructions and notices and phone calls and

letters you received from parents in those cases, in how many of [1088] those cases was race a question? A. Very seldom.

Q. You were notified of people's racial concerns in 1956, weren't you? A. Yes.

Q. And in 1959? A. Yes.

Q. And in 1962? A. Yes.

Q. But you were not notified of racial concern in the annexation of the southwest Denver area? A. No.

Q. So, really, the only time you were aware and had to consider the very sensitive problem of race was in the situation we have been talking about? A. Yes.

Q. And you were not ignorant of the difficulties connected with this problem? A. No, by this time we were aware.

Q. The only thing I can't understand is how, if there were these serious financial problems, it was possible for the district to avoid the use of space in Cole and Manual. If these financial problems were really serious, why wasn't that space used? A. Again, as I told you, we were not planning for just [1089] today. We still had to continue to build, and when we were building a building, some of our buildings were not fully occupied when we completed them, in the southwest, I think also in the southeast area, but we knew that within two or three years they would be, and it is far more expensive to go ahead and build a small building and then have to add to it.

Q. Was there ever a time in your tenure on the Board when Manual was full? A. I can't answer that. I believe there was, but I can't answer it for sure.

Mr. Barnes: That's all.

Mr. Brega: Nothing further, Your Honor.

Mr. Ris: Nothing further.

The Court: When the new Manual High was built in '52, in planning the courses studied, did you more or less abandon the old concept that this was a manual training high school?

The Witness: Yes.

The Court: So it became in its approach, theoretically at least, just the same as any other high school?

The Witness: Exactly the same.

The Court: College preparation?

The Witness: Everything was offered in each school in the same way.

The Court: There was no emphasis on manual training?

[1090] The Witness: No, sir.

The Court: The courses were—traditionally, that's what this school was?

The Witness: Originally, this is right.

The Court: Youngsters went there to learn a trade?

The Witness: That's right, and this was changed.

The Court: This was back in the early days, I suppose.

The Witness: By this time, educators were beginning to—

The Court: The twenties and thirties.

The Witness: By this time, educators were feeling that everybody needed to know how to read and write and express themselves, and we needed certain background things.

The Court: I expect that all the high schools had trade courses?

The Witness: Yes.

The Court: By that time I think East and West and South—

The Witness: All had some facility.

The Court: Machine shop or printing or this sort of thing?

The Witness: Yes.

The Court: But before the building in the twenties of East, West, and South, I think that most of the trade [1091] training occurred at Manual, didn't it?

The Witness: I think this is right.

The Court: Do you think that that tradition has had anything to do with the subsequent attitude at Manual?

The Witness: Well, the parents—this, of course, was before I was on the Board, the planning of Manual, but it is my understanding that the parents were very anxious to have the same offerings in the school located there as were offered in all of the other schools, with no emphasis—

The Court: I would think so.

The Witness: —on the trade.

The Court: Thank you.

Anything further?

Recross-Examination by Mr. Barnes:

Q. Mrs. Johnson, isn't it true that there was a heavier emphasis on vocational training in the new Manual than

there was in the other schools in the district? A. I think this is probably true and that many people wanted it and took it, and there were certain areas of—that children could make their own decision as to what the children were going to take, but there was no emphasis from the standpoint of offerings, because everything was offered at Manual that was offered any place else.

Q. They kept the name the Manual Training High School? [1092] A. Yes.

Q. The booklet that was prepared by the District, which has been offered as Plaintiffs' Exhibit 356, which is "The New Manual," could I ask you to read the sentence on page—the pages aren't numbered— A. "For roughly three-fourths of the student body, college is virtually an impossibility."

Q. And that represents the consideration for Manual when it was being built, doesn't it?

Mr. Brega: I will object to that. She said she wasn't on the Board at that time.

The Court: Well, she may have some information. We will let her say whether she can answer it or not.

A. Well, I am sure it was a consideration. It should have been a consideration.

Mr. Barnes: That's all.

The Court: Well, if you had your choice between Manual and East, Manual and GW, and you were preparing for college boards, you wouldn't go to Manual, would you?

The Witness: Well, interestingly enough, Judge Doyle, at one time there were more scholarships available at Manual, and we were working on this and trying to get them taken up, than any other school in the community. So if I were looking for a scholarship—

The Court: I didn't ask you about that. I asked [1093] you about preparation for college boards, which is a very formidable task for a youngster. It is something he concerns himself with.

The Witness: Yes.

The Court: He wants to go to a university or college.

The Witness: I would go to East. There are just—the opportunities were there, but they were not always taken up.

The Court: Well, I know we always heard of East as being a showplace, though.

The Witness: And it was.

The Court: For that purpose.

The Witness: And it was.

The Court: And finally, GW?

The Witness: Yes.

The Court: Because they did emphasize this.

The Witness: This is right.

The Court: And probably their level of scholarship is much higher, wasn't it?

The Witness: I am sure of this.

The Court: Their standard was higher?

The Witness: Yes.

* * * * * *

[1094] * * *

PALMER L. BURCH, called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

The Court: Please be seated and give us your name and address.

The Witness: Palmer L. Burch, 395 Fairfax, Denver, Colorado.

Direct Examination by Mr. Ris:

Q. Mr. Burch, so the record will reflect your race, are you white? A. Yes, sir.

Q. How old are you, sir? A. I will be sixty-three next month.

Q. You are a resident of the City and County of Denver? A. Yes, sir.

Q. How long have you resided here? A. I have resided in Denver since 1924.

Q. Could you tell us generally the areas in which you have lived and the years in which you lived in those areas? A. While I was—before I was married, which was 1946, I lived with my mother generally in south Denver, 231 Logan, 12 South Washington, 372 South Williams, and 459 South [1095] Pennsylvania. At the time I was married, I bought my first house at 1770 Roslyn Street near the airport, and in 1950 I acquired my present residence at 395 Fairfax, where I have lived since.

Q. Do you have any children? A. One.

Q. A daughter? A. Daughter.

Q. And she attended the Denver Public Schools? A. She attended three Denver Public Schools: Carson Elementary School, Hill Junior High, and George Washington High School.

Q. Would you outline briefly the experience you had in public life and in your business life prior to 1959, which you felt would be of some value to the School District? A. When I came to Denver, I attended Central Business College during the year 1924 and graduated therefrom on the day before Christmas 1924, secured a position and began to work the day after Christmas, 1924, for a firm of public accountants, particularly income tax work. I was with that firm for approximately six years, at which time I became associated with the firm of Horace W. Bennett & Company, real estate ownership, management, investment, and continued with that firm until my resignation in the spring of 1968.

During that period in 1946, shortly after I was [1096] married, I was approached by two individuals, both of whom are now deceased, to urge me to stand for designation as a member of the House of Representatives of the State of Colorado, which came as a surprise to me, because while I was aware of government operations I had never participated therein. And I immediately said, "What do I know about being a representative," and, obviously, had no experience. But in talking it over with my wife she said, "If that's your desire, Palmer, go to it." So, I gave my consent to stand for designation.

I was designated as a candidate. I participated in the primary election, and in the fall of 1946 I was elected as a member to the House of Representatives. I knew nothing about the legislative process. As a matter of fact, I had to ask where the House of Representatives was. But in those days we had a session, biennial sessions, and in 1947 we had 108 days in session and passed a few laws, and I might say I was so unaware of the legislative process that I did not introduce a single bill.

In 1948, I learned to like the process, I guess. I ran for re-election, and was defeated, and in 1948, though—I happened to be a Republican—in 1948, no Republican was elected in Denver. That was the year when Mr. Dewey was elected in September but defeated in November.

In 1950, I ran again for the House of Representatives and have been continually a member of the House of [1097] Representatives, with the exception of one year. In the year 1958 I ran for Governor of the State of Colorado, obviously was not elected, and returned to the House of Representatives in 1960, where I still hold.

[1098] Q. Then you ran for the school board in what year? A. I ran for school board in May, 1959.

Q. You were elected and took office in May of that year? A. Yes, sir, for a six-year term.

Q. Now, before going on the school board, did your experience in the legislature revolve around any educational matters or financial matters? A. Yes, the State Legislature is much concerned about educational matters, particularly with the financing thereof and all powers and duties—all powers, rather, of school boards are derived from acts of the legislature. During the year 1951—and I state frankly I knew nothing about schools in 1947, the year I served—but beginning in 1951 with the growing problems of education, not only in Denver but through the whole state, I became familiar with the problems of public schools, their organization, the problem of school districts and consolidation and the problems of financing schools.

Q. And have you since that time been active in financing matters in the General Assembly? A. Yes, sir.

Q. Have you served on any committees involving finances? A. I have; beginning in 1951, I was a chairman

or vice-chairman of the committee on appropriations, which is now known as the George Bundy Committee. In 1953 I became [1099] chairman of the house finance committee and in 1955 and '56 I was chairman of the joint budget committee, and in 1958 and '59 I was a member of the—of both the appropriations and finance committees and, since 1961, after my service on the Board of Education, I have consistently been a member from 1961 to date of both the house finance and house education committees. I have dropped my membership on the appropriations committee.

Q. You served one term then on the school board, 1959 to 1967? A. I served one six-year term and was reelected to a short term in 1965. So I served a total of eight years.

Q. When you went on the board in 1956—rather, in 1959, at that point in time had you had any previous experience at all in school administration? A. No, sir.

Q. Was it then necessary for you to acquaint yourself with the general operation of the school district? A. Yes, sir.

Q. Among the matters that you had to acquaint yourself with, did you inform yourself as to the matter of school boundaries; establishment and changes of boundaries? A. Well, it came very shortly after I was on the board—elected to the board. It became obvious that the present status of the school construction was called to my attention [1100] and at that time there was under construction three high schools, George Washington, Thomas Jefferson and Abraham Lincoln High Schools, which were scheduled—projected to open for business in the fall of 1960. And because of the changes that would take place in the lives of the children that were going to attend them, one of the first matters that came to me for my decision

and participation with respect to districting was the establishment of the attendance districts of George Washington, Thomas Jefferson and Abraham Lincoln High Schools and the attendant adjustment of the district high school districts which the children who were assigned to those new districts had formerly attended, so I became relatively—this happened in the fall of 1959, so that one year's notice could be given to the interested parents.

And on that I quickly ascertained the manner in which school attendance areas—what we call subdistricts of the district—were established and developed.

Q. Did you find that there were various factors and elements considered in determining the establishment or changes of boundaries? A. Yes, sir.

Q. Were you present during the entire testimony of Mrs. Johnson? A. Practically all of it; yesterday afternoon and this [1101] morning, yes, sir.

Q. Did you hear her testimony as to the various factors considered? A. Yes, sir.

Q. Would you generally agree that those factors were of consequence? A. Yes, I would agree generally. I would perhaps be somewhat more specific. In other words, the school board of Denver, the school administration of Denver had policies and I found that the final act of fixing high school boundaries devolved upon the Board of Education. In other words, the minutes of the board would show that the boundaries of the three high school districts and all the others who are, in effect, a mete and bounds description; that likewise this was true of the establishment of junior high attendance districts. But, with respect to the boundaries established for elementary districts, I found that they were an administrative matter; were never a matter of the record vote of the board.

In other words, in no place, to my knowledge, in the minutes of the meetings of the board, was there ever any metes and bounds descriptions of an elementary district and only occasionally was there a call to me or a—an appearance by the board of someone protesting an administrative change of an elementary district.

Q. Did you have contacts with members of the [1102] community concerning junior high and high school changes? A. Yes, sir.

Q. Both in person and by letter? A. Both on telephone and appearance and by letter, but more importantly by appearances of various ones before the Board of Education itself. Because the proposed boundaries of a district were always laid out for study, became available, and at a school board meeting, people were allowed to express their views through the traditional practices of the school board, designated as audiences.

Q. During your term on the board, Mr. Burch, do you know of any instance in which a child was refused the right to attend the school in the subdistrict in which his residence was located because of race or color? A. No, sir, not a single instance.

Q. When you came on the board in 1959, would you tell us what the policy of the board was in considering factors of race or color in connection with boundaries? This was after Brown against School Board in 1954, was it not? A. Well, I was aware, of course, as a member of the legislature and presumably an intelligent citizen who keeps aware of what's going on in this country of the Brown versus The Board of Education decision, reached in 1954.

Being aware of the constitutional provisions of the State of Colorado, which provide that no distinction or [1103] classification of pupils shall be made on account of race

or color, I was aware and sincerely believed that the schools of Colorado were not in any way operated by de jure segregation. Every school, to my knowledge, in this state, every public school in this state is open to enrollment by any child living within the boundaries of the district or the subdistrict as the school district—

* * * * * *

[1104] * * *

Q. Could you now restrict yourself more to what the position of the board was or the school district in Denver was when you came on the board in 1959 with respect to race or color or, as you ascertain it to be? A. I would state that I was aware of the public policy of the state with respect to education and I found that the Denver Board of Education's policies were in accordance with those of the public policy of the state.

Q. In 1959 in connection with boundary matters, were there any statistics available to you as a member of the board showing the racial or ethnic composition of the various schools or various neighborhoods in the district? A. No, sir.

Q. Were there any such figures or statistics made available to you during the years 1959 to 1964? A. Yes, sir, the first time—

Q. What time? A. The first time that I received any official figures with respect to the racial and ethnic composition of the Denver Public Schools was subsequent and immediately following the presentation of the so-called Voorhees Report, the [1105] study on equal opportunities in the Denver Public Schools.

Q. That was in March— A. At that time it became— I then learned for the first time the composition of oriental,

Negro, Spanish surnamed and Anglo in terms of percentage.

Q. Was that in March of 1964? A. Yes, sir.

Q. Now, as a member of the community, Mr. Burch, were you aware of the racial shift in population particularly in Northeast Denver during the '50s and '60s? A. Yes, sir, I was.

Q. With respect to the establishment of the senior high boundaries and before they opened in 1960, were there hearings held with respect to the specific boundaries with people permitted— A. Of those schools?

Q. Yes. A. Yes. In other words, the Board of Education operated in public meetings and you could—in other words, when a question came up for final decision, the discussion, the questions—the audiences, the comment and whatnot, you could call that a hearing although it was technically not a hearing in a formal sense, but people were heard.

Q. With respect to the Barrett School, had the plans for that already been formed by the time you came on the [1106] board in 1959? A. The decision to build a school and the order to go ahead on preliminary plans had been adopted before I came on the board. I did participate in the approval of final plans and the awarding of the contract for construction.

Q. Now, with respect to the testimony of Mrs. Johnson, you heard, concerning the Stedman situation in 1961 and 1962, are there any other facts that you could add to that to enlighten the Court? A. No, sir. Stedman—some of this will be from my memory, but Stedman School in 1961 had a capacity of approximately 600 and enrollments of approximately 600. By 1965 Stedman School, with the same capacity—its enrollment had moved up approximately to

900. In other words, it was on double sessions. And it was true, other schools also changed in enrollment population. But the situation with respect to Stedman and with respect to Hallett and Smith, all of whom were, by 1964, having attendance in excess of capacity, to me, it was intriguing that that occurred at a time when there was no additional construction in the area.

In other words, in other words, in 1959, when I came on the board, the Stedman subdistrict was wholly built up. There wasn't any vacant property. There was no new construction. And yet, with essentially—there had been a few houses built—but essentially the same number of [1107] houses in the area, the boundaries of the district unchanged. The population moved up by fifty percent, and of course this was a unique situation with respect to any elementary district in the city.

Q. Was that anticipated by the board at the beginning of that three-year period? A. No, sir, I had no—I assume that that was one of the schools that we would not have any problems with respect to double sessions and over-attendance. It was a stabilized area from the standpoint of construction.

Q. Now, with respect to the Stedman, Hallett, Smith area, during the '60s, and the decisions as to whether to make any additions or to add mobile units, could you advise the Court as to what the history of that was? A. Well, the growing overpopulation of the schools with respect to the facilities there began to intensify itself in 1963 and the administration and the board began to give it attention. In 1965 the recommendation was made by the superintendent that we build an addition to Stedman School, approximately 90 capacity, as I recall it; three classrooms and half a classroom to provide for special education and utilize

the library. And an addition to Hallett School of six classrooms, 180. That would then—with respect to Stedman, that would provide capacity in excess of 700. And the further recommendation was made that [1108] the excess number of children to keep them from going on double sessions or continue on double sessions should be transported to other schools.

The Court: This was in 1965?

The Witness: 1965.

And the board adopted a proposal for the construction of an addition to Stedman School by a vote of 5 to 2, with two members objecting and five supporting. The board unanimously then adopted the recommendation to transport well in excess of a hundred—I would say between 125 and 150—children of all grades, first through sixth, from Stedman School to Carson School, to Steck School, to Evans School, to Stevens School, and I think there was one other.

Q. What was the ethnic predominance of those schools? A. They were preponderantly Anglo schools.

Q. Would you tell us about the mobile unit situation? A. With respect to Hallett, again, the addition to Hallett was approved by the same split board of the vote, 5 to 2.

Q. The same year? A. In the same year. It was larger—it was a larger addition because we had a larger site at Hallett. With respect to Smith School, which was more level populated with respect to capacity than either Hallett or Stedman, as a result of a questionnaire, discussions, not with the [1109] board, but with the staff as the result of a questionnaire submitted to the families, parents of the children attending the Smith School, by a great major-

ity they elected that they would prefer to have additional mobile units installed at Smith rather than to have transportation, and on that basis the Board of Education authorized the acquisition of additional mobile units at Smith School.

Q. Had a similar questionnaire been submitted to the Stedman parents? A. Yes, sir.

Q. With what results? A. Not as preponderant as it was in Smith with respect to transportation but—in other words, on an answer it was not as well framed, as I recall it. But, with respect to Stedman, some people objected to having an addition and preferred busing. Some people wanted the addition——an addition large enough to provide no busing, and some said addition and the Board of Education took the latter, building a modest addition, increasing the capacity of the school modestly and busing the balance. The result was, when the addition was finally completed, which I believe was the opening of school in—I can't recall whether it was the beginning of the semester but the fact of the matter was that Stedman then reverted to a non—in other words, it had a capacity for the children there and the rest were bused. [1110] There was the elimination of double sessions, is what I want to say.

Q. Now, I direct your attention, Mr. Burch, to 1962 and the matter pertaining to Cole, Morey and Byers boundary changes. Do you recall that particular event? A. Yes, sir.

Q. And to what extent, if any, were there any racial or ethnic considerations considered by the board or you individually in making those changes? A. By me individually, none. By the board, my best observation, none. The question came up because of excessive enrollment at Cole Junior High School and it being the furthest northeast junior high school. A question of decreased enrollment—

in other words, enrollment below capacity at Morey, and the recommendations of the staff were that we extend the boundaries of Morey northward to accommodate the overpopulation existing at Cole. Then, as Mrs. Johnson has testified, you don't modify only one junior high or only one boundary. They need to look at the boundaries between Byers and Grant and look at the boundaries between Byers and Merrill. And it came—this junior high—as a package, and the final resolution of the board was to move the boundaries of Morey northward so that some of the enrollment of Cole could come to Morey; to move the boundaries of Morey [1111] southward—or northward, rather, so that capacity of Byers was not running full; that children attending Morey could attend Byers; to move the boundaries of Byers so that children attending Byers could attend Grant and Merrill.

In other words, the chess you made on seeking to balance the attendance and the prospective attendance because in a junior high school you have to take into account not only those now attending it but those in the fourth, fifth and sixth grades in being—who will be attending in the capacity, and—

[1112] Q. Now, in connection with these— A. And that was the consideration so far as I was concerned and I am sure the Board, that the action taken was to reduce the overpopulation at Cole, and I think the record will show that the overpopulation of Cole did go down. Strangely enough, the population of Morey did not increase.

Q. In connection with the staff studies that you have mentioned and considered prior to making this boundary change, did any of those studies reflect or show or give you the racial or ethnic composition of the various neighborhood areas involved? A. No, sir, we held studies on

changes in junior high enrollment which were always based on numbers of children and in no respect whatsoever in respect to race or ethnic derivation.

Q. Now, with respect to the plot of ground at 32nd and Colorado Boulevard and the junior high suggestion that we discussed in 1962, the decision was made not to proceed any further in consideration of a new building at that point, is that correct? A. Right. That resulted from a publication which I see here, a study of school boundaries and population, and the recommendation by the Superintendent that consideration be given to building a junior high school at 32nd and Colorado Boulevard, and that was first released to the public and the [1113] Board in February of 1962, and once again was available for discussion, both the Board and public, and that was the first time—

Q. What was the public reaction to that? A. That was the first time that I became aware of the opposition of organizations, CORE, NAACP, B'Nai B'Rith, and, in other words, the civil rights, you might say, organizations. That was the first time that they appeared with a determined opposition to any proposed project in public schools.

Q. And there was substantial unanimity among these organizations? A. There was, sir.

Q. Was that the first time this appeared? A. First time, yes.

Q. Did the events surrounding that particular suggestion also lead to the appointment of the Voorhees Committee? A. In other words, that was the first time. In addition to the objections by the civil rights organizations, and bear in mind they were not exclusively Negro oriented, CORE and NAACP and B'Nai B'Rith, Sheldon Steinhauser's organization, they were certainly not exclusively black, but they came in for the first time then. For the first time,

the question came up that in a school which they claimed would be de facto segregated that inevitably and as a matter of course the quality of education would not be the same as other schools, [1114] and it was on that basis then that the Board was—it was suggested that the Board authorize appointment of a committee, and the committee was appointed and given the title, "A Committee for the Study of the Equality," the equality of the educational opportunity in the Denver schools. That was the first time it came to my attention that the quality of Denver Public Schools was not—that happened two years or three and a half years after I came on the Board.

Q. After the Voorhees Committee report was made, did you study it? A. Yes, sir.

Q. That led to the adoption of Policy 5100? A. As a direct result of the Voorhees report was the adoption of Policy 5100, which for the first time put into the policy the words "racial and ethnic consideration."

Q. Plaintiffs' Exhibit 1, is that the copy of the Policy 5100? A. Yes, sir.

Q. Is that the first step that the Board had ever taken action concerning— A. Yes, that is the first time, yes.

Q. Now, I will direct your attention, Mr. Burch, to certain boundary changes in 1964, and do you recall what changes were made with respect to Gove at that time, sir? A. Yes, sir.

[1115] Q. Would you state what changes were made then and why. A. Well, if I may go back a little back in 1961, Jackson Fuller became a member of the Board of Education. He ran for the Board in 1959, when I was first elected. Jackson was a resident of Park Hill, living at 2090 Ash, as I recall it, and immediately Jack Fuller came to complain about optional areas and particularly

Optional Area A as between Smiley-Cole and East-Manual. He had valid reasons. He was constantly saying we should abolish them, all of them.

Now, we—the Board did not see fit to do that until after the Voorhees report was in. The sixty-four changes to which you refer, No. 1, we changed the boundaries as between East and George Washington High School, extending the boundaries of George Washington north on Monaco—I believe it was Monaco. Anyway, a substantial part of the area out by the airport came into the George Washington High School District, and for the first time that was to achieve a degree of racial balance.

At the same time, we abolished the optional area as between East and Manual and Cole and Smiley and established a firm boundary, as I recall, somewhere around Fillmore Street, and thereby children west of that went to Cole, east of that went to Smiley.

At the same time we brought Gove, a relatively small school, the smallest junior high school in the district, [1116] we fixed its attendance boundaries where it drew children from north of City Park. I don't remember the precise boundaries, but Gove's boundaries for the first time extended northward, west of or north of City Park, bringing children in that—well, we will say 32nd and Harrison or Garfield—they went to Gove, and the 1964 boundaries, again, the change in the boundaries at Gove, was the result of the Voorhees report to achieve a degree of racial balance.

Q. Were the children north of City Park assigned to Gove predominantly black, do you know? A. To my best knowledge, yes.

Q. Did that achieve some integration into Gove then? A. Yes.

Palmer L. Burch—for Defendants—Cross

Q. Then it was about in 1964 you began to get your first racial figures from the Administration? A. Well, I never received racial figures from the Administration. They came out in the abstract, as a result of the Voorhees report.

Q. And after that, did the continuing studies thereafter, where it was pertinent, contain racial and ethnic figures? A. Yes, continually thereafter used statistics, and for the first time began to give percentages on the various schools.

Q. And you had a boundary change for Kennedy in January, [1117] 1966? A. Yes, that last boundary change I participated in was the construction of the John F. Kennedy Junior-Senior High School, which necessitated a change in the boundaries of Abraham Lincoln High School and Kunsmiller and Kepner Junior High Schools, and people came in to protest this because that occurred after the annexation of Fort Logan and Centennial—some Centennial annexation—which changes the pattern of attendance from Lincoln to Kennedy, and the question of public bus service of high school kids arose at that time. We finally resolved the boundaries and everybody went presumably away happy.

* * * * *

[1117] * * *

Cross-Examination by Mr. Greiner:

Q. Mr. Burch, concerning your eight years that you served on the School Board, were you aware of the policy of the School Administration, first of all, with respect to the approvement and hiring of minority teachers? A. Not specifically, sir. In other words, each—again, if I may elaborate a little, again, the Board is governed by state law. They have to hire teachers, and as you know, the teachers are on probation, probationary contracts.

Every [1118] teacher has to sign a contract. Then they become tenure.

Q. That's a three-year probationary period? A. Yes, the state law provides that teachers shall serve—every teacher, even a new one, must have a contract. The contract then is renewed for three years, and at the end of three years, if a teacher's service has been satisfactory, they then have what we call a tenure contract.

Q. That's t-e-n-u-r-e? A. Yes, sir. I was not aware, and, of course, the state law requires that all teacher contracts be approved by the 15th of April, so the first time I participated in, you might say, the hiring of teachers—the Board obviously never interviews teachers and it doesn't, unless they specifically ask, know where they came from—but in April of 1960, a great long list of what was called a personnel report, "We recommend that the following teachers achieve tenure," and so forth. It was not until 1962, the 32nd and Colorado business, that I turned my attention to find out how many—how many Negro teachers were in the Denver Public Schools, how many Hispanos or how many Orientals, and at that time is when I turned my first attention to finding out the number.

Q. What did you find out? A. I found out there were not too many, and in asking—

Q. Do you recall how many? [1119] A. No, sir.

Q. Do you recall the schools to which they had been assigned? A. No, because, again—

Q. Did you make inquiry? A. Again, just a minute—

Q. Pardon me, Mr. Burch, but if you will just respond to my questions, this will move along a lot faster.

Did you inquire as to where the minority teachers had been assigned? A. No, sir.

Q. Your study took that not into account, is that correct? A. No, sir.

Q. All right, now, do you recall what proportion of the schools' teachers overall throughout the School District were minority and what part of 1962 was this? A. Well, it will be at the time the personnel—when we finally approved the teachers.

Q. In the spring of '62? A. Indicated they wanted to sign contracts.

Q. How did you go about finding out this information? A. I asked the superintendent in charge of personnel the number of minority teachers that we had in our public school system.

[1120] Q. That was Howard Johnson? A. That was Howard Johnson.

Q. And did he tell you he didn't know that information? A. No, sir, he gave the specific answer, as I recall. The time I first asked, it was 256—

Q. Did he have the figure right on the top of his head? A. No, sir, in other words, he could not respond to my question. In other words, he—it was—I asked that, and it was subsequently given to me, "I want to know how many Negro teachers, how many Hispano or Spanish surnamed, how many Oriental," and I finally got the information with respect to the total as of the April 1962 approval of the contracts.

Q. How long did it take to get that information? A. I would say that it took—meetings at that time—School Board meetings at that time were on Thursday afternoons. I would say it took three days.

Q. Do you know how the information was assembled by Dr. Johnson? A. No, sir, I have no idea how the school records are kept.

Q. At the time you made this survey in '62, Mr. Burch, did you also inquire about the hiring of minority principals or minority assistant principals in the public school system? A. No, sir.

Q. Your study was devoted only to teachers? [1121] A. It was not a study. It was a request for information.

Q. Now, what prompted you to make that request? A. Because of the sudden interest in the fact that we were accused of not providing quality education for children.

Q. Were you also accused in 1962 of not hiring a sufficient quantity or proportion of minority teachers? A. No such accusation was ever made to me, sir.

Q. Did you ever hear any such accusation while sitting in on a School Board meeting? A. No, sir.

Q. You don't recall any efforts, for example, by the Urban League in the late 1950's, as soon as you got on the Board? Wasn't the Board constantly asked to hire more minority teachers? A. You say the late 1950's? I recall this matter did not come to my attention until February, 1962, when this whole matter came into being.

Q. So, between April of 1959 and April of 1962, you in your capacity as a Board member never heard a request that more minority teachers be hired? A. No, sir.

Q. All right. Now, what action if any did you take then, Mr. Burch, after you discovered, and I take it that what you discovered was that there was a relatively low [1122] proportion of minority teachers in the School District? A. In terms of percentage, it would be about 5 percent, yes, sir.

Q. And then what action did you take? A. I took none. It was not my function as a Board member to direct anyone what action to take.

Q. Did you make any recommendations to the Board? A. No, sir.

Q. Did the Board itself make any recommendations to Howard Johnson? A. The Board as a result—again, the equality—the Voorhees Committee had been authorized and the Board collectively indicated to the staff that they should attempt to secure more minority teachers. I as an individual never made any such recommendation.

Q. I assume you voted in favor of it? A. I did.

Q. Was that a unanimous recommendation? A. To my knowledge, yes, sir. Well, it was not on a vote. In other words, it was a unanimous recommendation, yes, sir. No one on the Board objected. It never came out to a roll call vote, because there was not a question of motion.

Q. During the period 1959 to 1967, can you describe for us the means by which you kept track of what was happening [1123] in the schools within the School District. A. Well, obviously, the main source of information was the continual reports of the Superintendent and staff with respect to the schools. Second, the visits or, I guess you call it visits, attendance at functions within all of the schools of the city. I did not—I was not a School Board member who—as a matter of fact, there were schools in the system which I have never visited—I was not one who was constantly visiting the schools, because I did not consider myself an administrative School Board member. Certainly, with the volume of reports and the consideration of the annual budget, a Board member is kept apprised of what is going on in the public schools, as well as the press and radio and TV.

[1124] Q. Now, as I recall, Mr. Burch, you were in the real estate business from 1930 to approximately 1968, is that correct? A. Yes, sir.

Q. Did that include both commercial and residential real estate? A. No, sir, that was exclusively commercial, office buildings mostly in the downtown Denver. Our firm was never engaged in residential real estate.

Q. Did you belong to any realtor trade organizations? A. Yes, I belonged to the Denver Board of Realtors and at one time was president.

Q. And you attended association meetings? A. Yes, sir.

Q. Did you at those association meetings acquire any knowledge of population movement of Negroes? A. Not at those meetings. I acquired that by my general knowledge of the city.

Q. And by 1955, Mr. Burch, do you recall whether you knew where the eastern boundary of the Negro population was at that time? A. I could not say it precisely but it was obvious that it had moved at least to Colorado Boulevard.

Q. In 1965? A. Where traditionally, when I came to Denver, it was [1125] confined at the so-called Five Points area, but I would observe that, by 1955, when I was not a school board member, when my property interests were exclusively office buildings by 1955, that the eastern boundary of the so-called Negro residential area had moved to Colorado Boulevard.

Q. Now, you're not telling me, Mr. Burch, are you that in 1955 the area north of City Park was predominantly Negro? A. Not predominantly, no, sir.

Q. But there were some Negroes? A. There were Negroes who were moving east of Colorado Boulevard—or east of York Street.

Q. Now, if we talked in terms of predominantly Negro neighborhoods, Mr. Burch, in 1955, where would you place

the line? A. Predominantly Negro? Well, I would say —I was serving in the House at that time with Representative Earl Mann. He lived at 2149 High Street, and the predominantly Negro area would have been from, I would say, 20th Avenue northward. In other words, Earl Mann at 2149 High Street was in the center of the predominantly Negro residential area in 1955.

Q. Now, it's true, isn't it, Mr. Burch, that by 1955 all of the areas west of York were predominantly Negro? A. I think High is west of York. They were predominant.

[1126] • • •

By Mr. Greiner:

Q. Mr. Burch, after you got the information regarding the proportion of minority teachers in 1962, subsequent to that time what we have been referring to, I believe, as the Voorhees Committee, it issued its report, did it not, in the spring of 1964? A. Yes, sir, final report. Preliminary reports were available to the board prior to that time.

Q. One of the findings—and that report is in evidence as Plaintiffs' Exhibit 20, Mr. Burch—and one of the findings of that report was that the district had been assigning minority teachers to minority schools. Do you recall that? A. Yes, sir.

Q. Was that the first time that you had been aware of that? A. Yes, sir. In other words, I as a board member did not know where any teachers were assigned.

Q. Now, you mentioned these lists of teachers which you approved in April of each year. A. Uh-huh.

Q. What information was on the lists? [1127] A. Only the name and, shall we say, serial number. There was no indication then as to whether they were—it didn't even have

whether they were— Of course, they all had to have B.A. degrees. That was a condition precedent to hiring.

The Court: Excuse me. I thought you said that—maybe I'm mistaken—that you asked Howard Johnson to furnish you with a number of minority teachers, you said, after the accusation was made that you were not providing quality education.

The Witness: That came— Judge, that came at the time of the creation of the Voorhees Committee.

The Court: Oh, I see.

The Witness: That was one of the reasons for the creation of the committee.

The Court: This was following the controversy about building a junior high school out there?

The Witness: In other words, that it was—it was raised that we would have poor quality education there and that is when I said, "Well, how come we're having inequality education?" That's when I first asked "How many Negro teachers do we have in the whole system, out of some 4,000?" And I found out roughly five percent.

The Court: Thank you.

Q. That event which you have just been describing took [1128] place in 1962, is that correct? A. Yes.

Going to your last question, this—

Q. The list of teachers. A. —the name and the employee number; no indication of— The only way you could determine sex was by the name.

Q. It did not list the undergraduate school which had been attended by the teacher? A. No, sir.

Q. Did it give the teacher's address? A. No, sir.

Q. Well, I take it then that the board didn't really exercise any discretion regarding the approval of these things? A. It was in compliance with the law that we had to approve, in effect, employment contracts prior to the 15th of April.

Q. From what you have told me, you had no information upon which to exercise any discretion? A. No, sir.

Q. That was left up to the school administration? A. That was an administrative function.

Q. Now, on your direct examination, you mentioned the difference in community viewpoints with respect to the utilization of mobile units at Smith and Stedman Elementary Schools. Do you recall that? [1129] A. Yes, sir.

Q. You said something about the question being less well framed at one school or another. Can you explain what you meant by that? A. Well, there were two separate questionnaires, one going to the parents of Stedman and one going to the parents of Smith. And they were not precisely the same question. One of them—the question at Smith was "Would you prefer busing children to eliminate overcrowding, or the addition of—the acquisition of new mobile units?"

The question at Stedman, "Would you prefer a permanent addition to the school, or busing?" So in that respect they were not the same. The question posed to the different parents were not the same.

Q. Now, what was the point in time that you're describing that these questionnaires were sent out? A. Let's see, it would be in the fall, I would say, of 1965, because the authorization of the construction at Hallett and Stedman took place in the spring of 1966. And was accomplished before I left the board. So I would put the point of time of this questionnaire at the fall of 1965, September, October and so forth.

Q. And in the fall of 1965 it is my recollection, and correct me if yours is different, Mr. Burch, that there had already been placed four mobile units at Smith—or at [1130] Stedman? A. Yes.

Q. And six mobile units at Smith, is that correct? A. That's right.

Q. Now, the parents at Smith were offered either additional mobile units or busing, is that correct? A. Right.

Q. And the parents at Stedman were offered an addition or transportation? A. That's right.

Q. What was said about the removal of the mobile units at Stedman? A. It was my understanding—and again I can't testify to my own knowledge now—but it was my understanding that the construction of the addition to Stedman, with the additional classroom space and the busing of one hundred some children, would make it possible to remove the mobile units at Stedman. Now, I have not been back to see—I could not testify whether there are still mobile units at Stedman, but one of the considerations was the small size of the school site. But the mobile units, as they were there—you say there were two?

Q. There were four. A. Well, in terms of space occupied, if the mobile units took up as much ground space as would the three-classroom [1131] addition to the building—

Q. Well, now— A. Furthermore, mobile units would take more play space.

Q. Yes, because they're just single-story structures, aren't they? A. That's right.

Q. So, by the time 1966 rolled around, you had twelve mobile units at Smith. Do you recall that? A. Yes, sir.

Q. They were taking up an awful lot of space at Smith, were they not? A. That's right, but that was—in Stedman the addition was the site, and apparently the administra-

tion felt that the Smith site was large enough to accommodate more mobile units. I sometimes wondered in my own mind if that were so because it looked like an Army barracks out there.

Q. Now, in 1962, Mr. Burch, when the controversy arose over the proposal to build a new junior high school in Northeast Denver at 32nd and Jasmine, how long was that proposal under consideration before it was scrapped? A. Well, it was first given for study to the board in February, 1962, and in effect it was never scrapped. It just—the hearings on it and the public discussion and the desire to create a committee—it was never acted upon. But [1132] it was never—in other words, it was never rejected. It was just never acted upon.

Q. Wasn't a resolution passed which was introduced by Mrs. Noel, Mr. Burch, whereby the board in effect said that they would not construct anymore new facilities in Northeast Denver? A. That was after my service on the board.

Q. That was after— A. I was present at the meeting. That was the meeting after June of 1967, the first meeting after I left the board. I attended the meeting as a spectator and that is the time when the board adopted the Noel Resolution about no construction. It would be June, 1967, the first regular meeting after I left the board.

Q. So the proposal was in fact scrapped? A. Well, if you take that as scrapping, yes. But it was not scrapped in April, 1962, or 1963 or 1964. It was still, you might say, a proposal on which action was never taken.

Q. Now, what were the factors to your knowledge, Mr. Burch, that caused the board to defer action on the building of that junior high school? A. I would say the main one was public protest. I think the board is more respon-

sive at least in my opinion to public protest on any policy than perhaps any other, because [1133] they represent the public generally.

Q. Generally, was there a principle which came out of that protest? A. Yes.

Q. What was it? A. It was the recommendation of the so-called Voorhees Committee—recommended and was adopted that school boundaries be hereafter fixed with respect to racial and ethnic considerations an in light of adopting that policy it would have been contrary to policy to have continued on with the construction of a new school at 32nd and Colorado Boulevard which admittedly would have been, in the main, attended by minority students.

Q. Now, did you see any difference, Mr. Burch, or was it discussed by the board, between the building of a new facility which you knew would be predominantly black when it opened, and the building of additions to existing facilities which you knew would serve only minority children? A. Well, there is a big difference. The new facility at 32nd and Colorado Boulevard was a junior high school. The policy of adding additions to elementary schools was to sever the children in that neighborhood. And that policy did not change. At the same time that we were building additions to Stedman and Hallett, we were building additions to McMeen, to other schools in the district. There was never [1134] any change in the policy of the Board of Education with respect to the building of additions to existing schools—small additions.

[1135] Q. That's somewhat inconsistent, isn't it, Mr. Burch? A. Not necessarily.

Q. Well, you decided, as I understand it, not to build the junior high school at 32nd because it would be a segregated school, isn't that right? A. Well, don't put words

in my mouth. The claim was made that it would be a de facto segregated school.

Q. Yes, sir. A. I would have to admit that it probably would have been so.

Q. There is no doubt in your mind, is there? A. All right, I will say there would have been no doubt in my mind, but Stedman and Hallett were already de facto segregated schools, and the construction of an addition to those schools made no change whatsoever in the composition of the children.

Q. Well, it placed those children who were placed in those addition, did it not, Mr. Burch, and put them into a black school? A. But they were already there. They were attending the school under double sessions.

Q. I see. You mean there was no change in the enrollment? A. No.

Q. During those years at schools such as Hallett? [1136] A. Certainly, there wasn't—there was a change in enrollment. Stedman School's enrollment increased from 600 in 1961 to over 900 in 1965 without any change in the area from the standpoint of additional housing.

Q. Yes. You mentioned that. A. They were on double sessions.

Q. Did that surprise you, that change, Mr. Burch? A. Yes, that did surprise me.

Q. Mr. Burch, that had been the history, had it not, since 1950, of the eastward movement of the Negro population, that it led to denser populations? That wasn't such a surprising result, was it? A. You say it had been the history since—

The Court: He means, I suppose, that it was predictable and thus it shouldn't have come as any surprise. You can comment on that, if you wish.

A. (Continued) Well, all I want to say about it is that this is the only existing area where within the existing boundaries of the school that the population increased by that percentage, and it was true with respect to Stedman School.

Q. It was also true— A. I certainly would in no way be able to predict it on the basis of any information available to me.

Q. Is that right? What happened at Harrington School, [1137] for example, Mr. Burch? A. Harrington—

Q. In 1950. A. When I came on the Board, Harrington School had increased in population and we were transporting children to Smith School. Columbine School was on double sessions, and the Board had adopted plans for the ultimate demolition of Columbine School and the starting construction of what we call a primary unit. When we got the primary unit done, things had changed with respect to special education that we didn't go ahead and tear down the old school, but the capacity in the new primary unit and the old school were then greater than the population, and the recommendation was made by the staff that we transport children at the Harrington School to Columbine School instead of to Smith School, which was growing. And we finally resolved the problem by building an addition to Harrington, and Harrington then dropped back to capacity, aided by the construction of Barrett.

Q. Do you recall that both Harrington and Columbine were extremely overcrowded in 1955? A. No, sir, I had no knowledge of their status in 1955.

Q. Well, what was the activity that you have just described? Wasn't it to relieve the overcrowding at those two schools? A. Now, did I understand you to say 1955? I was not [1138] on the Board in 1955. I stated that when

I came on the Board in 1955 and '60 that both Harrington and Columbine were overcrowded and on double sessions or extended sessions or requiring transportation.

Q. Now, had that increase in their enrollment come about as a result of new construction in their attendance areas? A. Of new construction in the attendance area of Columbine and—

Q. Yes, sir. A. To a degree in Columbine, yes.

Q. And what about at Harrington? A. Harrington, no. Harrington was on the edge of the industrial district, isn't it, 38th and Steele, and by the time you get to 39th and Steele, that's factories.

Q. Would you agree with me that what happened at Stedman had already happened at Harrington some five or six years prior? A. No, I will not agree with your—it is an assumption only.

Q. Now, you mentioned the alternatives given to the Smith and Stedman parents. Do you have personal knowledge of what those alternatives were? Were you present at those meetings? A. No.

[1139] Q. Did you see any written reports concerning them? A. I saw—with respect to Smith, I saw the questionnaires.

Q. Oh, you did? Did the questionnaire identify the school to which the student might be transported? A. No, sir, to my knowledge, not to my recollection.

Q. Now, during the period of time that you were on the Board, Mr. Burch, between 1959 and 1967, as a Board member, what information did you receive concerning levels of achievement in the Denver Public Schools? A. Only the triennial publication that was put out and had been traditionally put out since Dr. Oberholtzer became Superintendent. There was never any information given

to the Board as to the achievement level of any individual school, but, rather, in the aggregate of the schools of Denver.

Q. The type of report you have reference to is similar to Exhibit 82, is it not? A. Yes, sir.

Q. Yes. Now, when did the question of the equality of educational opportunity first—when was it first raised? A. It was first raised and charged at the time of the—at the recommendation to construct the junior high school at 32nd and Colorado Boulevard, first raised to my attention, first time I had heard of it. I had been on the Board roughly three years.

[1140] Q. Now, Mr. Burch, you knew about the triennial testing program at that time, did you not? A. Yes, sir.

Q. And did it ever occur to you to find out what the achievement levels were in these minority schools? A. No, sir.

Q. Did anyone in the School Administration volunteer that information to you? A. No, sir.

Q. And you never asked for it? A. I never asked for it.

Q. Do you recall when that information, that school-by-school comparative data, was first made public? A. I don't recall it was ever made public while I was on the Board.

Q. So, the program— A. I have seen references to it since my leaving the Board, but I have no information as to the achievement level of the school where my own daughter attended, and I never asked for it.

Q. Well, I take it that at Carson, Hill and what was the other school? A. George Washington.

Q. George Washington, you didn't have any qualms, did you, about the quality of the education your child was

[1141] receiving? A. I had no qualms about the quality of the education my child was receiving.

Q. Now, as a Board member, were you aware of the fact, Mr. Burch, that the School District was spending considerable money during your tenure on the Board for programs which I might colloquially call compensatory education programs? A. Yes.

The Court: What kind?

Mr. Greiner: Compensatory education.

The Witness: Compensatory education.

The Court: Oh.

Q. When did you first become aware, Mr. Burch, of compensatory education programs in the District? A. I can't recite the precise year, but I became aware of a compensatory education program installed at Cole.

Q. Cole Junior High School? A. Yes.

Q. What year was that? Do you have a recollection? A. Well, it would have to be a recollection. I can't state precisely. It was at the time of the—started at the time of the boundary change between Morey and the others. In addition to that—

Q. 1962? A. 1962. That was when an enhanced and enlarged, a [1142] greater compensatory educational program was installed at Cole, to my knowledge, and with my tacit approval, although it was never done—although it was done through budgeting rather than as a policy of the Board.

Q. Do you recall the nature of that program? A. No, sir, except with one respect. Compensatory education, of course, is based on a reduced number of pupils for each teacher, or two teachers for the same number of children

as in an ordinary course. That's the main thrust of the compensatory education, perhaps additional courses, emphasis on other things.

Q. You don't have any specific recollection? A. No, but I do know that the thrust of Cole was to reduce the teacher-pupil ratio.

Q. That can be done in two ways, either cutting the class size in half or adding another teacher. A. Quite right.

Q. Were you aware of any compensatory education programs in the District during your tenure? A. Yes, sir, in other words, the compensatory education, if that's what you want to call it, that arose as the result of the Voorhees Committee, where the Board beefed up, provided money, additional personnel, additional courses, at Smiley Junior High School and Baker Junior High School.

Q. Now, so, you have mentioned Morey, Smiley and [1143] Baker— A. Not—I made no reference to compensatory at Morey.

Q. I am sorry. Cole. A. Cole.

Q. Smiley— A. Cole on the Board's own, before the Voorhees report. Baker and Smiley as a direct result of a recommendation of the Voorhees Committee.

Q. And the first such program that you can recall was 1962? A. With respect to Cole.

Q. Did the— A. '64 and '65 with respect to Smiley and Baker, as a result of the Voorhees report.

Q. Now, do you recall, Mr. Burch, whether or not the School District received federal assistance in the funding of those projects? A. Well, beginning in 1965, yes.

Q. That was from the Elementary and Secondary— A. That was the passage in 1965 of the Elementary and Secondary Educational Act by the Federal Government,

and we finally—I can't recall when the appropriation was made, but I think in anticipation—I maybe better not say that. The 1966 budget adopted in the fall of 1965 first included additional ESEA money, which had heretofore not been available [1144] to the District.

Q. Do you recall the schools which were targeted to receive those funds? Were there any schools in addition to Cole, Baker and Smiley, to your recollection? A. Yes, by and large, the schools in the Platte River. In other words, Platte bottom, Fairview, Greenlee, the old one—Elmwood. I think that Kepner and Valverde qualified to a degree. Horace Mann, Bryant-Webster, Crofton-Mitchell, Wyatt, Wyman, Whittier. Those specifically were so-called target area schools.

Q. Did the School Administration report to the Board as to why the Administration thought these programs were required in those schools which you have just described? A. No, except in a general—that is where the so-called culturally and economically disadvantaged children, whom ESEA—the thrust was to provide greater facilities for education—that's where they resided. In other words, that was the guideline, obviously based on census tracts and figures on family income and consultation with the Welfare Department. There is where the economically and culturally disadvantaged children lived. That was the whole reason for those tracts.

Q. I take it that the money wouldn't have been spent in those areas, Mr. Burch, had those children been achieving satisfactorily in those schools, is that correct? A. I don't—I will not—the ESEA did not require as a [1145] condition precedent achievement. It was on the culturally and economically disadvantaged. Now, you can jump to the conclusion that they were not achieving, but you are not going

to have me so state, because the culturally and economically disadvantaged areas of this country is where ESEA money was channeled.

Q. What was the objective of the program, Mr. Burch? A. To enlarge the educational opportunities of those culturally and economically disadvantaged children, sir. That was the thrust of the whole national program.

Q. And that was never equated with achievement? A. It hasn't been equated with achievement yet. It had only been in operation for the calendar years of '66, '67, '68 and '69.

Q. Did you receive any valuations of these programs from the School Administration? A. No, sir, I never received any during my service on the Board, which was during a year and a half of ESEA operation. I have never received an evaluation of any increase in achievement during that year and a half, nor have I as a public official yet.

The Court: I think we might be able to save a little time. You were satisfied in your own mind that it was justified to use this approach?

The Witness: Yes, sir.

[1146] The Court: That there was some necessity for it?

The Witness: Right.

The Court: Doesn't that really answer your question?

Mr. Greiner: I think so, Your Honor, yes.

The Court: All right, let's get on with it.

Q. Mr. Burch, you were a resident in the City and County of Denver in the years 1955 and 1956? A. Yes, sir.

Q. Do you recall being aware of the controversy in

the community over the proposed boundary changes at that time? A. No, sir, I took no note of school affairs in 1955 and '56.

Q. You were in the legislature at that time? A. That's right.

Q. And you don't recall any publicity about a letter written to the School Board by certain legislators? A. No, sir, I do not.

Q. Now, I believe you said that it was in 1969 with the building of the proposed building of the junior high school at 32nd and Josephine that you first became aware of racial considerations, is that correct? A. I didn't say that. I said I first became aware—that was the first time that there appeared before the Board objections raised upon racial considerations. Obviously, I [1147] was aware of the racial—of the racial characteristics of this city, but the—there were never any—let me state this, the boundaries of Barrett School, for example, were set while I was on the Board. They were never set by the Board. They were done by administrative decision. I never received any complaint, written or otherwise, about the boundaries of Barrett School, but the first time, when the full impact of the racial considerations, the de facto segregation, that that would be a de facto segregated school, it then came out in the open publicly at the Board of Education at its hearings after the introduction of the recommendation that we consider building a school at 32nd and Colorado Boulevard.

Q. And your recollection is different from Mrs. Johnson's, is that correct? Mrs. Johnson recalled that the Board had received protests about the building of Barrett, its location, and the establishment of its boundary lines. A. That could well be, because I was not a member of the Board at that time, sir. The Board may well have received

protests about the building of Barrett when it was proposed for study, but the record shows the go-ahead order given January, 1959.

Q. So, when you came to the Board it was already built? A. For all intents and purposes. It hadn't been built, but it was decided to build it.

Q. When the question of equality of educational [1148] opportunity in minority schools was first raised or first called to your attention in 1962, Mr. Burch, did you have an opinion at that time as to whether or not there was a relationship? A. No, that was one of the reasons why I supported the formation of the Voorhees Committee, to get the facts if there was. I had no knowledge of it.

Q. What sort of indicia would you have looked to or did you hope to have come out of that committee report that might have helped you make a determination as to whether or not there was a relationship? A. I had no—I could not have instructed the committee to—as to what they should find. As a matter of fact, the committee—we had to provide—the committee drew its conclusions from the staff, and there was assigned to the Voorhees Committee certain members of the staff. I would have been incapable of directing anyone to give me the factors by which I could have found out if the quality of education was unequal.

Q. Well, the Committee did in fact issue a final report? A. In 1964, yes.

Q. Did it answer the question that you had hoped would be answered by it? A. Well, they made some 180 recommendations, all of which were directed to attempting to improve the quality of educational opportunity, and thereby improve achievement, but [1149] no one can say if any of those actually finally resulted in greater achievement of educational—not opportunity—but educational results.

Q. Now, there was a subsequent committee appointed, was there not? A. Yes, sir.

Q. Were you on the Board when it was appointed? A. Yes, sir.

Q. Do you recall the reasons why it was felt that it was necessary to appoint that second committee? A. Well, you notice the difference in name. One was a special study committee on the equality of educational opportunity and the other was an advisory committee, and I don't recall the full title, but the creation of the second was to in effect advise the Board and Administration in the formulation of methods rather than calling attention to unequal opportunities.

Q. Well, was the premise of the second committee, which was called the advisory council on equality of educational opportunity in the Denver Public Schools, was the premise there that inequality in fact existed in certain of the schools? A. Only as alleged or as demonstrated, whatever word you want to say, by the Voorhees Committee.

Q. Well, I take it that there must have been a feeling that there were some inequality problems or it wouldn't have [1150] been necessary to have an advisory council, would it? A. I think that's probably right, but you will note also that the second one was to be composed of representatives of—I forget the wording—of civil rights organizations, and, in other words, its composition was significantly different than the Voorhees Committee. The Voorhees Committee, as I recall, was twenty-four, three from each of the eight high school districts, plus staff. The Bird Committee, the second one, I can't recall the members, but in addition there were members not really residents in the high school districts.

Q. So, the composition of the second committee was somewhat more cosmopolitan? A. That's right. It brought in

the viewpoints of the civil rights organizations as members of the committee instead of what you call—obviously, they worked with the Voorhees Committee, but they didn't have a voice in the vote, as they did in the other.

[1151] Q. Now, if the first occasion, Mr. Burch, of your attention being called to racial considerations was the proposed junior high school in 1962 at 32nd and Jasmine, I take it the second such instance would have been the controversy which surrounded the proposed boundary changes at Cole, Morey and Byers, also in 1962, is that correct? A. Yes.

Q. And which came first? Do you have a recollection? Did the Cole-Morey matter come up after the junior high school? A. To my recollection—and I might possibly be wrong—the 32nd and Colorado Boulevard came up in February. The boundary changes with respect to Byers, Morey and Cole, they came up subsequently to that. Because again I think, sincerely, or I will state that one of the reasons advanced for building the new junior high school—and it was to be a modest size—was two purposes: number one, was to relieve the overcrowding at Cole, and number two, was to work to the point where they could eliminate Gove. No doubt in my mind that, had the building at 32nd and Colorado Boulevard been constructed, a substantial part of the Gove area would have attended that junior high school.

Q. In fact, there was a plan to close Gove down, wasn't there? A. Frankly, when I came on the board, they said Gove [1152] ought to be torn down. It's 700 capacity. It hasn't got this and it hasn't got that. And we ought to abolish it as a junior high school. And I think the construction of the new high school has had some bearing on the ultimate disposition of Gove.

Q. So the plan to— A. Now, going back to the boundary delineations, I personally—I personally received no objections from the change in boundary lines between Morey and Cole. I received a whole lot of objections, written, telephone calls and whatnot, against the extension of the inclusion in the Byers district of children who had previously gone to Morey and it was the same as you had everywhere, "Well, you're breaking your friends" and whatnot. A few little arguments about changes in the Grant-Byers district because they had to cross the Valley Highway and so forth and so forth. But there was no significant or rising opposition that ever presented itself to me or to the board at the time we adopted the boundary changes that you refer to.

Q. So that we can see, Mr. Burch, what the situation was in 1955, I am now showing you what's in evidence as Exhibit 416. In 1955 what was the capacity for Byers? A. For Byers? Capacity? This is 1955? I'm reading. 1355.

Q. And what was its enrollment in March of 1955? [1153] A. 1971.

Q. What was its projected enrollment the next fall? A. 1096.

Q. And at any point in time was it projected that Byers would exceed its capacity? A. No, sir, at no time.

Q. That projection which is Exhibit 416 goes up until which school year? A. 1961-1962.

Q. All right. So Byers was under capacity and it was projected to remain that way, is that correct, as shown by this exhibit? A. That's what the exhibit indicates, yes, sir.

Q. Well, in the exhibit—you recognize that as school district figures, do you not? A. I assume it is. April, 1955. I had no connection with the school district. Let me say this—and this is similar—this is the same as similar esti-

mated memberships that were given to me; the 1959 projection, on beyond these years. This is obviously a school district exhibit. But it is April, 1955.

Q. Now, that exhibit also lists the capacity at Cole, does it not? A. Yes.

Q. What is the capacity given for Cole? [1154] A. 1,908.

Q. 1,908 students? A. Yes, sir.

Q. And do you know what the enrollment was at Cole in 1955? A. No, sir, I have no idea.

Q. Handing you what's in evidence as Plaintiffs' Exhibit 215, the first column gives the enrollment at the various—Cole, Smiley and Morey. If you will look at 1955—what was the enrollment at Cole? A. 1,338.

Q. 1955? I beg your pardon. A. 1,401.

Q. 1,401. And you have just told us it had a capacity of 1,908, is that correct? A. That may have been true, sir, in 1955, but the capacity of Cole when the boundary changed was not 1,908. It was somewhat nearer 1,500 or 1,600. I am certain that the capacity of Cole Junior High School in 1962 will not show 1,908, at least for junior high school purposes.

Q. What had happened at Cole to your knowledge to reduce its capacity? A. Well, some of the facilities at Cole had been transformed from junior high use to special education use.

Q. Special education— [1155] A. And from the standpoint of the capacity comparing it with more than the others, we were dealing with the 30-a-room capacity normally associated with a junior high school class.

Q. The special education children were being bused in, weren't they? A. All special education children classes are transportation classes in the whole district, sir. There is no significance of busing into Smiley. They're also bused

into Evans. They are bused into Skinner. The special education is based on busing.

Q. We were talking, were we not, Mr. Burch, about Cole? Busing of special education. A. Obviously—I can't state as a matter of fact but it is my understanding that when you establish a special education center that it's unlikely that you have enough in the subdistrict and you thereby gather them together.

Q. Well, is it your testimony that in 1962— A. May I refresh my memory. It says "Capacity of Cole, 1,908, until 1960. 1961 to Present, 1,725."

Q. Is it your testimony then, Mr. Burch, that in 1955 that Cole was overcapacity? I believe that's what you said on direct examination. A. In 1955?

Q. In 1962. [1156] A. Well, in 1962—in 1962, with 1,725 capacity. 1961 was 1,932 enrollment. As a result of the boundary change, it dropped down to 1,654. 1,512 in 1963 and it has not been, to my knowledge, above capacity since.

Q. So, how much— A. Again, on the capacity, 1,725, sir; not 1,908.

Q. Yes. So, if the special education classes had not been there, what would the situation have been? A. Well, I'm certain that the 1,932 membership in Cole is junior high membership and not related to the—These were not necessarily special education classes of junior high age at these special education centers.

Q. Are you referring particularly to Cole? A. Anyplace. Special education classes are not necessarily based on age. We have special education classes that I have attended where you have children of all ages.

Q. Now, the school directly to the south of Cole was what junior high school? Morey? A. Directly to the south?

Q. Right. A. Well, to the southwest would be Morey, yes, sir; not directly south.

Q. What does Exhibit 215 show the situation to be at Morey in 1961? A. It shows that Morey had 894.

[1157] Q. Enrollment, and it had a capacity at the time of 1,170. So it was undercapacity, is that correct? A. Yes, sir.

Q. Now, as I recall the boundary change, an area was taken from the southern attendance area of Cole and given to Morey, is that correct?

Mr. Ris: What year, please?

Mr. Greiner: 1962 changes we're talking about.

A. Yes. In other words, it would be the south and west boundaries.

Q. How many students were moved? Do you know? A. No, sir, I have no idea how many were physically moved.

Q. You cited some figures about how much the enrollment went down at Cole. A. That's right.

Q. How much did it go down? A. From 1,932 in 1961, until 1963, 1,512. It went down 420.

Q. In a two-year period? A. In a two-year period, by these figures.

Q. What about the next year, right after the boundary change? A. 1,932 in '61; 1,654 in '62. That's a reduction of 278, and the final reduction, 420, which would, from that —[1158] and these were available to me—would have the objective of accomplishing a reduction in excess—the enrollment over capacity at Cole was accomplished in the two-year period.

Q. Well, now, Mr. Burch, would it have been possible to solve that very same problem by simply moving the special education courses to Morey from Cole? A. I suppose it

would have, sir, but that was not the question on which we were deciding.

Q. That was never even suggested? A. There are always—not to my knowledge, no, sir. There are always alternatives to anything. It's the one that has the general recommendation of the staff which is adopted.

Q. Now, during your consideration—the board's consideration of this proposed boundary change, Mr. Burch, you did say, did you not, that racial questions were raised about the Cole-Morey boundary change? A. No, sir, I did not say that.

Q. It's your recollection that there were no such questions raised? A. I said that I had no objection raised to me from any extension of the Morey boundaries to the northwest. I had a lot of static from people objecting to the moving of children formerly going to Morey, to Byers, primarily because of distance and associations. The racial question was never [1158] raised, sir.

Q. So your recollection is different from that of Mrs. Johnson, is that correct? A. If that is—Sobeit. That's my recollection.

Q. Do you recall her testifying about the receipt of petitions at board meetings protesting that change? A. I heard that but I could not from my recollection ever—and this could be adduced—any petition, sir, that was ever brought to the Board of Education, at least, when I was president, was always filed with the minutes of the meeting. I have no recollection of a petition signed by anyone objecting to the changes in the boundary between Morey and Cole.

Q. Now, did you have any knowledge, Mr. Burch, of the differences in the racial compositions of the areas which first were being moved from Cole to Morey in the one instance, and being moved from Morey to Byers in the other instance? A. Yes.

Q. You knew, did you not, that the area being taken from Cole and given to Morey had a different racial character than the area being taken from Morey and given to Byers, did you not? A. I did.

Q. And did you have any idea what the impact of those two moves might be on the racial composition of Morey? [1160] A. No. In other words, that was not a consideration sir. In other words, the attendance boundaries of the Denver Public Schools were never related to racial or ethnic considerations. That consideration was wholly on the number of children.

Q. Now, what you have just told me as reflected in Exhibit— A. Let me go on. There was, by Policy 5100; it was adopted subsequent to the consideration of the boundaries of Morey and Cole. And race and color did not enter into it nor did ethnicity.

Q. You seem to be making a distinction, I take it, Mr. Burch, between the board overtly using race or ethnicity as a basis for its decision on the one hand and instances where the board had brought to its attention questions of race and ethnicity on the other, is that correct? A. That's correct. But the board had not adopted a policy with respect to those things brought to their attention, sir.

Q. Now, as I recall, one of the recommendations of the Voorhees Committee was the establishment of a policy of limited open enrollment. Do you recall that? A. Yes, sir.

Q. Do you recall whether or not in the development of the program of limited open enrollment which was in March of [1161] 1964, as I recall, in the development of that program, was an objective of integration discussed as a possible objective of limited open enrollment? A. It was. Yes, sir. In other words, that was the suggestion; that we adopt a policy of open enrollment or of limited open enrollment,

was a direct result of the recommendations that every measure should be taken to achieve as much integration as possible.

Q. Now, you will recall, Mr. Burch, that the policy which defines the limited open enrollment policy—the written definition of that policy—it did not establish any conditions, did it, that the transfers under LOE have an integrating effect? A. No, sir.

Q. Was it discussed? A. It was hoped— It was hoped, sir, that that policy would achieve a better degree of integration. But there was no mandate about it. I will say, frankly, as a matter of personal opinion, I viewed the whole thing with a dim idea.

Q. Why? A. With a dim view.

Q. Why? A. I did not feel that it would be productive of any great degree of integration. And it was also putting burdens [1162] on parents by the fact that no transportation was at that time provided.

Q. Did you vote against that? A. So I will say, frankly, and state to the Court I viewed the idea of limited open enrollment with a dim view, myself, although I voted for it on the hope that it might accomplish something.

Q. Now, during the course of your tenure on the Board of Education, Mr. Burch, did you ever receive any information concerning teacher experience in minority schools? A. Teacher what?

Q. Teacher experience. A. No, sir.

Q. Did you ever acquire any knowledge during that time period while you were on the board that indicated to you that teachers in these minority schools tended to have less experience? A. No, sir.

Q. Were you aware of a higher rate of teacher turnover in these minority schools? A. Well, it's difficult to answer

yes or no. I was concerned with the teacher turnover in the whole system. But it was not, to my own knowledge—but it was stated that there was a greater teacher turnover in the older schools and in the schools in the minority area, wherever they might [1163] be.

Q. So, in your own mind, you didn't focus on teacher turnover in just the minority schools? A. No, because in the personnel reports that there was—while there may have been more teacher turnover in a Columbine, a Harrington, a Whittier, than there was in a Bradley, a Fallis, a Kunsmiller—it was therefore entirely too much turnover, in my opinion, all over.

Q. Now, there are two sources of turnover, at least that occur immediately to me: one is resignation of teacher, and the second is the transfer of the teacher. Is that correct? A. Did you say transfer?

Q. Yes, sir. A. That would not necessarily be turnover. Again, if I may refer to Mr. Fuller, Mr. Fuller came on the board in 1961 and joined with me and for the first time—at the time of the technical report, resignations and whatnot, we asked the superintendent to provide us reasons, and shortly after that time, in 1961, the personnel report given showing who resigned, also gave the reasons. Marriage, pregnancy, leaving city, husband leaving city, retirement, and whatnot. In other words, all resignations then were categorized. That was not available until after Mr. Fuller. He was strong for it and I joined him and we finally got that information. [1164] But transfers as between schools, that wasn't on this personnel report. In other words, it was not severing from what came on the report. What came on the report was the leaving of the district. But not moving from school to school within the district. So transfers could not be—while

they may have affected turnover in schools, they were not the turnover I was talking about.

Q. So you were talking about resignation-type turnover? A. I was talking about things which resulted in the teacher leaving the employ of the district.

Q. Now, from a standpoint of the school from whence the teacher was transferred, the effect on the school was the same, was it not? A. It could have been. But may I say that the only—I had no knowledge nor did I ever participate in any transfer of teachers from school to school. We also approved the transfers of a principal from this school to that school, and coordinator. But never did the board ratify, approve, or instigate transfer of a teacher from school—from this school to that school. That was an administrative decision, worked out with the teachers, so far as I knew.

Q. Were you aware of the written policy of the school district during your tenure, Mr. Burch, to the effect that a teacher would not ordinarily be expected to request a transfer until the teacher had been in a school for three years? [1165] A. I probably am aware of it. But it was one of those administrative policies with which I, as a board member, was not concerned.

Q. Did you see any educational benefit in such a policy? A. I repeat, I was not concerned with that administrative policy.

Q. So you didn't recognize that there is some benefit to be derived from having a stable membership of teachers in a given school? A. I repeat, sir, that a board member is not a school administrator. Those particular things are left to the administration. Even though, probably with the majority of the board, we could have changed it. But with obviously a big policy book—I skimmed through it and I

was aware of certain policies. But with respect to the one you mentioned, that was not my concern. I never questioned it, sir.

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[1166] *Cross-Examination by Mr. Brega:*

Q. Mr. Burch, looking first at the Cole-Morey change in 1962, I would like to have you take the Exhibits 398 and 399, and turning to the appropriate page—398 now would be the school year '61-'62 and 399 the school year '62-'63—I wonder if you would examine those and tell the Court, first, for Cole, which you said was primarily a minority school at that time, would you tell the Court what percentage of Cole in 1961 and 1962 was white prior to the boundary change. A. Forty-five—as of May 1, 1962?

Q. Yes. A. 45.0 percent, according to this statement.

Q. No, I am saying white. A. Oh, white.

Q. Anglo. A. Oh, well, wait a minute. This copy I have here shows Negroes, Orientals and Spanish. This is the elementary schools here.

Q. Yes. What you have to do here is you have 45 percent Negroes, right? A. You want me to do some subtraction? All right. Obviously, starting with 100 percent, the Anglo would be 10 percent.

Q. Ten percent in the year of 1961 and '62? [1167] A. As of May 1, 1962, yes.

Q. Would you look at Exhibit 399 and tell us what the percentage of Anglo was in Cole, January 1, 1963? A. This says that in January, 1963, it was 16.90.

Q. So, it increased the Anglo by 6.9 percent? A. That's what the figures show, yes, sir.

Q. Now, in looking at Exhibits 398 and 399, would you examine those two and tell the Court how the percentage

of minority students or black at Morey changed from the school year '61-'62 to '62-63? A. May 1, '62, the figure shows Negro 15.0 percent.

Q. Would you tell the Court what— A. January 24, 1963, the figures show Negro percentage 27.99 percent.

Q. So, the black enrollment at Morey after the boundary change increased by 12 percent?A. By 12 percent, yes, sir.

Q. Now, I want to go back a moment, if I may, to the teacher situation which Mr. Greiner dwelled upon. Isn't it a fact that during the time you were on the Board, a black person filed an action against the Board or a complaint in the Anti-Discrimination Commission or now known as the Civil Rights Commission, against the Board for racial and ethnic data on the teacher applicant forms? A. Yes, sir, that is true.

[1168] Q. And isn't it a fact that as a result of that these things were removed from the applicant forms? A. It came to our attention that a complaint of some—whatever takes place at the Anti-Discrimination Commission—a member of the Commission had filed a complaint with the Commission that we were—the school's records were discriminatory, and we had attorneys' conferences and what not, and finally it was resolved that the School District, No. 1, would remove from all applications the applicant's picture that came in traditionally and any reference to race, but it was finally agreed that the teacher who was a tenure teacher or a permanent employee, they would be left there, so we could identify quickly that this person was a Negro or Oriental or what the case may be. That did occur, although it never came into the general public—I don't recall ever having heard anything about it in the press, but it did occur yes.

Q. Then, at a subsequent time, I believe, after the Voorhees Committee, you began to get requests, recommendations, to solicit teachers on the basis of race and ethnic background? A. Yes.

Q. And isn't it a fact that when you got into this you found, for instance, that it was extremely difficult to find qualified teachers of Hispano background, for instance? [1169] A. Well, it was always difficult to get qualified teachers of either the Hispano or the Negro race, because of the competition. In other words, the same situation existed over the whole United States or over the State of Colorado, and, frankly, there was more demand for their services than there were numbers to be chosen. We were in competition to get a qualified Negro teacher or a qualified Spanish American teacher. We were in competition with school districts all over the United States.

Q. In other words, there was a great demand? A. So it was difficult. It was difficult to secure teachers of the minority, ethnic or racial minorities.

Q. Now, when you got to the problems in the Stedman-Smith-Hallett area, were all of these schools on double session or extended session at one time in this period of 1961, '62, '65, in there? A. To my best recollection, yes. When the enrollment of the school increases over its capacity, you have extended sessions. You have double sessions. In other words, you attempt to accommodate the children within the existing facilities, and, certainly, the thrust of the Administration and of the Board during my whole tenure was to eliminate double sessions where possible.

Now, I would have to answer, I believe, that the development of double sessions obviously required the putting [1170] of mobile homes at Smith, or mobile units. The

development of double sessions finally resulted in the mobile homes and subsequent addition at Hallett, and, likewise, at Stedman, and when the addition at Stedman and the transportation to the other schools—in other words, it is a known fact that there have been no double sessions at Stedman or at Hallett since the additions were built. There still may be, to my knowledge—I wouldn't know as to the present number of children in Smith. There may still be some classes, some grades and some classes on extended or double session.

Q. During this period when you had those mobile units, you also had four at Phillips and four at Park Hill. Now, these schools were predominantly Anglo, were they not? A. Yes, sir. They were prior to 1964. In other words, there were changes made in the elementary boundaries at Phillips, at least, subsequent to the Voorhees report, which increased the population of Phillips and particularly its minority population, but one of the problems that worried us at the Board is Phillips is a very small site and the construction of any mobile units there reduced the playground area. That was always our problem about mobile units.

Q. During the time you were studying whether or not to build additional capacity or bus people out or double sessions, isn't it a fact that you had received a report then from a special study as the result of the Voorhees Committee on [1171] whether people liked busing? A. Yes.

Q. Or liked the neighborhood school policy? A. Yes, sir.

Q. Isn't it a fact— A. Made available to the members of the Voorhees Committee and made available to the members of the Board of Education and the staff was a report which was confidential and never released publicly,

but it was in effect a study of questions and answers, a poll, shall we say, of many of the points that were under study by the Voorhees Committee.

Q. Now, I would hand you what has been marked for identification as Defendant's Intervenor's Exhibit U, and ask you if you can identify that document. A. Yes, that is the Confidential Copy No. 40 of a publication called, "The Equality of Educational Opportunity in Denver, Colorado," which was developed and authorized by the Voorhees Committee under the auspices of Research Services, Incorporated, and this came into my custody and my possession as a member of the Board of Education as the fortieth confidential copy. How many others, I don't know. That's the fortieth copy, which I have had at all times.

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[1173] * * *

Cross-Examination by Mr. Brega (Continued):

Q. Mr. Burch, in consideration of this Stedman-Smith-Hallett area and these changes that occurred in '66, had you examined and used the questionaire regarding the attitudes of Denver people toward busing Denver children? Had you examined this report and studied it on whether people were in favor or opposed to busing in the elementary schools? A. Well, we were aware—yes, a School Board member was aware of the response to his question, attitudes toward busing Denver school children.

Q. All right. Let me read the question. "Would you approve or disapprove a plan whereby elementary school children would be taken to different schools by bus so that no one school would ever have mostly minority group students?

Now, would you tell the Court, in the elementary school, what percentage of the Negro parents disapproved of moving by bus to another school? A. Forty-three percent.

Q. Did you also at this period of time take a poll in the Hispano or Spanish, as this is classified, and could you tell the Court what percentage of the Spanish people voted [1174] disapproval of busing in the elementary school? A. 61 percent of Spanish parents disapproved.

Q. Now, examining page 43, which goes into the question, as I will read it: "This card describes two different plans or ways by which children might go to school in this city. Which of these plans do you consider best for children in this city, elementary school or Grades 1 through 6?" And one is a neighborhood plan and the other is an open enrollment, and would you tell the Court what percentage of the Negro parents voted in favor of the neighborhood school plan? A. 71 percent.

Q. And what percentage of the Spanish parents? A. 79 percent.

Q. In favor of it? A. Yes.

Q. All right, now, were these factors that were considered by the Board when you looked at this overcrowding in this area as part of the viewpoint of the community? A. Not wholly. I was guided in my views on the Stedman situation specifically by communications which I received in writing and by telephone from parents in the Stedman School district.

Q. Well, isn't it— A. I asked why not come to the Board and make those things public, why call me alone, and they said, "We would—

[1175] Mr. Greiner: Your Honor, we object to the witness' hearsay statements.

Palmer L. Burch—for Defendants—Cross

The Court: Overruled.

Q. Now, counsel has questioned you on whether you anticipated the tremendous growth in the population east of Colorado Boulevard as far as the black population. The exhibit before the Court, S-1, reflects that between 1963 and 1968 the total black school population increased by 45 percent. Could you tell the Court whether or not you had any studies that indicated that this growth was coming? A. What was the time period, sir?

Q. Between '63 and '68, or up until you left the Board. A. In other words, it is not an official census. No. The Board recognized, of course, the constant increase in the—we became aware of a large increase in Negro population in Denver Schools upon the census of 1960. It was apparent in the years since there has been a steady increase. Now, you say, were we aware that it increased 45 percent in five years?

Q. Or anything near that percentage? A. Well, only by figures that you might read on—for other purposes. We ourselves knew it was increasing, but I had no knowledge it increased 45 percent.

Q. Well, as a matter of fact, were you not concerned about the number of students that were going to schools in this particular northeast Denver area? [1176] A. Yes. In other words, as I have stated, it was a unique thing in my experience with public schools that an increase would —such an increase would develop in an area already developed. By that I mean when we add a newly annexed area where the developer was still building houses, you never knew how many kids were going to come from any house; but in an area which was built up, where there was no new construction—apartments, as you are all aware,

apartment construction, that's what's affecting central Denver. That causes the school enrollment to go down, because children of lower school age traditionally don't live in apartments.

Q. Well— A. But I was—what's the word? This surprised me, that growth in an established area.

* * * * *

[1177] (Following a recess, the trial resumed at 2:05 p.m.)

By Mr. Brega:

Q. Mr. Burch, prior to lunch we were discussing the Stedman, Smith, Hallett situation about 1966. During this period of time when you were concerned with the problem of overstudent population in these school areas, was there any discussion when you were talking about building or objection from the community on the basis of race or ethnic background? A. Yes. The answer to that is yes. There was objection stated that the addition to a school which was already preponderantly Negro enrollment would insure that that would continue to be a de facto segregated school. But there was also support given—to me, expression of support given to me for the construction of additions at both of these schools in the—by people in the District.

Q. Now, isn't it a fact that in the Smith subdistrict the majority of students there at that time were black? A. I was led to believe that that was true, yes, sir.

Q. And yet the parents of those students wanted mobile units rather than busing out of the subdistrict? A. Well, the question was not posed to them as to additional construction. It was never proposed that an addition be made

to Smith School, per se. The question there was additional mobile units to increase the classroom capacity, or busing. And, the preponderance of opinion of those [1178] particular people was more mobile units, no busing.

Q. Now, at the time that that was brought up to the Board, do you know whether the Board voted unanimously in favor of more mobil units at Smith? A. I can't recall precisely, but I would believe from my recollection that notwithstanding the no votes on the construction of permanent additions, I would recollect that the vote on the question of acquiring the requested number of mobile units, I think, was wholly affirmative. I don't recall of a no vote on the acquisition of additional mobile units at Smith School.

Q. And Mrs. Noel and Mr. Benton both voted in favor of that? A. That's my recollection. They both voted no on the Stedman-Hallett permanent additions, but I recollect as being president of the Board that it was a unanimous vote finally on the acquisition of additional mobile units at Smith.

Q. And it was also a unanimous vote of the decision of busing students out of Stedman, isn't that right? A. Correct.

Q. One hundred some students? A. Correct.

Q. And they were bused, were they not, to predominantly Anglo schools? A. Yes.

[1179] Q. Now, I want to cover just for a moment this annexation with you. Did this create a real problem for the Board during the time—the period of time that you were serving? A. It certainly did. The projections of the Board prior to my being on it had built schools, at the then outlying boundaries of Denver, and a good example is Pitts School at Hampden and Grape, or what not, was

on the then boundaries. Then annexation took place in Hampden East and Hampden West and Golden Key and what not, with the result that we, under the laws pertaining to annexation, it became our obligation to immediately provide schooling facilities for those children, and they couldn't attend the nearest school because it was already full. But, during my service the annexation of the so-called Bear Valley addition and Bear Valley West, the addition—the annexation of Fort Logan and the property south of Fort Logan, Centennial Estates, or something, and the annexation in the south and east of Thomas Jefferson High School, they certainly posed problems for us.

Q. During the time that these annexations were being sought by the City, did they ask School Board's opinion on this or seek your advice? A. The practice was that the City Planning Office would deliver to us the proposed annexations; the proposed developer's plans on it. And would ask us to make an estimate of the number of children that might result from that annexation. [1180] But, as the annexation usually went through, we had—we thereupon had the obligation of educating the children.

Q. Well, these areas that were annexed didn't for the most part have any schools, did they? A. Yes, they had schools. But, the children in the annexed areas to all of southeast Denver attended schools in the Cherry Creek School District. But, the school laws, a resident of a school district notwithstanding the fact that this annexed area might contain a school within it, the children could no longer go to that school; they had to attend Denver schools. So, sure, they had schools there in most cases that they were attending, but we had to provide schools over and above what they had. They could not go to the Cherry Creek schools after they became residents of Denver.

Palmer L. Burch—for Defendants—Cross

Q. As these situations developed, I recall that in 1965 both the Fort Logan annexation and the Centennial Estates were deannexed by court order. A. That's correct. We acquired the children immediately upon annexation, although I can't say immediately but at the beginning of the next semester or at the beginning of school year by arrangement and understanding with the existing school board, but in those two cases we had children who became our obligation, who subsequently were deannexed and became Sheridan's obligation and then finally became our obligation. And with respect to the Fort Logan and Centennial Estates [1181] annexation to which you refer—

Q. Did you ever have occasion to go to the City Council and object to annexation? A. Yes, sir, I appeared before a City Council meeting at one time when an annexation was proposed. I think it was the Centennial Estates annexation. And vigorously protested on behalf of the Denver Board of Education and the people of Denver in my representative capacity that this was an unwise annexation to the City of Denver and should be turned down that night.

Q. As the result of this service on the Board and your service in the legislature did you propose any legislation concerning who had a right to object or to veto an annexation? A. I did twice in 1963. I personally introduced a bill into the general assembly to provide that no annexation to the City and County of Denver should be valid except as approved jointly by the Council and the School Board. The bill went nowhere. In the year 1967, I succeeded in having a bill introduced under another representative's name, and it was passed and became law. And since that time, in the spring of 1967, annexations to Denver must be approved jointly by City Council and by the Board of Education.

[1182] Q. Now, did the annexation of Montbello area

have any effect upon the Smith-Hallett-Stedman area? A. No.

Q. How did they go to school in the Montbello area? A. Well, Montbello started slowly and projections were made as to the number of school children there, but, obviously, Smith School was the closest in terms of geographical distance, but there was obviously no point in busing—they had to be bused to a school from out there. The final solution hasn't been developed yet, but the developers finally entered into an agreement whereby they agreed to construct one of their typical residence structures in the shape of a school building, and the District leased it for a certain period of time and that's the schools in Montbello today. You might call them cottage schools. They are certainly not comparable to other schools, but to my best knowledge, in the smaller or lower grades, kindergarten, first and second, they try to take care of them there. I think the children third through sixth are being bused to other schools in the system, but not to any Park Hill Schools, because of the capacity already—

Q. Now, the financing of the students, the new students coming in, could you tell the Court what the revenue sources are for the School District? A. Well, the revenue sources of the Denver Public Schools are like all other schools in Colorado. The primary [1183] and major source of revenue for operating schools is derived from a property tax imposed on all the taxable property in the district at whatever rate of levy the School District determines is necessary. Since 1947, there has been state support of education which results from appropriations made to the Department of Education, which is distributed to all the school districts in the state under a complicated formula which attempts to determine need; and then, of course, more

recently, the money coming directly to the school district from what we call the Public Law 874, the so-called impact area, where the Denver schools get approximately $1,300,000 a year as the result or by reason of parents working at Lowry and working in this building and the Post Office and what not. We get that without restriction. There is no restriction imposed by the states with respect to state aid except that no part may be used for capital construction purposes. We may not use any state money for the construction of the school building, and the ESEA money for Denver's district received in 1966 was somewhat less than two million. None of that could be used for buildings, although it could be used for equipment.

So those are the sources of revenue. And the major one, of course, is property taxes.

Mr. Brega: Your witness.

Redirect Examination by Mr. Ris:

[1184] Q. Mr. Burch, was LOE, limited open enrollment, an outgrowth of the Voorhees report? A. Yes, sir.

Q. Before LOE actually went into effect, do you know whether Dr. Oberholtzer or anyone else made a trip to the East to investigate the operation of such a plan? A. Yes, during the insipiency of the Voorhees Committee and prior to its creation, Dr. Hinderman, at least, was sent especially by the Board to review what had taken place in Detroit and other eastern schools. The limited enrollment, limited open enrollment, we were told, had been utilized some place, and we sent representatives—I remember specifically Dr. Hinderman, although there may have been others in the staff, but they came back to report to us as best they could what had been the results of limited open enrollment in other districts.

Q. It was on the basis of the Voorhees report and these reports that you then adopted it? A. That's right. Now, as I stated before, I went along, although I was not convinced on the basis of the evidence that it would have any material effect on the situation.

Q. With respect to the finances, are there any limitations of the state law pertaining to increase in operating budget? A. Yes, beginning, yes, with the last legislature, [1185] in adopting the new School Foundation Act, since it was advanced by the school people and by the legislature and all as something to in effect put a cap on the ever-increasing property taxes, there is a provision in the school district law or the School Finance Act that a school district may not increase its expenditures in excess of 106 percent of the previous year's expenditures except by a vote of the people.

By regulation of the State Department of Education, it has been a little different than what the legislature intended it, but that bill is now before us in its limited session, and in the fall of 1970 it is my feeling, my view, my judgment, that a majority of the school districts in the State of Colorado, are going to have to go to the people to have their operating budgets approved.

Q. What is the principal source for capital construction funds? A. The only source prior to 1945, the only source of capital construction by school districts was bond issue. In 1945, the legislature saw fit to adopt what they call the post-war planning levy of one mill, which authorized every school district in the state to levy one mill for the purpose of catching up on construction they had to forego during the war. That remained at one mill until 1963. In the 1963 session, I, as a member of the legislature and also as a member of the Board of Education of Denver was succes-

ful in [1186] having the state law modified so that a district having a valuation in excess of $250 million, of which there are only two in the state, Jefferson County and Denver, could impose a two-mill capital reserve levy. That was done in the year 1969 again. That rate of levy has been applied to all districts in the state and under law now all districts in the state may levy two mills on the valuation of their property for capital reserve construction purposes.

Q. Is that sufficient to do away with the necessity for bond issues? A. No, sir, it is only a supplement to bond issues.

Mr. Ris: That's all, thank you.

Recross-Examination by Mr. Greiner:

Q. This preference that was expressed by the students at Smith for mobile units, had the parents at Smith at that time been advised of the comparative levels of achievement at Smith? A. Let me go back. It was expressed by the parents of students at Smith, not the students at Smith.

Q. Pardon me, had the parents been advised of the achievement level at Smith with comparison to other schools? A. Not to my knowledge, because I don't think —as I testified earlier, as a Board member as I was not aware of the achievement levels of any schools in the District, and I [1187] doubt very much if it were not available to members of the Board that it were available to the parents.

Q. You said the parents at Smith, there was no promise held out to them that there would be any permanent addition at Smith? A. It was not proposed. It was never advanced that a permanent addition to Smith would be made.

Q. Yet, I assume you agree with the Voorhees report, which said that mobile units should only be used on a temporary basis? A. It being a recommendary and advisory report, I am not required as a Board member to agree with any such report.

Q. Did you conceive of the mobile units at Smith being permanent? A. No, mobile units by their nature are temporary, but it can be defined as one school year or longer.

Q. By February, 1966, there were twelve mobile units at Smith? A. Correct.

Q. When was the first time that mobile units were removed at Smith? A. I could not testify that any mobile units have ever been removed at Smith, sir.

Q. Now, you will recall, Mr. Burch, that I showed you Exhibit 396, which showed that Cole had a capacity of 1908 [1188] students in 1955. Do you recall that? A. That's what you have here, yes, sir.

Q. Or that's also on Exhibit 215? A. Yes, sir.

Q. Exhibit 215 shows, does it not, that the capacity at Morey was reduced? A. It shows that—

Q. At Cole, I am sorry. A. It shows that the rated capacity of—are you talking about membership or capacity?

Q. Capacity, sir. A. The capacity of Cole in 1955 was 1908. The capacity of Morey until 1955 was 1446, and after 19—at a later date, the rated capacity of Cole became 1725 and the rated capacity of Morey became 1170.

Q. Now, I believe you indicated that that reduction in capacity at Cole was caused there by an increase in its utilization for special education, is that correct? A. I could not testify to my own knowledge, but when I—having seen these figures, which incidentally I am—in this exhibit, I would surmise that it was used in preparation for the

1966 bond issue; but when I raised the question how come Cole, which formerly had a capacity of 1908, is now 1725, the answer was that we still have the same number of rooms but the use to which certain rooms are being put, with a lesser [1189] number of special education children than other children, that has resulted in the capacity, and the same was true at Morey.

Q. Now, back in 1955-56, when Cole was rated at 1908 students, do you know how many special education students — A. No, sir, I don't.

Q. —were going to Cole? A. I can testify to nothing that occurred in 1955.

Q. But it is your testimony that you think the number increased between '55 and '62? A. The number of special—

Q. Yes. A. I am led to believe that's true.

Q. I am handing you what has been marked for identification as Plaintiffs' Exhibit 421, which purports to be the principal's report from Cole Junior High School in the school year 1956. Can you identify that for us? A. No, sir, this happens to be Morey.

Q. I am sorry, here is the one for Cole, Exhibit 420, excuse me. A. Yes, this is—I would say that this is the principal's semi-annual report of the operations of Cole Junior High School for the school year '56-'57.

Q. It shows the number of special education students in the school, does it not? There is a special column for it? [1190] A. Special education, yes, sir.

Mr. Greiner: Your Honor, we offer Plaintiffs' Exhibit 420.

Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: Received.

(Whereupon, Plaintiffs' Exhibit 420 was received in evidence.)

Q. Referring to Exhibit 420, how many special education students were going to Cole in 1956, Mr. Burch? A. I assume the last column, "T"—

Q. Is the total. A. Forty-four, membership on last day of semester, 44.

Q. So, there were 44 special education students in Cole in 1956, and at that time it had a rated capacity of 1908 students, is that correct? A. It would appear so on the record.

Q. I am handing you what has been marked Plaintiffs' Exhibit 422, purporting to be a resume of the annual principals' reports for the school year 1962-63. Can you identify that for us? A. Yes, sir.

The Court: This is still Cole?

Mr. Greiner: Yes, it includes Cole.

A. (Continued) I would identify this as a school [1191] document. As to whether or not—I might say this is the first time I have ever seen a summary of the annual report of principals, because they were made to the Administration and not the Board.

The Court: This is probably prepared by the staff of the School Board, anyway, isn't it?

The Witness: Yes.

The Court: I mean, this summary.

Mr. Greiner: Yes, Your Honor.

The Witness: Your Honor, that's the first time that I as a School Board member ever saw a report

of the principals, because there was not a report that came to the Board but rather to the staff.

Mr. Greiner: We offer 422, Your Honor.

[1192] Mr. Ris: No objection.

Mr. Brega: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 422 was received in evidence.)

By Mr. Greiner:

Q. Now referring to Exhibit 422 for the school year 1962-63, there is a column for special education, is there not? A. There is.

Q. And if you will look at the line for Cole Junior High, Mr. Burch, how many special education students are in Cole Junior High School? A. It says 71.

Q. So in other words, betwen 1956 and 1962 there was an increase in special education students at Cole, approximately thirty-six students, is that correct?

Mr. Brega: Object to the form of the question, if the Court please. The exhibits say that only in the years of 1956 and 1962 those were the numbers. The exhibit does not show what happened in the intervening years.

The Court: True, but—

Q. Comparing the two years, what was the increase? A. Well, again, the question is misleading.

The Court: Never mind. I'll take care of that.

The Witness: One report was—

[1193] The Court: You just answer the questions as they come up, and if there's any objections, of course, I'll rule on those.

A. As between the two, it shows an increase of 27 students. But, one is for a full year and one is for a half year.

Q. Now, 27 students and—and yet the difference in the rated capacity of that same school for those two years is the difference between 1908 students which was its rated capacity in 1956, and 1525 students which was its rated capacity in 1962, is that correct? A. Yes, sir. The mathematics of what you say are correct.

Q. So that for 35—or 27 more special education students they reduced the capacity of the building of—by 173, is that correct? A. That's apparently what happened.

Mr. Greiner: No further questions.

Redirect Examination by Mr. Ris:

Q. With reference to Exhibit 420, on the 1956 matter, you said something about there may have been the study in connection with the bond issue. What was meant by that? A. That is with respect to Plaintiffs' Exhibit 215. In other words, I have never seen this form on the capacity [1194] of schools come in this form.

Mr. Greiner: Your Honor, so the record is clear, 215 was prepared by plaintiffs. It is not a school district document.

Q. You have never seen such a document? A. No, sir, I never saw it in this form.

Q. And you have never seen Exhibit 240 before? A. No,

sir, I have never seen a principal's semi-annual report. They never came to the board.

Q. And have you ever seen Exhibit 422 before? A. No, sir, I have never seen the summary of annual reports of principals.

The Court: These were not presented by him.

Mr. Greiner: Very definitely not, Your Honor.

The Court: These consolidated principals' reports?

The Witness: But these, Your Honor, were never submitted to the board either individually or in pamphlets. I have never seen these reports before.

Q. So what you're being asked to prepare now is something that has just been put before you? That's nothing you have any background or any knowledge of? A. Obviously these were in existence but they never came to the attention of the board. I have never seen these reports before.

Q. Now, with regard to the different figures with [1195] respect to the capacity of Cole, do you have any personal knowledge as to the reasons for the variances as shown by these documents that Mr. Greiner has called to your attention? A. No, sir, I have no— All of the change in the rated capacity in the principals' reports were before my time. I had to start in with no knowledge that the capacity of Cole Junior High School was 1725 students.

Q. Is it true that special education classes can make a difference in capacity? A. They can. Special education classes traditionally do not have the same number in them. In other words, a class would be 30. A special education class, depending on the degree of handicap, could be 5, could be 8, could be 15. But, never more than 20.

Q. Well, is it correct, Mr. Burch, your testimony before lunch in which Mr. Greiner led you along concerning special education as a possible reason for changing a capacity—

Mr. Greiner: I object to the form of the question as leading, Your Honor.

The Court: Overruled. It is redirect and he can clarify to some degree. We will give him some latitude on that.

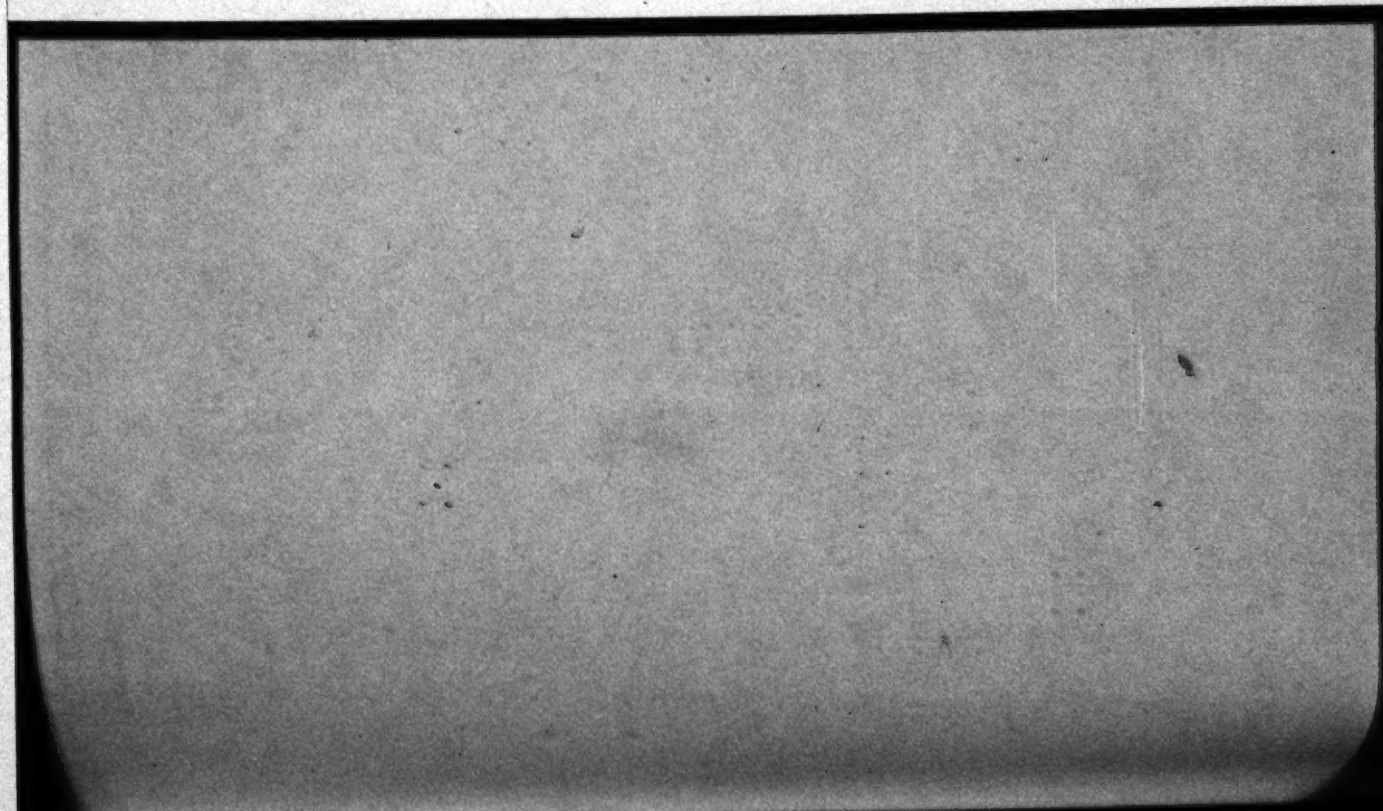
You don't object to his referring to your question as being leading, do you?

Mr. Greiner: I believe it's an accurate statement, [1196] Your Honor.

The Witness: Let me say that special—in special education, whether it is hearing, the blind, lame, speech, is a very sensitive thing, and the board of education in Denver and the Denver Public Schools have constantly sought to enlarge the opportunities for the education of those, that class of pupils, and I did not state from knowledge that I knew that additional classes were at Cole, but always the plea of parents of handicapped children, "Give us more education."

Q. Very well. So you were testifying that special education classes would be one possibility for a change in capacity? A. Yes, we always sought to enlarge our special education classes.

Q. But not that you knew from your own knowledge that that was the reason for these differences in capacity? A. Correct.



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William Berge—for Defendants—Direct

[1197] WILLIAM BERGE, a witness called by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ris:

The Court: Please give us your name, address and occupation.

The Witness: William Berge, 500 Capital Life Building, Denver, Colorado. Lawyer.

By Mr. Ris:

Q. Mr. Berge, your race is Anglo, is it not? A. Yes.

Q. How old are you? A. Forty-six.

Q. Are you a native of Denver? A. No. I was born in Cleveland, Ohio; moved out here when I was five years old and have been a native since 1928.

Q. Did you attend Denver Public Schools? A. Yes.

Q. What schools? A. Dora Moore, Park Hill, Aaron Gove, and East High School.

Q. What year did you graduate from East? A. 1941.

Q. Where did you go to college? [1198] A. Dartmouth College.

Q. And law school? A. University of Denver.

Q. Graduating what year? A. 1950. Dartmouth College, 1948.

Q. Are you married? A. Yes.

Q. Have children? A. Yes.

Q. How many? A. Three boys.

Q. Are they all in the Denver Public Schools? A. Yes, two are at Thomas Jefferson and one at Jessie Hamilton.

Q. What other schools have your boys attended? A. Pitts.

Q. Since you have been married,what— A. Excuse me. Pitts and University Park.

Q. Since you have been married, what areas have you lived in Denver? A. When we were married we lived at 1414 Marion and then we moved to 2830 South Monroe and then we moved to our present residence at 3098 South Jasmine.

Q. How long have you been at that address? A. Since 1962.

[1199] Q. Are you presently a member of the Board of Education, School District Number One, Denver, Colorado? A. Yes.

Q. When did you become a member of that group? A. In May of 1967.

Q. You were elected to the post? A. Yes.

Q. In the May 1967 election? A. Yes.

Q. Had you ever had any special education or employment in school administration? A. No.

Q. What was your first basic contact with the Denver Public Schools, either P-TA level or whatever it may have been? A. I think the primary introduction to school matters was with the advisory council at Pitts Elementary School.

Q. About what year was that? A. About 1963.

Q. What type of advisory council or committee was that? A. Each school in the district was requested to form an advisory council to make recommendations to the Board of Education as to what that particular advisory council felt that particular school needed. And it had to do primarily with the needs of each individual school in the district.

[1200] Q. Did you actually participate in that council? A. Yes.

Q. For what period of time? A. Two years.

Q. And then what was the occasion of your first having any citywide position in connection with the school district? A. I was appointed chairman of the advisory council on equality of education opportunities, which was a council appointed by the Denver Board of Education in 1966.

Q. Now the members of the board were selected by the Board of Education? A. Yes.

Q. And by whom were you designated as chairman? A. The Board of Education.

Q. Who was the vice-chairman? A. Bernard Valdez.

Q. What is his position? Or what is his job, do you know, at the moment? A. To the best of my knowledge, he is director of welfare.

Q. Of the City and County of Denver? A. Of the City and County of Denver.

Q. Could you describe generally the composition of the commission or council? A. The council was composed of 31 members and was [1201] representative of all districts in the school district. It had minority representation. It had the representation from certain designated groups such as the Park Hill Action Committee, CORE, NAACP, LARASO (?).

Q. What is LARASO? A. Latin American—

Q. A Latin American group? A. Yes.

Q. Representing the Hispano community as we have discussed it in this trial? A. Yes.

Q. Did the advisory council act basically as a full group or did you split it up into subcommittees or one job primarily, or— A. We divided it into subcommittees and each subcommittee had a program, and when that subcommittee had finished its objectives, why, then the entire

committee met and formulated the report which was eventually submitted to the board of education.

Q. How often did the full committee meet? A. Oh, an average of once a week, usually every Tuesday night.

Q. Was that your regular meeting night? A. Yes.

Q. At what hour? [1202] A. Usually the meetings began at 7:00 or 7:30 and continued indefinitely. Some went way into the early morning hours and we made—we attempted to adjourn by 11:00 or 11:30 but that was not always possible.

Q. Where were these meetings held? A. Some meetings were held at Baker Junior High School. Most of them were held in the board room of the Capitol Life Building.

Q. East 16th Avenue and Grant Street? A. Yes, sir.

Q. Were these meetings open to the public? A. All meetings were open to the public except when the council went into executive session.

Q. How often was that? A. Not very frequently. It occurred more at the latter part of the schedule when we were attempting to formulate our plan and put it together in a written form.

Q. At the open meetings did people appear to present their positions on various facets of the educational programs? A. Yes.

Q. Did you have both members of the white community and the black community? A. Yes.

Q. What was the basic purpose of your committee? What were you charged to do? [1203] A. Well, basically we were given a charge to determine whether or not the school policy No. 1222-C, which dealt primarily with neighborhood schools, should be kept in effect so far as the construction of new buildings was concerned in northeast Denver.

Q. Of course, the Voorhees report had already been published before you were appointed? A. Yes, that's correct.

Q. That was your point of departure, really; the Voorhees Committee? A. Yes.

Q. Now, you say there were 31 members? A. Yes, sir.

Q. How active was your committee? How many would attend an average meeting, would you estimate? A. The committee for the most part was very active. I believe the average attendance was somewhere between 18 and 23 of the 31 members for each meeting.

Q. And were the members of the public at virtually every public meeting you had; to express their views? A. I would say at the majority of the meetings members of the public attended. There were a few where no public people attended or participated.

Q. Now, at the conclusion of your deliberations was a report then drafted? [1204] A. Yes.

Q. What was the basis for doing that? A. A drafting committee was formed and the chairman of that committee, Minoru Yasui, and they drew a rough draft of the report based on the findings and recommendations of the subcommittee and then they presented it to the entire advisory council. Each council member or each member of the council had the opportunity to read it and evaluate and make any suggestions, changes or criticisms which the particular member deemed necessary.

Q. Were there some changes made from the rough draft? A. Yes.

Q. Were they as to form or substance? A. Mostly of form.

Q. Was the report adopted unanimously? A. No.

Q. Could you tell us how many dissents there were? A. I believe there were three—three or four.

Q. Was there a minority report also drafted? A. Yes.

Q. Is that also in the report or appendix or part of it? A. Yes.

Q. What was done with the report when it was finally concluded? [1205] A. It was submitted to the Board of Education.

Q. Now as to the report itself, Mr. Berge, did you make some preliminary findings, both fact and legal considerations— A. Yes.

Q. —that you felt were in existence or applicable to this particular case? A. Yes.

Q. And could you summarize those for us? A. Well, I think some of the preliminary findings were that de facto segregation did exist in certain districts in the city. But, to the best of our knowledge, neither the Board of Education nor the administration had taken any active part either directly or indirectly in promoting de facto segregation.

Q. With regard to the neighborhood school concept, what position did your council take? A. The council basically endorsed the neighborhood school concept as such.

Q. Did you make some specific recommendations? A. Yes.

Q. And were these based on some specific conclusions as to what should be done? A. Yes.

Q. And would you summarize those for us, please? [1206] A. Yes, one of the basic recommendations was the establishment of a cultural arts center which would be a school or group of schools designated by the administration which would concentrate primarily in music appreciation, art appreciation, and perhaps other forms of appreciation, depending upon the acceptance of the program.

Eight schools at the primary level I believe were selected at random, but with the selection made so that the children who went from these eight schools to the cultural arts center would receive in exchange cultural and racial experience. In other words, the schools were selected so that there would be Hispanos, Negroes, and Anglos in attendance at the same time. I believe it was the sixth grade students from the elementary schools chosen to participate and were given the option of attending the cultural arts center. In other words, the purpose of the program was explained to the parents and then the parents were given the option of enrolling their students in the cultural arts program.

Q. What other recommendation? A. Another recommendation was for a superior school program for Smiley Junior High School and Baker Junior High School.

Q. What did that contemplate generally? A. That contemplated basically going into these schools, making evaluation of what was needed in each school to make [1207] that particular school a superior school.

Q. And another recommendation, the educational center? A. Oh, yes, there was—that was a third one. There was a recommendation that an educational center be established on a pilot study basis to determine whether or not this would be a step in the right direction as far as improvement in quality of education was concerned.

Q. And what was contemplated to being encompassed in an educational center? A. Well, basically, as we envisioned it, there would be an area somewhere between 50 acres and 250 acres to which could be established multiple purpose building which could be used for varying purposes such as an advanced science center, multi-lingual buildings, special purpose buildings whereby students from

all over the city could attend for the specific purpose in which they were interested.

Q. This also contemplated vocational education? A. Definitely.

Q. And a centralized library? A .Yes.

Q. Did you also recommend a further school capacity study? A. Yes.

Q. Now, did you make any other recommendations or come to any conclusions concerning the northeast Denver area [1208] with respect to new schools? A. Yes, I believe the recommendation was that there should be no new construction made in northeast Denver until such time as the particular paragraph of Policy 5100 could be implemented. In other words, to the best of my recollection, that particular paragraph says that in the neighborhood school concept there can be some concentrations of racial and ethnic groups which are not necessarily in the best interests of those particular groups.

So the recommendation was that no new construction be made in northeast Denver until some formal alleviation could be made to comply with this requirement. It's either paragraph 1222-C, subparagraph (b)6, or 5100 of the same paragraph.

Q. With respect to 5100, did you make a specific recommendation as to what should be done or attempted in an attempt to make it workable? A. Yes.

Q. What did you have in mind in that regard? A. Well, I think the basic recommendation was that a voluntary open enrollment plan be established and that this be submitted and explained and advanced with the idea being that you could explain it to members of the community and to the parents and by getting community acceptance

for this plan you would be able to accomplish some realistic integration.

[1209] Q. Why was community acceptance considered of consequence by the council? A. Well, if you don't have community acceptance for any plan, it just won't work.

Q. Now, with regard to the recommendation you made —I'm jumping a little ahead now. I'm sorry. I'll come back to that.

Mr. Ris: Will you strike that, please, Wayne.

(Addressing the reporter.)

Q. After your report was in, then did you retain any further interest in the school district and its problems? A. Yes.

Q. What did you do about it? A. I decided to run for the Board of Education.

Q. And what was your basic program upon which you ran? A. I think this can be boiled down to three primary reasons. I was interested in attempting to establish quality education to establish equality of educational opportunity and the basic retention of the neighborhood school concept as best it could be implemented in achieving integration.

Q. After you became a member of the Board then in May of 1967, did you see whether some of the recommendations that your council had made had been implemented or were you instrumental in seeing that some were implemented? A. Basically the recommendation of the—

[1210] Q. First, I should say, accepted by the board, rather than being implemented. I am jumping ahead here. I am sorry. A. They were accepted by the board.

Q. All right. What was done with respect to the cultural arts center? A. The cultural arts center was established and was put into operation and it was well received by the parents and the students who were involved in it.

Q. And what was done with respect to the superior school program. A. The superior school program encompassed, as I recall, approximately 159 recommendations. These recommendations were submitted to the staff and faculty and to the administrative people involved in each school and in the central administration. A priority was established for each of these 159 recommendations, and within budgetary limitations and based upon the priorities as established, a number of these suggestions were put into actual operation.

Q. And what if anything has been accomplished on the educational center? A. A substantial effort was made to obtain land at Lowry Air Force Base, which we learned was to be declared surplus. We went to a great deal of effort through Congressman Rogers' office and Senator Allott's office and Senator [1211] Dominick's office in an attempt to obtain these for the board. We were unsuccessful in doing this. We felt this would be a logical site because of the location.

When we learned that this was unavailable, we attempted to get some land in the Platte Valley area, and we also recommended that Montbello be considered as a possible site for a central center, such as this.

Q. Has that land actually been acquired to date? A. No, sir.

Q. Do you have capital funds to go out and buy that much acreage in the open market? A. No.

Q. Since you have been on the board, have any new

schools been opened? A. Yes, Traylor Elementary School was opened.

Q. When was it opened? A. I believe Traylor was opened in the beginning of the school year in 1968. I am not sure about that.

Q. All right. A. And Jesse Hamilton School was also opened.

Q. Prior to the opening of those schools, had children been bused from the subdistricts where those schools were located to other districts? A. The children who eventually ended up attending Traylor were bused primarily to University Park School, which [1212] is a substantial distance across town. University Park School, I believe, is located at approximately East Iliff and about South Fillmore.

Q. After Traylor opened, then that left some openings at University Park? A. Yes, approximately 200 vacancies existed in University Park School after Traylor opened.

Q. Did the board take any action with respect to filling that space? A. Yes.

Q. What was that? A. Students from, I believe it was Smith and Fallis School and possibly Philips, I am not sure, were moved to University Park.

Q. Was this on a voluntary basis or mandatory? A. To the best of my knowledge, it was a voluntary basis. I am not sure of that, but at least that was my intention at the time, that the advantages be explained to the parents who would be going from the sending school to the receiving school, and they would be urged to allow their children to make this change, since the vacancies existed.

Q. Who proposed this bus movement in the board? A. I believe I did, sir.

Q. Was this plan intended to have any integrating effect racially? [1213] A. Oh, definitely.

Q. Do you know when that plan went into effect? A. It either went into effect with the opening of Traylor or at the beginning of the semester immediately following the opening of Traylor.

Q. When you became a member of the board, was LOE then the policy with respect to open enrollment? A. Yes.

Q. And that's without—the district furnished transportation and, regardless of the integrating effect on either the receiving school or the sending school, right? A. Yes.

Q. Was that changed during your term of office? A. Yes.

Q. And how was that changed? A. It was changed from a limited open enrollment program to a voluntary open enrollment program, in which the district would provide the transportation for the pupil who was making the move, and the requirement was also that in order to make the change from the sending school to the receiving school there had to be an improvement in the racial composition of the receiving school.

Q. Do you know when the resolution was adopted authorizing this plan? A. I believe it was in—I believe in November of '68.

[1214] Q. To become effective when? A. With the opening of the second semester in 1969.

Q. That would be January, '69? A. January of '69.

Q. Was that long enough to educate the public and to get community acceptance of that plan? A. No.

Q. Now, during the period roughly from April of 1968 to April, 1969, Resolution 1490, the so-called Noel Resolution, was adopted, and there was considerable activity. Can you just briefly tell us what the chronological pro-

gression of this was? A. I believe the Resolution No. 1490 was introduced April of 1968, was tabled until May of 1968, at which time the resolution was passed. Numerous public hearings were held on this resolution.

Q. Where? A. Mostly at South High School.

Q. Were they well attended? A. They were extremely well attended.

Q. Many people expressed their views? A. Many, many views were expressed and many differences of opinion as to policies and procedures and programs were stated.

Q. By both blacks and whites? [1215] A. Yes.

Q. And Hispanos? A. Yes.

Q. And then following the adoption of 1490 in May, '68, then what happened? What was the development? A. Dr. Gilberts went to work on the plan which 1490 encompassed. I don't recall exactly when it was submitted to the board. I know—I believe the original resolution required that it be submitted no later than September of '68, but I don't believe he was able to complete it by that time and I think it was submitted to us in October or November of 1968.

Q. And is that report called "Planning Quality Education," which is marked as Exhibit D? A. Yes.

Q. Were there some very novel features in this plan, Mr. Berge? A. Yes.

Q. Now, during this period, was there apparent a substantial difference of opinion and philosophy between various members of the board? A. Yes, I think the board was united in two things. I think all members of the board were interested in quality education and equality of educational opportunity for each pupil in the district, but there was a substantial divergence [1216] among the board members as to how this should be accomplished.

Q. So there was a common end in which everyone was in agreement, but the difference as to means? A. Yes.

Q. Now, with respect to the three resolutions, 1520, 1524 and 1531, was this difference in philosophy apparent during the consideration of those resolutions? A. Yes.

Q. And during the period of time that these resolutions were under consideration, were they hotly debated? A. Yes.

Q. Were members of the public heard on them or was this basically a board matter at this point in time? A. At best I recall, I believe members of the public were heard. I'm not positive on that point, but I knew they were vigorously discussed among the board members.

Q. And the three resolutions were adopted by what vote? A. I believe it was a five-two vote.

Q. Now, prior to the three resolutions, do you recall approximately how many students were already being bused in the school district? A. I believe approximately 10,000.

Q. Was it within the contemplation of the board that this was a permanent busing arrangement for that many students? [1217] A. No, it certainly wasn't in my contemplation and I don't believe it was within the contemplation of the majority of the school board members, but I may be in error on that.

Q. Where were these students being bused? What categories did they fall in? A. They were being bused primarily from the newly-annexed areas where there were no schools to schools where vacancies existed, and it was my understanding that that would be on a temporary basis and would not be on a permanent basis.

Q. Were there some students being bused within their own subdistricts because they lived beyond a certain dis-

tance from the schoolhouse? A. Yes, sir.

Q. And then there were some being bused out of the Northeast Denver area? A. Yes, and, of course, those who were physically handicapped.

Q. Special education, you had various categories in that regard? A. Yes.

Q. What about the Montbello area? A. Yes, as far as the junior high school and senior high school level students were concerned, they were being bused, and I don't believe any of the elementary students [1218] at Montbello were being bused at that time, because I believe the cottage schools were able to accommodate them.

Q. What was the reason that you did not provide actual classroom space for the pupils in the newly-annexed areas? A. Simply there were not funds available for capital construction.

Q. Was there a capital bond submitted to the people recently? A. Yes, sir, in November, 1967.

Q. Now, how big a bond issue did that contemplate? A. As I recall, it was approximately 35 million.

Q. It was not passed, is that correct? A. No, again, as I recall, I believe it went down to defeat, approximately seven to three.

Q. Then came the May, 1969, election, and you had two new members on the board, right? A. Yes.

Q. What now happened with respect to the members of the board and their philosophical concepts as the means by which these goals were to be achieved, or the new board? A. Well, the philosophy of the board changed in that those who were proponents of the voluntary plan now constituted the majority of the members of the board.

[1219] Q. So, the previous minority now became the majority? A. Yes.

Q. Then 1520, 1524 and 1531 were revoked, I believe, on June 9, 1969? A. Yes.

Q. Before those three resolutions were revoked, had any child under the program contemplated by those three resolutions actually, physically changed his school subdistrict or become subject to mandatory busing? A. Not to my knowledge.

Q. When was it contemplated that the three resolutions would go into effect? A. I believe it was the fall of 1969.

Q. The opening of the September term, 1969? A. Yes.

Q. And then immediately following the revocation of 1520, 1524 and 1531, Resolution 1533 was adopted? A. Yes.

Q. Could you state for us what policy is enunciated by 1533? A. Well, 1533 is basically the same resolution as 1531, with one phrase added, which phrase appears at the bottom of Page 3 of Resolution 1533, and that phrase is, "And that participation by individual families shall be optional."

[1220] Other than that, Resolution 1533 is identical with 1531, to the best of my knowledge. In other words, the complexes contemplated in 1531 are the same as 1533.

Q. Now, can you briefly summarize what 1531 contemplated? A. 1531 contemplated the pairing of certain schools into what would be known as complexes and the participation in these pairings and in these complexes by the individual schools which were so named. This was to be done under the direction of the administration and it was to be done after consultation with members of the community and with parental representation in the form of PTA groups and others.

Q. Was this to have a stabilizing effect on the ethnic and racial composition of the schools? A. I am sure this was one of the hoped for results.

Q. That was one of the recitals in the resolution itself, was it not? A. Yes.

Q. All right, did 1533, the new resolution, retain this complex grouping idea? A. Yes.

Q. Or concept? A. They are identical.

Q. Were the schools to be involved listed in the initial resolution? [1221] A. Yes.

Q. Is a resolution of this nature, Mr. Berge, intended to set out all the details of the plan? A. No.

Q. What is required following an adoption of a resolution setting forth a policy of the district? A. Well, a great deal more further work is involved. You have to do all the administrative detail which is necessary to put the resolution into effect. The resolution itself would more or less or could more or less be described as the skeleton in the work that's necessary to make a complete entity out of what follows after the resolution is adopted.

Q. And then, of course, this litigation came along and the July hearings and the Court's injunction followed that? A. Yes.

Q. All right, now, so far as the four members presently constituting the majority of the board are concerned, has there been an opportunity to implement and determine whether 1533 would achieve its desired end? A. No.

Q. Does the board recognize there is a problem here that needs some attention, Mr. Berge? A. Oh, there is no question about that. All of the [1222] board members are cognizant of many of the problems which exist and I think all are very sincere and very dedicated and very motivated in attempting to reach a realistic solution, but the majority of the board feels that until you can get a plan which the majority of the people involved will accept and back, then, regardless of any plan which the board adopts, you are not going to be able to make it work.

Q. Do you think there is a reasonable probability of 1533 succeeding, if given an opportunity? A. Yes.

Q. When—

Mr. Greiner: We object to the witness speculating, Your Honor.

The Court: Overruled.

A. I believe that there is a reasonable possibility of 1533 succeeding, and the reason I make that statement is because of the tremendous success which the voluntary plan on the cultural arts program obtained. It is my hope that you could take a plan such as the cultural arts center, enlarge it as far as the high schools are concerned. In other words, you might have certain classes at East High School which students from Thomas Jefferson and George Washington could attend, maybe twice a week or three times a week, or maybe full time, and by getting it started this way, then people would realize the advantages which can be [1223] obtained by communicating and by attending classes with people of other racial and ethnic backgrounds, and would, therefore, be willing to pursue it on a more intensive basis, but at least at this level it would receive the backing of the students and the parents who are directly involved, and, therefore, would have community support, even though it might be on a limited basis at the embryo portion of the program.

Q. Would this require a great deal of public education and orientation? A. In my opinion, yes.

Q. There has been testimony of one witness, Mr. Berge, that one of the members of the administrative staff made the remark that it was the policy of the district with respect to VOE that they had caused the VOE program to be formed but they were under no obligation to promote it.

Is that the policy of the district, or was it? A. It certainly is not, not to my knowledge.

Mr. Ris: Thank you.

Cross-Examination by Mr. Barnes:

Q. Mr. Berge, the genesis of the 1967 advisory council was concern in the community about race relations, was it not? A. I don't think that was the primary genesis of the council, no. That was certainly one facet of it, in which we [1224] were all concerned.

Q. There was a great deal of talk about mixing of races in the schools at that time, wasn't there? A. Yes.

Q. And a great deal of consideration of how it could best be done? A. There was some consideration and some discussion as to how best it could be done. I am not trying to quarrel with you, Mr. Barnes. I am trying to be as factually accurate as I can. I don't think there was a great deal of it.

Q. But the term "equality of educational opportunity" is one which is generally connected to the problem of how to improve the education of minorities, isn't it? A. Well, as I understand the term "equality of educational opportunity," it is to put each pupil in the district in an educational environment which will enable that particular pupil to achieve to the best of his potential. Now, that's the way I understand the term.

Q. By each pupil is generally meant including minority pupils who are thought to have been previously not getting an equal education, is that right? A. Well, certainly, minority pupils are definitely considered, yes.

Q. Mr. Berge, does the advisory council's report state [1225] anywhere the conclusion that you mentioned that

the school board had not had any responsibility in the creation of the de facto segregation in the city? A. I believe it is on Page 31. "Nonexistence," and I am quoting from Page 31, "Objective evidence is nonexistent that the Board of Education or the school administration of the Denver Public Schools deliberately intended to create such de facto segregation in certain schools within the district."

Q. Did the council, to your knowledge, consider the changes in the Columbine-Harrington-Stedman boundaries in 1951 and '52? A. To the best of my knowledge, I believe these were considered in subcommittee meetings, Mr. Barnes, but whether the full council considered these, I don't recall.

Q. Well, do you recall receiving any report about those optional zones in 1951 and 1952? A. We may have received them, but I do not recall receiving them or seeing them.

[1226] Q. Did you receive any reports from any subcommittee concerning the boundary changes enacted in 1955 and 1956 from Manual and East, and Cole and Smiley? A. Not that I recall.

Q. Do you recall any substantial study on those changes? A. Not by the entire council. It may have been by one of the subcommittees but not by the entire council.

Q. There may have been but you're not aware that there was in fact? A. That's right. I didn't participate in all of the subcommittee meetings.

Q. Did the council or any of its subcommittees to your knowledge study the desirability of construction of Barrett in 1959 at the location it was constructed in? A. No, not that I recall.

Q. Did it consider the boundary changes between Morey and Byers in 1962? A. I don't believe so. But again, I'm not positive.

Q. Who was the author of the minority report for the council? A. Stephen Knight.

Q. And he is now a member of the board? A. Yes.

Q. You spoke briefly about the cultural arts program, [1227] Mr. Berge. How many hours a day does a child who participates in that program attend wherever it is he attends? A. As best I recall, I believe the child goes for —it's a sixth grade level program. And the child goes either in the afternoon or the morning for two days a week.

Q. And it's optional? A. Yes, sir.

Q. And are there any courses there in math or science? A. Not that I— There may be now, but when it was originally proposed it was primarily for music, for arts, and one other factor which I don't recall at the moment.

Q. It's a program designed for non-college preparatory kinds of subjects, isn't it? A. Well, I don't know whether you would consider music—I think the answer to your question is yes.

Q. As I have a description here in Defendants' Exhibit F, which was introduced last summer, which indicates that they do such things as making silk screens and play autoharps and act in plays—that isn't designed to overcome the achievement gap, is it, in minority schools? A. No, I think it's primarily to attempt to get the children to learn to work together and play together and understand each other.

Q. Was the superior school program which you described ever put into effect at Smiley Junior High School? [1228] A. Certain portions of it were. I believe I stated—let me clarify it—that within budgetary limitations and based on the priority as established of approximately 159 recommendations which were made a part of our study, the superior school program was put into effect at Smiley and at Baker.

Q. Can you say specifically how many of the 199 things were actually done, was different? Ten? Fifteen? Was it a hundred? Can we get any idea of the proportion? A. I don't recall. I believe if my memory is correct that approximately $600,000 was spent on this program.

Q. Let me ask it this way. Has there been any measurable evidence of improvement of achievement at Smiley Junior High School or Baker Junior High School as a result of this program? A. I believe there is some. The exact extent, I don't know. I think right after this program was put into effect some boundary changes were instituted whereby some of the pupils at Smiley were taken out of Smiley and sent to other schools, and I think that had some bearing on the results of the superior school program at that particular school.

Q. That would have been boundary changes since 1967 at Smiley? A. Yes.

Q. Can you describe them any further? [1229] A. With the opening of Jessie Hamilton, some of the children in attendance at Smiley were sent to Jessie Hamilton I believe—

Q. When was that? A. I think that was when Jessie Hamilton opened, which I thought was in 1968.

Q. Was there a change in the attendance district at Smiley in 1968? A. I don't recall.

Q. I don't mean to be leading you into this. I am not aware of any such change, and if there is one I would like to know about it. A. The only one I can think of—what I thought was the opening of Jessie Hamilton. I may be in error. It might have been in 1967.

Q. Were there any differences in the implementation of the superior school program at Baker and Smiley to your knowledge? A. The composition of the families at Baker

enabled us to qualify for supplemental funds from the government under one of the programs and I believe it was determined that basically there were different needs at each school, and I'm sure that some of the programs that went into effect at Baker were not put into effect at Smiley, and vice versa. Although the particular differentiation, I don't know.

[1230] Q. Let me turn your attention to educational centers which you mentioned. Was it conceived that these centers would be the location of the advanced or unusual courses in math and aeronautics and other such subjects? A. As I recall, and my understanding was that these certainly were considered. But, we had hoped that you would have multi-purpose buildings so that if you did want to go into a high school or a junior high school or an elementary school, then the buildings could be definitely used for these purposes as well as those which I have identified.

Q. Would they be centers where a child came to study all day or to study for part of the day? A. Well, I think it was hoped that they would come there all day. Maybe not in the beginning, but eventually they would definitely come there all day.

Q. Did the advisory council recommend that an interim center be established in the Montbello area? A. It did.

Q. Did it not? A. Yes.

Q. Would it have required bussing of most of the school children in Denver to get out to Montbello? A. Yes.

Q. Montbello is way out—of north—on the northeast corner of town beyond the airport, is it not? [1231] A. That's right. As I recall we figured that with the annexation of Montbello it was an ideal opportunity to establish an educational park on an experimental basis and with the growth of Montbello, you get an area big enough, as I said,

50 to 250 acres, and in the area—as the area grew, building schools, which would encompass the educational park. I don't believe it was contemplated to bus the children as such at the inception.

The idea was that with the growth of the area, the area which was designated as the school area or the educational park area could grow.

Q. Well, in 1967 when you campaigned for the school board, was the issue of educational parks discussed? A. Definitely.

Q. Was it discussed by you? A. Yes.

Q. Were you in favor of it? A. I wanted to try an educational park on an experimental basis, yes.

Q. I would like to turn your attention, Mr. Berge, to page 129 of Exhibit 21, the 1967 council's report, and you will see there a statement of philosophy by the advisory council. And there are three paragraphs in the center which I'd like to have you read. These three here. A. "We therefore hold that the council's concern is to [1232] improve the educational opportunity of all children in all of the areas of the city and in all of the levels within the systems. We hold that the neighborhood school principle is educationally sound for elementary schooling so long as it does not interfere or impede the quality of education. We hold that desirable education for our children can best take place in a school system that is actively involved in furthering the racial and cultural integration of our school community."

Q. Now, isn't there something of a contradiction in the recitation of the neighborhood school policy and the same—the statement as to the recitation of the desire for cultural integration, racial and cultural integration? A. I don't believe so.

Q. How can the neighborhood school policy be strictly maintained and cultural and racial integration be achieved? A. By the use of a system such as the cultural arts center.

Q. And does racial and cultural integration achieve its ultimate in the cultural arts center? A. Not achieve its ultimate, but it's a step in the right direction.

Q. Has it done anything to improve the achievement test results in the schools? A. In my opinion it definitely did. It certainly has [1233] motivated my boy.

Q. Have you got any indication or any analysis of the effect of the cultural arts program or participation in it—that it has had on minority children back in their—in the minority schools? A. I don't know.

Q. With the music and autoharp playing—that isn't going to help much on English and literature, is it? A. No, with the possible exception that it might motivate the child to exert himself in a more concentrated way on those other subjects.

Q. Is there any evidence that it has in fact had that motivational result; any substantial evidence? Any statistical evidence? A. I don't know, Mr. Barnes.

Q. Is there any other way that the conflicting concepts of neighborhood school policy and the cultural racial integration can be resolved? A. Yes.

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[1235] * * *

By Mr. Barnes:

Q. Mr. Berge, referring then to the report of the advisory council on superior schools, was there not a request by the council that the results of the superior schools program be reported on? A. Yes, I believe there was such a request.

Q. Was such a report ever compiled? A. I don't recall.

Q. And turning your attention to the statement that you made about the advisory council's recommendation on voluntary open enrollment, did in fact the advisory council address itself to that program? A. I don't—here, again, now, it has been quite some time, Mr. Barnes, and I don't—on reflection, I don't believe we did. I believe this came later. I don't think that was one of the recommendations of the advisory council. I am not sure, however.

Q. On page 47 of the advisory council report, there is a list at the bottom of the page of five general recommendations. No one of those includes voluntary open enrollment, does it? A. That's correct.

Q. Is there any other place in the report where [1236] recommendations might be contained? A. Not to my knowledge.

The Court: Well, all of the three programs remain recommendations? These were on a voluntary basis, Mr. Berge? In other words, this would be optional?

The Witness: I don't understand your question, Your Honor.

The Court: Well, you described on your direct testimony three main purposes or recommendations, rather. One was to have a cultural center concentrating on art and music. Two, a superior school program for Smiley and Baker. Three, an educational center, campus idea. Participation in these was to be optional, I assume.

The Witness: Not on the superior school concept, no.

The Court: Well, I mean the educational center and the cultural center?

The Witness: Yes, sir.

The Court: So, then you would have a home room or home school and then movement to these centers on an optional basis, is that right?

The Witness: Yes.

The Court: So you would really be operating two systems, a home or neighborhood school, and then you would be bussing to these centers on the side, is that right?

[1237] The Witness: If there were enough people in agreement who wanted to participate in such a program, yes.

The Court: But you wouldn't expect it to be 100 percent, anyway, I don't suppose?

The Witness: No, and I would anticipate that the participation would be very small at the inception.

The Court: Thus, this is not unlike the program suggested by Superintendent Gilberts, I guess, only his was not voluntary. I think it contemplated that everybody would participate in this campus idea, when he testified here at the preliminary injunction.

The Witness: Yes.

The Court: He said that this was one approach, but I don't believe that he considered it to be an optional or voluntary program. His idea was that the neighborhood school would be the home base but that you would have a center, a campus, where special courses would be taken, and he called this the cluster program, I believe.

The Witness: Yes, I think that's correct, Your Honor.

The Court: But you would operate this on a voluntary basis? I mean, this would be an essential aspect from your standpoint?

The Witness: Definitely, just the way the cultural arts center was operated.

[1238] The Court: There would be no compulsion about it?

The Witness: That's correct.

Q. Mr. Berge, turning your attention to page 135 of the advisory council report, do you see a paragraph there beginning with the words, "The advisory council," in the middle of the page? A. Yes.

Q. Would you read that paragraph for us, please? A. This is under Appendix 11, School Capacities?

Q. Yes. A. "Thinking Behind Recommendation on School Capacities"?

Q. Yes. A. "The advisory council in giving orderly consideration to matters affecting the quality of educational opportunity found that wherever there is a concentration of any minority racial or ethnic group, this fact in correlation with other social and economic factors usually adversely affects the quality of educational achievement."

Q. So, the council was aware even at that time of the educational disadvantages of concentrations of minority students, wasn't it? A. In some instances, yes.

Q. And in the charge cited on page 102 and 103, at the top of page 103, there is another reference to the adverse [1239] effect on educational opportunity on children living in areas of concentration of racial and ethnic minorities, isn't there? A. Yes.

Q. You came on the board in May of 1967? A. Yes.

Q. And from that time you have been aware of the educational disadvantages of being in or having racial concentrations in certain schools? A. For some people, there may be a disadvantage. For some others, it may be an advantage.

Q. Well, the statement on page 135 of the report of which you are the chairman of the committee says it usually adversely affects the quality of educational achievement. A. Yes, there are some results exactly as stated in that paragraph, but that doesn't mean all the results are that.

Q. Turning your attention, Mr. Berge, to Plaintiffs' Exhibit 29, which is in evidence, on page 10, which are the minutes of a board meeting that was held June 29, 1967, do you see at the bottom of page 10 a reference to a statement made by you, third line from the bottom? A. "There was lengthy discussion about the implications of the motion and the amending motion. Mr. Berge contended his motion was intended to respect to the utmost [1240] degree the freedom of choice of individuals and to accommodate all of the children in the city, those whose parents want neighborhood schools and those who believe that a better education could be obtained outside of their area. He submitted that the harmful effects of segregation could not be changed with enforced integration."

Q. Now, even at that time while on the board you were willing to talk about the harmful effects of segregation, were you not? A. For some people, yes.

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[1241] * * *

Q. All right, considering the neighborhood school policy to which you have referred, Mr. Berge, the School District does not always act consistently with that policy, does it? A. I think for the most part it does, yes.

[1242] Q. Well, for example, looking at what we have up here on the easel as the 1956 boundary map, but which will give us a rough approximation of the location of the schools

in the district, there is now Montbello district which would be out here off the edge of the map, would there not? A. Yes.

Q. And the children from that district and the—from the junior high school have been transported up until the Court's order last summer, up to Lake Junior High? A. Yes.

Q. And that is in pursuit of the neighborhood school policy? A. No.

Q. And the Barrett Elementary School which was built on Colorado Boulevard was built right adjacent to its boundaries, was it not? A. I don't know, Mr. Barnes. I wasn't on the Board at that time. And I don't know.

Q. Well, some elementary schools are sometimes built adjacent to their boundaries? You wouldn't contest that, would you? A. No.

Q. And that would be contrary to an idea of the school surrounded by subdistrict boundaries which are an equal distance away from it? [1243] A. Not necessarily.

Q. So it would be a modification—probably a modification which is followed in order to achieve some educational advantage, isn't it? A. Again, not necessarily.

Q. What other reason would there be? A. For example, when Thomas Jefferson was built, it was built at the edge of the boundary of the city at that time. And then with the annexations, the city just mushroomed out in that area so that now Thomas Jefferson, instead of being at the edge of the boundary, is now in the middle of the district, or the area.

Q. Well, though, that would not apply to Barrett, would it, located on Colorado Boulevard? Will you take my word for it that it is located on Colorado Boulevard? A. Are

you sure it's located on Colorado Boulevard? It isn't. It's on Jackson.

Q. Its playground is between Josephine and Colorado Boulevard?

Mr. Ris: That's incorrect. Josephine is down near York Street.

Mr. Barnes: Through this trial I have been saying Josephine.

Mr. Ris: We have been aware of it.

The Court: We will take not that Jackson is one [1244] block west of Colorado Boulevard, and it was at all times. It was never Josephine.

Q. In addition, Mr. Berge, has there not been in the past while you were on the Board transportation from the southwest Denver, southwest corner of the city all the way across University Park? You testified to that earlier, didn't you? A. Yes.

Q. And that is a good ten miles, isn't it? A. Yes.

Q. And that is a modification of the neighborhood school policy? A. Yes, because there were no schools in the neighborhood.

Q. Well, there were schools in the neighborhood, some of which may have been—may have had empty spaces and some of which may not have? A. Well, they didn't.

Q. Are you sure of that? A. Yes.

Q. So you transferred the children all the way to University Park in order to take advantage of space there? A. Yes.

* * * * *

Q. An expense in order to take advantage of an educational purpose, isn't it? [1245] A. Yes.

Q. Well, is the transportation from Traylor to University Park consistent with the neighborhood school policy? A. I don't understand your question. Would you repeat it?

The Court: What he's saying is—I think we can save time here, Mr. Berge. The neighborhood school policy hasn't been carried out in its very purest form. There have been some compromises in various ways in order to utilize the physical plan. As a matter of fact, your program as a member of the advisory council would compromise it, wouldn't it? I mean, if you had a school and you had other institutions where you took special classes—this would not be pure adherence to neighborhood school policy, would it?

[1246] The Witness: It would be a modification of it on a voluntary basis.

The Court: Right. So there are many compromises with it. I mean, it's not possible to maintain it in its purest form, I don't suppose.

Isn't this about all you want to develop?

Mr. Barnes: Exactly, Your Honor.

Q. The next question, Mr. Berge, is why if the policy can be modified or compromised in some instances, it was not and has not been modified or compromised in order to promote—in order to overcome the disadvantages which you noted on the page 135 and 103 of the advisory council report? A. Because the advantages which are noted in the pages which you suggested cannot be accomplished

without community acceptance and participation. And until you can get a plan which the majority of the community will get behind and make work, it's just not going to be feasible to put it in operation.

Q. Community acceptance of integration? A. Community acceptance of modification of the neighborhood school concept.

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[1248] * * *

Q. Well, let's look at the concept of voluntary integration for a minute, Mr. Berge. Do you allow children in [1249] your school district to decide voluntarily whether to go to public schools? A. No.

Q. As a representative of the state or through the—you, through the school board, you enforce the educational decision on the child, do you not? A. Yes.

Q. And whether or not the child perceives the advantages of this education, he is forced to go to school, isn't he? A. That's correct.

Q. And whether or not the parents perceive these advantages, the child is forced to go to school? A. Yes.

Q. And you don't leave the educational decision to the child or to the parent in this case, do you? A. No.

Q. Well, perhaps you're referring then to the right to voluntarily choose a school. Is that what you consider to be important in the—as a voluntary choice? A. A portion of it, yes.

Q. There are modifications of that policy, too, aren't there? A. Yes.

Q. As a general rule, the child must go to the school in which he lives, the subdistrict in which he lives, isn't [1250] that the case? A. Yes.

Q. So that child doesn't have a voluntary choice to go to any school he wants to in the district? A. That's true.

Q. And if a child happened to live in the area of the Traylor School before that school was built, he didn't have a choice whether or not to go to University Park? A. That I believe is substantially correct. I think there were exceptions to that, but basically your statement is correct.

Q. And these limitations on the absolute freedom of choice are done for the educational advantage of the child, aren't they? A. For the most part, yes.

Q. If we modify this voluntary principle on the choice of schools for the educational advantages of the child and we do it in this instance I have mentioned, why don't we do it again in order to achieve integration? A. You can if you get the acceptance of the community, the acceptance of the parents, and those who are going to be involved. But, until you get that acceptance and that participation and that backing, you're not going to make it work. They just won't accept it.

Q. Do you have acceptance of parents and the children [1251] in having them go to school if they don't want to go to school? A. For the most part, definitely yes.

Q. Do you suppose that when public schools were first instituted everybody wanted to go to school? A. I don't know what happened when they were first instituted. I presume not.

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[1268] * * *

Cross-Examination by Mr. Brega:

Q. Mr. Berge, as a result of your being chairman of the advisory council, did you and the council have occasion to

study various educational proposals that existed throughout the country? A. Yes.

[1269] Q. And did you have people who were attempting to determine the answer to this educational opportunity question that you were confronted with? A. Yes.

Q. And in this regard, did you study states and cities outside of the State of Colorado? A. Yes.

Q. Was there any answer that was found by the committee that was a complete answer to educational opportunity for all people? A. No.

Q. Did you find in your study that the forced busing that occurred in other cities created an educational opportunity that was equal and worked with the people of those communities? A. No.

Q. What in fact did the council find in regard to forced busing in other areas? A. Mr. Brega, I don't recall that the council made any specific finding as such, but I think the limited access which we had to the busing which was done in other areas against the will of the people resulted in a departure of the whites from the core area to the outlying and surrounding suburbs and a concentration of the minority groups in the core area.

[1270] Q. In other words, it was your opinion that the forced busing aspects of this would leave even a worse problem than might exist at that time? A. Yes.

Q. Now, in consideration of your voting against 1520, 1524 and 1531, did you take these things into consideration? A. Yes.

Q. I want to call your attention to a provision of Resolution 1520, and I will read from it, if I may. It is in the middle of the opening paragraph: ". . . which changes are one of the steps designed," and then it says, "by revising

and thereafter stabilizing the racial and ethnic composition of pupil memberships in such schools."

Do you see that in the opening paragraph right towards the end? A. Yes.

Q. Was it your opinion that this proposal would in fact stabilize the racial and ethnic composition of pupil memberships over a long period of time? A. No.

Q. Why not? A. Well, because this plan was not presented to the people. It was not explained. It required mandatory busing of students from a particular area for the sole purpose of attempting to achieve racial and ethnic balance and without [1271] any regard to the wishes of the parents and the pupils involved. Secondly, for the reasons which I described to Mr. Barnes concerning the implementation of the transportation of senior high school people for the first time and limiting that to one area and not providing it for all students who were similarly situated. I didn't feel that it was worth the attempt to put it into operation.

Q. Now, turning to Page 5 of Resolution 1520, it talks about, in Paragraph 1, to recommend further changes in the boundaries of Smiley so that approximately 850 pupils who would otherwise attend Smiley will go to other junior highs beginning in September of 1969. Now, was that on strictly a racial composition? Was that the purpose of that paragraph? A. I think it was certainly the major consideration of that paragraph, yes.

Q. In other words, what was proposed by 1520 was taking 850 black students out of Smiley and moving them to other junior highs on a racial balancing basis? A. In my opinion, that was the primary consideration, yes.

Q. Now, in looking to the bottom of Page 6 of Resolution 1520, the paragraph begins, "It is further resolved that those pupils entering their senior year of high school in September of 1969 and who reside in the senior [1272] high attendance areas changed shall have the option of attending the senior high where they previously attended."

Now, in your opinion, was this a good, valid provision to put in a resolution for attempting to treat all of the students equally and fairly? A. Well, it gave special consideration to the senior high school students. I didn't feel that it went far enough. I didn't feel that the taking of the children in the sophomore and junior years was fair. I thought it should have started, if it was going to start at all, with the beginning of the students when they entered the high school. In other words, having graduated from the school which was in an attendance area at East and in an area which was to be designated as a transfer to South, I thought it was better that the students graduating from the junior high school then attend South High School, rather than disrupting those who were already in attendance, unless they voluntarily wanted to make the disruption or the change.

Q. And are these reasons also in addition to the ones you stated for voting against Resolution 1520? A. Yes.

[1273] Q. Turning your attention, if you will, to Resolution 1531, do you have a copy of that before you? A. Yes, I do.

Q. Down at the third paragraph beginning, "Whereas, this Board of Education, having heard the views of citizens on the said proposal of superintendent, having considered the racial and ethnic composition, traffic patterns, distances and memberships, pupil achievement data. . . ."

Did the Board in fact have all of that information presented to it in its consideration of Resolution 1531? A. Mr. Brega, I don't recall that all of these items listed were actually presented to the Board. I feel that all of these items were considered by the staff in making its recommendations to the Board. But I don't recall whether all of these were actually presented to the Board.

Q. Isn't your opinion that Resolution 1531 in its effect was merely an experiment?

Mr. Greiner: Your Honor, I believe we will object to the leading nature of counsel's question to this witness. I think it is now apparent that there is no adverse interest between the intervenors and this witness. There has been no demonstration that this is a hostile witness. And it seems to me that leading questions are inappropriate. We would object.

The Court: Well, if they are within the scope of the other examination, why, I think that he is within his [1274] rights.

I would say this: that they are extra-leading. They're not only leading— In other words, I think you're doing most of the testifying. But I guess you're entitled to if you wish. I don't think it has much probative value, though, when you conduct an examination in this fashion because it is the witness under oath who really counts, you know. What he has to say.

Q. What, in your opinion, was the purpose of 1531, the purpose why it was passed? A. My opinion, and I believe it was so stated by the superintendent, that this was an

experimental program and was concerned to some extent with sociological experiences.

Q. Was it for the purpose of achieving some racial balance? A. I'm certain that element entered into it, yes.

Q. Did the reasons for your voting no on 1520, 1524 and 1531 differ from the reasons why you voted against it on June 9 of 1969, at the time it came up for consideration again? A. No, I don't believe so.

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[1283] * * *

The Court: Does the board have any long-term plans for Manual, Cole; these other schools in the near east side so as to bring them into equality from the standpoint of—I mean, for furnishing quality education?

That isn't even a separate but equal system from what I have heard.

The Witness: Well, I would disagree with that statement as far as Manual is concerned and partially as far as Cole is concerned. The board—to answer your question specifically—does not have any specific plan other than 1533, which we feel we have not had and opportunity to really put into effect the way we would like to do it.

The Court: What's going to be the eventual answer, do you think?

[1284] The Witness: Well, I think the eventual answer, Your Honor, is basically this: that you're only going to get some meaningful realistic integration in this city when you can adopt a plan which the majority of all segments—and by that I mean

the majority of the Hispano community, the majority of the Negro community, and the majority of the Anglo community—will get behind and sponsor. To me, it's totally unrealistic to say to members of a minority community that you are—

The Court: Well, this isn't— Certainly, I recognize that we have always functioned in political areas on the basis of government by consent of the governed. That's desirable. I mean, particularly if you're in public office, you know.

The Witness: Yes.

The Court: It's almost essential. I mean, there is no problem there. I mean, you don't have to sell me that.

The Witness: I'm not trying to sell you.

The Court: I mean, as a feature. I can see the value of it. But then I take it that you're going to wait until the public accepts the necessity for integrating these schools, or the housing patterns change, is that right?

The Witness: Well, that would certainly enter into it, yes.

[1285] The Court: Meanwhile, there is just not going to be any basic change except what you might work out on a voluntary open enrollment basis, is that right?

The Witness: That's the only way in our opinion that you will accomplish any realistic integration; is when you get a plan which the majority—and by majority I mean the majority of the minority areas will get behind. It's very revealing, Your Honor, to get the comments from the Hispano community

and the Negro community to the effect that they want to live together, they want to stay there and they don't want their children moved out of that particular area. And using this as a major premise, we feel that the way to get it accomplished on a realistic basis is to affor to those who don't agree with that major premise, the opportunity to transfer their children to a school which would be a predominantly minority school. And there are others in the Anglo community that feel exactly the same way; to afford them the opportunity to do this.

The Court: Well, I think I have expressed myself a few times here to the effect that I don't suppose that black parents relish the idea of having their kids go to some far-away school, per se, just for the ride. Why should they? They've got the same apprehension that any other parent has.

The Witness: That's right.

[1286] The Court: They don't know what's going to happen, and they're going into the unknown. They don't know who they're going to associate with and they might get into a hostile environment when they get there.

The Witness: That's right. That's been one of our major concerns.

The Court: I don't think—I say, that's their concern. But, I'm sure they have concerns. But, undoubtedly, most of them would be willing to run the risk in order to get a better education for their children. You don't think this is true?

The Witness: Oh, I think they ought to have the opportunity to do exactly that. That's the position

of the board. And that's the plan that we're attempting to foster.

The Court: Now, let me get this straight. Are you giving everybody who wants a chance to go to another school in, say, the Manual area, the right to do so, unconditionally?

The Witness: If the transfer would improve the racial balance to the receiving school.

The Court: And, if there is an opening in the receiving school. Right?

The Witness: Yes, sir, that has to be an element entered into.

The Court: Well, there is not going to be any [1287] opening from GW to Manual. Do you think? I mean, there is just not going to be transfers on that basis, are there?

The Witness: I don't know. You would be surprised at the interest that's been displayed. I can't answer your question specifically yes or no. We would like to attempt to explore that possibility. I know this, Your Honor, that of the 1,543 applications which we received on a voluntary basis, we were able to process and implement approximately 687, if my memory is correct.

The Court: This is at the elementary level?

The Witness: I believe that's at all levels, Your Honor.

The Court: When was this? This year?

The Witness: Yes, sir.

The Court: This was because you had that many openings in pure Anglo schools?

The Witness: And because people were— Well, for example, at the meeting at East High School there were two parents, one a doctor and one another individual who got up and expressed gratitude to the board for allowing their children to go from George Washington—I believe one went to East and one went to Manual.

The Court: You anticipate, then, that there will be a large number of people who will pursue this route from, say, GW or Thomas Jefferson to Manual or Cole?

[1288] The Witness: Not a large number at first on a total school day, but I think you will have a substantial number at first either for certain courses or for certain days of the week. And when people do it on this basis and see the advantages, just like they did with the cultural arts program, others will follow and then you will be able to magnify the program and by so doing you will get acceptance of all portions of the community which are involved.

The Court: Well, coming back once again to this other problem of improving the standards in minority schools—you don't have a top-to-bottom program, a head start and so on, whereby you're going to bring these culturally and economically deprived people into a place where they can compete and truly take advantage of an educational opportunity?

The Witness: Yes.

The Court: Do you have a program of this kind?

The Witness: Resolution 1533, Your Honor.

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[1292] • • •

JAMES C. PERRILL, called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

The Court: Will you take the witness chair? Give us your name and address.

The Witness: My name is James C. Perrill. I live at 1324 Birch Street, Denver, Colorado.

Direct Examination by Mr. Bis:

Q. Mr. Perrill, how long have you lived in Denver? A. Twenty years.

Q. You are an attorney by profession? A. Yes.

Q. You are Anglo? A. Well, I am English, Scotch, Irish, German, French and Dutch.

Q. Anglo within the context we have discussed it here. A. I don't know what that means.

Q. All right, you are Caucasian then? A. Yes.

Q. How old are you? A. How old?

[1293] Q. Yes. A. Forty-five.

Q. Are you married? A. Yes.

Q. And have children? A. Yes.

Q. Are they in the Denver Public Schools? A. Yes.

Q. What schools have they attended? A. We have a daughter who is a senior at East High School in Denver and a daughter who is an eighth grader at Gove Junior High School.

Q. How long have you lived at 1324 Birch, or in that area? A. We have lived fourteen years within a block. We lived six years in the 1200 block on Birch and eight years at our present address.

Q. Where did you live before that? A. At East Tenth Avenue and Madison Street.

Q. You are now a member of the School Board, having been elected in May of 1969? A. Yes, sir.

Q. Have you held other public office? A. Yes.

Q. What office and when? [1294] A. This may be a little more than you asked for, but I served as an Assistant U. S. Attorney for Colorado from 1956 to 1959. I served as a Denver Municipal Judge in 1959 and '60, and as Chief of Staff of the Mayor of Denver from 1960 to 1962, and I was elected to the Colorado Senate in 1964, took office in 1965, January, and served until January of 1969.

Q. In the service that you had in the State Senate, did you have occasion to familiarize yourself with any matters pertaining to education, education finances or minority problems in general? A. During the four years I was in the senate there were a number of problems. Of course, education was an ongoing problem from the legislature, both in terms of state participation in the formulation of program and in finances. There were certain minority oriented, I think you could say, issues that did come before the legislature.

Q. Were you in the legislature when the open housing legislation was first enacted? A. Yes, that was my first session, in 1965.

Q. All right, did you vote for that bill? A. Yes.

[1295] The Witness: Excuse me. I think I know which bill you're referring to. Would you please make sure that I understand what you're asking me?

Q. Well, I am referring to the bill that Senator Brown referred to the other day as being the first open housing

bill in Colorado. A. Well, no, that was in 1959. I wasn't in the legislature.

Q. Was that amended then? A. Well, the amendment to the existing law—and I was present when he testified—in the 1965 bill to which he referred to was the one I voted for.

Q. That was the broadening amendment he referred to then? A. Yes, it was.

Q. Now with respect to the Denver Public Schools, School District No. 1, at what point in time and what capacity did you first become interested in the problems of either the district itself or any of the component schools? A. I think as a parent, we became—our family became involved in 1957 when our older daughter commenced public school. But, shortly after that—and I don't recall exactly the year—our older daughter attended Teller Elementary School which is at East 12th Avenue and Garfield Street, and I served on the lay advisory committee of Teller for two or three years, [1296] probably in the early 1960's.

Q. Was that advisory committee the same that Mr. Berge testified concerning yesterday, that he served on? Did you hear that? A. Yes, I'm sure it was, because the purpose of them was rather uniform throughout the School District.

Q. And then with respect to Gove, did you serve in any similar committee at that school? A. Yes, I served on the Gove lay advisory committee, although the record will show that my wife's name was listed for several years. But, she never did serve. It was I. She does now, incidentally. But, I served on that committee from 1964 to 1969.

Q. Were you active on that committee and in parent-teacher work during that period of time? A. As active as

I could be. I think it's fair to say I was active. I was chairman for, I think, two years.

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[1310] * * *

Q. Then at one point in time you made the decision to run for the board? A. Yes, I did.

Q. You were elected? A. Yes.

Q. And then after you were elected were you the mover to rescind the three resolutions, 1520, 1524 and 1531? A. Yes.

Q. And then 1533 was enacted? A. Yes, all the same evening.

Q. The same agenda? A. Yes, June 9th, 1969.

Q. Now, with regard to 1533, can you explain to the Court exactly what your position and the position of the majority of the board was with respect to that particular plan and what you contemplated by that plan? A. That's quite a question.

The Court: Do you want him to break it down?

The Witness: No, no. If I can just be a little bit deliberate in my answer.

The Court: Okay. Help yourself.

[1311] A. Well, first of all, I had said during the campaign that the most basic problem facing the community and facing the matter of effective operation of the Denver school district was that prior to the election of last year, May of last year, the board had—this is what I said, the board had created a chasm between itself and the community. And that, in order for the board to make lasting

progress and lasting decisions, it had to get back together with the community.

Now, the reason—the reason I moved to rescind the three resolutions, 1520, 1524 and 1531—the reason 1533 was offered all at the same time was to clear the air in the community to demonstrate to the community that we were making a new start, that we were making a genuine effort to reestablish credibility with the community and soliciting the trust in the community in what we intended to do in the community, all of the community, not certain portions of it; all the community. This is a neat trick today in Denver or anywhere else. But that's what we wanted to do. We felt we had to do this first.

Now, 1533 went with the Gilberts report—planning quality education report at the elementary level as far as we felt we could do consistent with the framework that I have just discussed with respect to working with and for the community. The Gilberts report almost placed participation [1312] in the pairing of schools, in the complex approach to schools, on a voluntary basis, but not quite. In the instance of participation in the complex approach, whether transportation that would be necessary from school to school for specific courses, I don't recall was ever stated in the Gilberts report. This is one of the many things left unanswered, purposely. So that the community feedback could help determine what these details should be.

With respect to the pairing of schools, the ultimate decision as to whether and to what extent schools should be paired and participate reciprocally was left to committees who were to work together from each of the schools involved. The committee, if the report were implemented, the committee could tell the members, the parents and the

teachers and the youngsters in each school whether they would pair or not. It would not be shifted to the judgment of the entire school community whichever school it might be. And we felt that those resolutions—1531, which was basically looking down the road to working on the problem of understanding and the lack of understanding between ethnic and racial groups in the community, had some good ideas, but that we had to clarify the fact that no one would be forced to subscribe to a program, would be forced to understand somebody else. Because we felt you don't generate understanding in that atmosphere. So we went as [1313] far with 1531 as we could, and called it 1533. We went one step further. Item No. 2 on the agenda was a motion. It wasn't a resolution. And it referred to—well, it was a direction to the staff to get busy on the concept of voluntary open enrollment program with transportation provided in each case where the child's transfer or the high school and secondary school student's transfer from one school to another would improve the ethnic or racial composition in both the sending and receiving schools. And this is what I had high hopes for. And I had a speech prepared June 9th, 1969, which never came off because the atmosphere was such that anything I said would have been voted down so to speak by the people whose understanding and cooperation would be needed. But, the design of Item No. 2, which is really part of 1533 and really part of the new policy thrust initiated that night—that board meeting night, was to get the high school youngsters involved in helping to convince their parents that learning to understand people from other backgrounds was a useful thing. And that, if they could learn this very important consideration of life generally in school and then—then these people

could learn to live better and more productively and more harmoniously as adults. And this is not my idea. This is an idea probably generating from people whose ideas over the broad spectrum I would probably disagree with to some extent, but this is a [1314] part of their thinking processes with which I do agree.

Now, we did not ever propose, and I would never propose that high school youngsters volunteer to go to a school against the wishes or even will of their parents. They're going to have to talk their parents into the advisability of this. We're not in the business of splitting families. But, if they can talk their parents into the usefulness of this kind of experience and helpfulness of this kind of experience, then we felt the youngsters take the lead on this and really generate a thrust to make VOE work on a secondary school level particularly.

Q. And do you feel this had any relationship to either quality education or offering equality of educational opportunity? A. Well, I think—your question addresses itself to two different but important considerations in public education. They're both important. One is—Quality education would presuppose the best opportunity available for each child to achieve. That's one thing. And I think quality education would also—this is my view, which I cannot impose upon the entire community by legislative action—in my view quality education also encompasses offering and participating in the case of our own children, in an experience of learning to know people from other backgrounds. They are both important. They are both part [1315] of quality education. One is the proper subject of legislative determination, in my view. That is formulating the best educational program that will make and achieve

the best achievement atmosphere possible and the other is something that the district has to offer and encourage and furnish leadership and hope that support will be generated within the community for this business of voluntary involvement in the social, ethnic, racial problems of the community. This business of voluntary open enrollment, offering the children part-time or full-time opportunity of going to school under another social atmosphere; another social environment, another ethnic environment, if you will, as part of their educational process. I think it's useful. I'm glad our children go to school within this atmosphere because you cannot impose this legislatively, inflexibly upon the entire community.

Mr. Bis: Thank you.

Cross-Examination by Mr. Greiner:

* * * * *

[1319] Q. You mentioned that a boundary change at Gove—that was in 1964? A. Yes.

Q. That was at a time, was it not, when all of the optional zones in the school district were terminated, is that right? A. I really don't know.

Q. You don't recall that.

Q. Now, as I recall, one of the areas that was picked up into the Gove area by that boundary change was the area served by Barrett Elementary School, is that [1320] correct? A. Yes.

Q. Do you know whether or not the children from that area were bused into Gove after that boundary change? A. I know an awful lot of them got there by automobile and public transportation. I don't think they were. They

may not still be bused. I really don't know. I suppose I should.

Q. You don't recall what the distance is from Gove to— A. I can compute it. It's far enough to be bused, I think Well, yes.

Q. They are bused, aren't they? A. Yes, I guess they are bused if they want to be bused, but a lot of them don't choose to be.

Q. And that resulted from a boundary change, a change in attendance area, is that right? A. Yes.

Q. And those children up in the Barrett area then, by reason of the change, were required to change schools, were they not? A. Well, offhand I can't think of any other options they would have unless they would move or something like that.

Q. Those children used to go to Smiley, did they not? [1321] A. I think so.

Q. And then they were mandatorily assigned to Gove, is that right? A. Boundaries were changed. The word is yours.

Q. Well, my point, of course, Mr. Perrill, and I think you recognize it, is that that's the same kind of activity contemplated by 1520, 24 and 31, was it not; mandatory busing? A change in attendance area, and integration? A. Yes.

[1322] Q. And it worked, according to your testimony, is that right? A. I think so. I think it worked pretty well.

* * * * *

[1336] Q. Now, between January of 1969 and April of 1969 you will recall that there were a series of public meetings held throughout the district, were there not, for the purpose of explaining the three resolutions that were then

under consideration? A. You had better refresh me a little bit more. Are you talking about school board meetings or other meetings?

Q. School board sponsored meetings. Meetings where the public was invited to come and give its views on the proposed resolutions. A. Where?

Q. Oh, was there one at South High School? A. Yes.

Q. Now, do you know what I'm talking about? A. Yes, I do.

Q. And there were a whole series of those meetings, were there not? A. There really were not.

Q. How many were there? A. 1969?

Q. Yes. A. Well, the one—I missed a couple because I was campaigning. The one in January was televised, well publicized, and I think fits the description.

[1337] Q. What was the subject of that meeting? A. 1520.

Q. 1520 pertains to what level of education? A. Senior high. And I'm not entirely sure when 1524 was presented. I think it was March. I think they had a breather, but I'm not sure. I think the board asked for a recommendation at the junior high level for February but the administration wasn't able to cut it and they had to put it off until March—until—anyway, it's close, if it isn't right. And it seems to me that it was April, and this was a month before the election, a meeting at South High, and I'm pretty sure, where 1531 was passed. And I think the February or March meeting on 1524 was at South High and I know the January meeting was. There were a great number of people at those meetings that I attended although I didn't attend the one in April because I had a conflict.

Q. All right. Now, was one of the reasons, if you know, for those meetings to explain the plans in order to rally

community support in their favor? A. That really wasn't the way it took place. I think by that time the community was really polarized.

Q. By what time? A. January, 1969. Polarized specifically on the issues of the approach embodied in 1520 and 1524 and not so much in [1338] 1531, although it got tainted by the brush in the earlier amendments. There was one-way communication only and the administration wasn't saying anything. 1520 was explained in a closed type program. It was almost a board conference without public participation on January 16th over Channel 6 by Dr. Gilberts. That's when 1520 was explained. Whether he went any further and indicated what he felt might be done a little later with respect to junior high and elementary schools, on January 16, 1969, I'm not sure. But that was the only real explanation on 1520.

The night people got up and screamed at the board on one side of the thing or the other—that would be the night of January 30, 1969—there must have been some explanation on 1524, because there wasn't a special televised meeting over Channel 6, in either this instance or 1531. So there had to be a brief explanation.

But the kind of communication that took place in response on the part of both sides, people on both sides of the issue wasn't very constructive. Nobody listened to anybody else, unless they agreed with them.

Q. I take it that you recognized, at least as early as January of 1969, that something was going to have to be done if these resolutions were to be successful, to rally community support behind them, did you not? A. I didn't think they were good policy in the first [1339] place, good public policy on the part of an elected legislative body.

Q. Well, I take it then that you would agree that your

campaign for the school board was not at all designed to rally community support behind the resolutions, was it? A. The reason for my campaign was to be elected to the school board. Part of my campaign was that, if elected, I would vote to rescind these resolutions.

Q. So you were, in effect, campaigning against them, weren't you? A. Well, I felt my candidacy was a little more important than these three resolutions. But certainly, speaking for the recision of them was part of my campaign. The rest of it was semantics, I think, isn't it?

Q. And during the course of that campaign, Mr. Perrill, did you recognize that there might be these other educational benefits of the resolutions which you described earlier? A. What other?

Q. The fact that achievement might be raised, aside from the nice social experience? A. Yes, these are possible benefits.

Q. I am asking if you mentioned them during your campaign? A. I mentioned the lack of achievement as a very important problem in the community. I probably also mentioned [1340] that I doubted lasting and significant improvement in achievement deficiencies could be achieved for the children to go somewhere on a bus to school away from their own locality.

Q. Well, it's fair for me to say, is it not, Mr. Perrill, that during your campaign, the thrust of your approach to the resolutions was to emphasize their inconvenience, the fact that children, as you have said, would be transported at distances from their immediate neighborhood; the fact that extracurricular activities of these children might be curtailed; the fact, if the children got sick, the parents would be just minutes away from the school? These were the things you emphasized, was it not? A.

Yes, but you're misstating it, and it may be minor but it's kind of important. The way this issue was stated by me in my campaign was that people felt this way, and that is an important difference. People felt that the convenience aspect was an important thing, that availability for extracurricular activities was an important thing; the safety factor.

* * * * *

[1342] Q. Now, one of the items which you campaigned on was the idea of building schools where the children were, is that correct? A. Yes.

Q. Now, I take it that when you build schools where the children are in Northeast Denver, those become black schools, do they not, for example? A. Mr. Greiner, if you build the schools where the children are, they are populated by the children in the midenvirons. Northeast Denver is substantially black. So that's the answer to your question.

Q. Right. Now, I take it that you haven't abandoned hope, Mr. Perrill, of eliminating all-black schools, is that right? You think voluntary open enrollment would achieve that purpose, is that correct? A. I don't know that all-black schools ever will be or should be abandoned. I don't have quite that much insight because I don't think we have the same definition of that term integration.

Q. Well, you understand what an all-black school is? [1343] That's pretty clear, isn't it? A. You don't really expect an answer to that, do you?

Q. Yes. A. I understand what an all-black school is.

Q. Of course. And the idea of voluntary open enrollment means, as I understand your direct testimony, was that it would be a device which might eliminate racial

concentrations; concentrations of minority students in these minority schools, is that not right? A. No.

Q. No? A. Absolutely not.

Q. You don't look upon VOE then as a device which might in fact change a minority school to one which is predominantly Anglo? A. Well, look—

Q. Can you answer my question? A. Yes, I can. I can answer your question. You don't promote understanding by mixing people. This in itself doesn't do it. Integration—the definition of integration—or integration exists when, through resources, equal ability to generate resources and through a complete destruction of resistive-type attitudes, people are able to live wherever they really and truthfully want to live. Then you've got integration in the community. It's up here. It's [1344] a community attitude. Now, if people—if that atmosphere and attitude—if people then still want to live in somewhat—to some extent in a cluster situation, then, I'm not going to be for telling them they have to. It's what the atmosphere, the community attitudes reveal. Now, when you send school kids to another school for the purpose of helping improve that attitude, that's what you're doing. You're not sending them to that school so that you're going to break down and diffuse minority school kids throughout the community, because that won't do it. They're going to go back home after they get out of school.

Q. Well, I take it then that the answer to my question is that you don't think—you do not think that voluntary open enrollment will change a predominantly minority school to a predominantly Anglo school? A. I don't know. I don't know. I am just saying that that isn't necessarily the objective to be achieved.

Q. Now, when you build the schools for the children

where the children are—or when you build additions where the children are, then—and those happen to be located in all-black neighborhoods, doesn't that increase the number of children, Mr. Perrill, who then become located in these minority schools? A. Well, it certainly does if the people attending them are the kids within the mid-subdistrict, yes.

[1345] Q. And that every time you build one of those additions or build one of those new schools in a minority neighborhood you create more concentration which then has to be corrected by some measure, is that right? You magnify the problem? A. Correct by some measure? What would be corrected by some measure?

Q. Well, if I have understood some of the other people who testified here in behalf of the school board, that they had hopes this program such as voluntary open enrollment might in effect desegregate these minority schools, change them into Anglo schools— Now, I take it you don't comport with that view, if I understand you. A. Well, gee, it just isn't quite that simple. I think that, if that could be achieved with respect to any particular school it would be very much a help. But again, that's not the end. This is a means to an end, and maybe that's where you and I are a little hung up on that.

Q. Well, I take it the end that you're talking about is this cultural understanding, is that right? A. That's as good a word as any; as a good a term.

Q. I don't say that's the end. But I'm also talking about another end, namely, for the improvement of the educational opportunity for these minority children. And you understand that? [1346] A. All right. There are other ways to do that.

Q. Well, let's talk about some of those other ways. What are they? A. I think I just stuck my neck out a

little bit. I don't know the entire answer to that question. And nobody else does. And I'm not an educator. And so I'm really at a disadvantage. But another alternative to improving the achievement of disadvantaged kids in public schools generally as it has been presented to me by educators is that probably—and there is a developing body of experience and evidence being accumulated on this point—but probably individualized instruction; differential staffing, modular construction, even, modern day techniques of presenting education will do so much to enhance the achievement opportunity of individual children as anything else, maybe more. Maybe this is the best way to go. But at this point in time, nobody knows anything conclusively, ironclad, unrebuttable conclusions in this regard. But I'm beginning to be persuaded that individualized instruction is a very important factor to consider in improving educational opportunities for disadvantaged kids.

Q. Does that mean, Mr. Perrill, that we're going to reduce the pupil-teacher ratio to one-to-one?

The Court: I doubt that.

A. That's not my understanding of individualized [1347] instruction.

Q. What is your understanding? A. Well, you don't hang that up in and by itself. As I understand, it's part of the modular concept of education generally. And within this whole context of education you have kids learning in all sorts of group compositions, maybe one in a high school—the whole school will learn something, if you can get them there in one place, through a movie or something like that. There may sometimes be several classes; maybe all the English classes at the fifth-grade level at a particular school will learn something together, if you have

room and you don't have too many partitions and you can get them together. Maybe all the class in a traditional sense will take some courses together. But children who have deficiencies in their production, in their achievement, will be given special attention in terms of attacking that deficiency at a realistic level.

For example, if you have a seventh grader who is reading at a third-grade level, you don't pretend that child can read at a seventh-grade level. You have to have a teacher who is interested in and qualified in attacking that kid's problem of reading improvement. So, hopefully, that kid's reading ability will proceed from the third-grade level to the seventh-grade level or at the same level of [1348] whatever grade they're in at the time they win the battle. And whatever problems require a one-on-one situation or really a three-on-one situation, because individualized instruction, I think, presupposes that you've got one teacher, almost always certified, here, and about three kids in a semicircle around them, and a one-on-three situation.

A one teacher to three kids, attacking a particular problem that those kids have. Now, the most reoccurring problem is reading, reading deficiencies, but there are others; mathematics, emotional—lack of ability to get along with other kids, and whatever their problems are, individualized instruction attacks the problems that the kids have, particularly when they are deficient and tries to bring them up at their grade level as fast as possible.

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[1394] *Cross Examination by Mr. Brega:*

Q. Mr. Perrill, would you look at Exhibit B, which is the blue exhibit that you have before you there? If you

will, would you turn your attention to page 15 of that exhibit? This involves the Hallett plan. A. All right.

Q. Does the exhibit indicate to you the change in percentage of the racial and ethnic backgrounds of the students in Hallett between 9-27-68 and 9-27-69? A. Yes, 9-28-69.

Q. What was the Anglo percentage at the school in September of '68? A. 10.1 percent.

[1395] Q. What had it become in September of '69? A. 38.2.

Q. Now, in regard to the number of Anglo students involved in that program, would you look at page 16 of that exhibit? A. All right.

Q. And under the last column, "Participation, September of '69," as I understand it the participation would only be Anglos moving into Hallett because they need to improve the racial balance, so would you look at the last number and tell the Court how many Anglo students were brought in, in September of '69? That would be voluntary open enrollment to Hallett, the last column. A. Well, the numbers present in September of '69 were 221.

Q. All right, and how many participated in leaving? How many of the black students at that time participated in leaving Hallett? A. 205.

Q. Do you have any feeling as to whether the present court action and the injunction have any affect on the efficiency of the Hallett program at this time or the VOE program itself?

Mr. Greiner: That's a double question, Your Honor, and I object to it.

[1396] The Court: Overruled. He may answer.

A. I think that community attitudes as such are having an effect upon the success of the Hallett and other VOE programs. I do think that there has been a continuation of the historical attitude not to settle for anything less than some kind of non-discretionary—that's not even a word—mandatory program for mixing children up, and that as long as there is a chance that this may be the outcome of legal action, that no one is willing to think about anything different or new.

In other words, the community is still largely hung up on the same issues that were generated a year ago, because there still remains a chance that the policy made by the Board prior to the election will be sustained judicially.

[1397] Q. Now, in consideration of your presenting to the Board Resolution 1533 and also the agenda item 2, I would like to call your attention to the transcript at page 633 when Dr. Gilberts testified, and I would like to just read a portion of this to question you about 1533. He said:

> "That is, as a part of the changing attitude of the community, a certain amount here of involvement in salesmanship in terms of the schools' part is going to be necessary. I believe the participation of people who do this willingly will be a lot more productive in terms of definition of integration than those who are put into situations who feel personally they are not acceptable to them."
>
> And then one other—"Question: Dr. Gilberts, you're telling me that mandatory integration is bad?"
>
> And his answer: "No, I'm not saying that. I am saying that the other approach . . ." 1533—". . . I think has some real merit and something that needs to be tested."

Now, when you created 1533, would you tell the Court whether this was done in conjunction with and upon the advice of Dr. Gilberts and the administration? A. We certainly consulted with him. We determined that in substance we were in agreement as to the thrust of the ideas incorporated in 1533. 1533 was not all some board [1398] member's idea. There was input from the administration, specifically from Dr. Gilberts.

Q. And he also was consulted with the agenda to the VOE program that you were talking about and instituted? A. Yes. We were quite optimistic about the motion embodied in Agenda Item 2.

Q. Well, did they indicate—did Dr. Gilberts indicate to you that he thought this would work or could work? A. Yes. In fact, we had more discussion than that.

Q. Well, I'd like to bring that out so we'll know what went behind this. What was your thinking in 1533? A. Well, I referred to this I think earlier in my testimony, but the idea of getting students involved in generating interest and participation in voluntary open enrollment, particularly at the high school level, he thought was a good idea, and he had had thoughts on this technique himself using student councils, using officers of classes at the pertinent high schools, and getting the children interested in helping to change community attitudes, not in opposition to their parents, but each of them being responsible for convincing their parents that participation in VOE was a useful thing and a useful part of their education.

And we even proceeded to the point of starting to work out some of the mechanics of trying to get students [1399] together over the summer months of 1969, and it was about that time that the litigation was filed and sort of preempted many things.

Q. Well, what is the Board doing at the present time for the educational achievement at the Cole School? Are they doing anything? Do they have anything on the planning board? A. Well, first of all, Mr. Brega, the Denver Board of Education is a part-time, non-paid board. That's a statement of fact, not complaint. We have to rely heavily upon the efforts and the recommendations and judgment in educational matters on our administration. Whatever the administration does can be said vicariously to be action of the board, to be sure. But it's primarily the administration that is involved in educational programs with our encouragement and hopefully our understanding and so forth.

Now, there are some new things going on at Cole Junior High School. I'm not as familiar with them as I should be. And I'm not even certain how new they are, except I think they are new as of last September.

One is that there is a new approach to dealing with the child who is emotionally distraught, for whatever reasons —maybe he brought the problem with him from home or maybe he didn't—from the classroom at Cole Junior High.

[1400] Q. Does this program have a name or do you call it a name? A. Well, the principal has a name for the room where these kinds are sent—

Q. What's that? A. —on a non-disciplinary basis. It's called the crisis room.

Q. What happens there? A. What happens there—well, I think there is about a—about a ten-to-one relationship between staff and youngsters in the room. And they try to get them to settle down, to redirect their interest and their attitudes towards education and they send them back to their next hour, regular class, if they have been successful.

The details of what this process involves would depend upon the situation, depend upon the child and the problem. Rather than—this is as opposed to just suspending a child.

A lot of these children who end up in the crisis room might have done something that would serve as a basis for suspending them, sending them home. But, this is felt not to be a thoughtful alternative in many cases at that school by the teachers and the staff. So that this is an additional tool—a tool in addition to the rather abrupt and arbitrary decision of suspending a child, keeping them [1401] there and getting them reoriented.

Q. Are they using additional educational studies for some of these pupils in this approach? A. Well, in a sense. There is also another program called the Cole extension, which is not immediately on the school grounds, and I'm not sure exactly how far away from the school grounds it is. I think it's several blocks away—where children are sent who are terribly far behind in terms of achievement with respect to their grade level. I spoke of this briefly earlier in my testimony.

And this example has been given to me by the principal of Cole Junior High, of a twelve-year-old seventh grader who was achieving in reading at the level of the fourth grade; simply was not benefiting from the educational process at the seventh grade level. As an example, this child was and has been sent to the extension center and an attack made upon the educational deficiencies with respect to that child at the level he or she needs to be picked up.

If the child reads at the fourth grade level and you start them at the fourth grade level and bring them up to grade level as soon as possible.

The alternative to this, when a child—and this is something that is in—I think it's fair to say pilot stage. It's

in the development stage as an educational technique and approach. The thought is that this needs to [1402] be extended to the high school level. More involved and complicated, I am sure, at the high school level.

But, the point being, where the children reach the legal age where they no longer have to go to school, if they are reading at the age of 17 at the fifth grade level, that's a major contributing factor to the youngster dropping out. They can't relate to the school. They can't relate to what's being offered in terms of educational opportunity. And the only feasible alternative to that child in that situation too often seems to be just to drop out and forget the whole thing.

So the approach is, rather than using the absolutely rigid, uniform, sterotype approach to education so that everything is taught to the same kids, the same age, in each school in the city, is to relate what is taught and how it is taught to the needs of each child as nearly as we can.

Now, this is in the development stage.

For example, the modular approach to both construction and education is a new idea in Denver. We have bids let on the Cheltenham School in which modular education which would provide the physical means for implementing a modular type approach to education. This is new in Denver. But, it's something we're moving toward, we're moving to; with starts.

[1403] Q. How about the Board? Has it attempted to bring in the administrators or teachers? You mentioned you got this from the principal at Cole. How did you talk to him? Did the Board bring him in? Or— A. Yes. I happened to sit in on a committee meeting of the Colorado State Senate Education Committee where a presentation was made on the success of Senate Bill 174 funds, funds

to be used for kids in a disadvantaged position in terms of their education. And the Education Committee of the Senate wanted to know, "Okay. $2 million was appropriated by the state for use in local school districts in this area. And the Denver School District received 800-some-thousand. Now, what are you doing with this?" They made a presentation.

And Mr. George Morrison, the principal at Cole, made a presentation of the things that I had been discussing, what they're doing at Cole.

Jefferson County made a presentation, and so forth. I listened to Mr. Morrison's presentation and a teacher by the name of Ramona McHindry. Then about—as a matter of fact, two nights ago, the Board had sort of a running commentary over several meetings in several months and had concerns with respect to disciplinary problems and standards in the schools this fall and this winter. And we were not sure that we understand the nature—the extent of discipline problems that are being realized or that are generating in schools [1404] generally, but particularly schools where there is transportation involved as a result of the court order.

So we asked to come in—Mr. Mackie, the principal at Thomas Jefferson High School, which is incidentally nine through twelve. We asked Mr. Morrison to come in. We didn't personally do it. These were the people who came in. It was an administration decision, as to personnel.

Mr. Morrison; Mrs. Taylor, the dean of Kepner; the AP—the assistant principal—at Hamilton Junior High School whose name escapes me; and the assistant principal at Merrill Junior High, Mr. Astuno; and in a give-and-take two-way communication situation for several hours the Board I think gained tremendous insight into both problems and discipline at the school level on the line, so to

speak, and problems in scholastic achievements and in grading.

This we intend to continue to do at the teacher level so we can gain more insight and perspective of operating problems, line problems, because it's almost impossible for board members who are part time and who can't possibly know all the problems and have all the information that's available within the district.

But we think that differentiated levels of communication will be helpful in the operation of the district and in the formulation of better policy, sound [1405] policy.

Q. I only have one other question. Mr. Greiner asked you whether you had carried the predominantly black precincts. Could you tell us whether you carried the predominantly Hispano precincts? A. Yes. On the average—well, the so-called Hispano areas to the west, the near west, the Platte Valley area, I carried approximately three to one. And, there is something of a Hispano area in the Harrington Elementary School neighborhood, which is 37th and Cook, I believe, northeast Denver. I carried several precincts there. And that was an area where former Smiley Junior High youngsters commenced going—who lived within the Harrington subdistrict, commenced going to Hamilton Junior High when it was opened in January of 1969. And, we carried that.

We carried that area, and I had considerable discussion with some people up there as to why.

[1406] Mr. Brega: No further questions.

Redirect Examination by Mr. Ris:

Q. Mr. Perrill, you read from the exhibit to the Agenda, Item Number 2, which you could not find at the moment

any reference to there in the Board minutes of June 9, 1969, Plaintiffs' Exhibit 6. Have you had occasion during the noon recess to re-examine Exhibit 6? A. Yes.

Q. And do you find the motion set forth in that exhibit? A. Yes, on page 10. I had forgotten the Intervenors' Exhibit Number X, I believe, is incorporated in Exhibit 6 to the June 9th meeting, on page 10. It is the same thing.

Mr. Ris: All right, that's all.

Recross Examination by Mr. Greiner:

Q. I take it that there has been no evaluation of these programs at Cole? They are still in the preliminary stage? A. Yes, but I think that the staff at Cole is very encouraged with results and in that sense there has been an evaluation. No final lasting conclusions have been drawn yet, because it is new.

Q. Have children been tested for achievement in this [1407] program? A. If they have, I am not aware of it.

Mr. Greiner: No further questions, Your Honor.

The Court: This program is initiated by the staff at Cole, I guess?

The Witness: Your Honor, I don't know, but I think probably the initial idea did come from the staff at Cole.

* * * * *

JOHN E. TEMPLE, called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

The Court: Please give us your name and address.

John E. Temple—for Defendants—Direct

The Witness: John E. Temple, 6036 South Elizabeth Way, Littleton, Colorado.

Direct Examination by Mr. Creighton:

Q. Mr. Temple, are you employed by the Denver Public Schools? [1408] A. Yes, sir.

Q. And when were you first employed? A. January, 1949.

Q. What was your first assignment? A. Teacher of mathematics at South High School.

Q. And how long were you at South in that capacity? A. I was at South until January of 1968, with the exception of one year, the school year of 1963-64, when I attended the University of Tennessee on a National Science Foundation Scholarship and obtained a master of mathematics degree.

Q. And what was your assignment after South High? A. I was assigned as a teacher on special assignment to the Title 3 Art Research Project as an evaluater of that project.

Q. And how long did that last? A. Til August 18th of 1969.

Q. And then where were you assigned? A. I was assigned to the Office of Planning Research and Budgeting of the Denver Public Schools as a coordinator.

Q. Now, is that department the present form of what was formerly called the Department of Budgetary Services? A. Yes, this department now includes the Department of Budgetary Services, yes.

Q. And can you tell the Court what the Department of [1409] Budgetary Services has done over the years in connection with pupil membership data? A. Well, the principals send reports to the administration building con-

taining all the membership figures, and these are compiled in the Office of Planning and Research and Budgeting, which was formerly Budgetary Services.

Q. And you are still in that office? A. Yes.

Q. And since going there last August, have you participated in the preparation and assembling of certain exhibits for this trial? A. Yes.

* * * * *

[1412] Q. Mr. Temple, I hand you Defendants' Exhibit DA, which is now in evidence, and as Mr. Greiner has pointed out, this shows the percentage of new teachers employed in the schools during the period 1962 to '68 with previous teaching experience. Would you tell the Court just generally over that period of seven years what percentage of teachers in the schools have had experience? [1413] A. Well, about the—

The Court: This will be the percentage of new appointees?

The Witness: Yes, sir.

The Court: To the system.

A. (Continued) About the lowest percentage was in 1964 when it was approximately 37 percent; during this period the highest percentage of new teachers with previous teaching experience was about 50 percent, and for the other years it ranges between around 37 percent and 50 percent.

The Court: So, 37 to 50?

The Witness: Yes, Your Honor.

The Court: Are the figures.

Q. Now, then, Mr. Temple, I hand you Defendants' Exhibit DB, which, as has been said, shows the percentage

during those years new teachers in the system with three or more years' teaching experience. Now, is three years the period of time in the Denver Schools which leads to—which must be served to lead to tenure? A. That's correct.

Q. How do those percentages run in those seven years? A. From a high percentage in 1966 and '67 of approximately 24 percent down to the lowest on this chart shows about 17 percent in 1968.

Q. And finally I hand you Defendants' Exhibit DC, [1414] which shows the percentage of teachers in the years we have mentioned, new teachers, having master's degrees, and what are the highest and lowest there again? A. The low was in 1962.

Q. The first year of that series? A. Yes, and it was approximately I would say three and a half percent, and the high year was 1965 and it was approximately ten and a half percent.

Q. What was the second high year? A. Second high year was about a tie between 1966 and '68, when it was approximately 10 percent.

Q. And what has been the general trend in that regard? A. Well, it has been steadily upward.

Mr. Creighton: All right, does the Court wish to see them?

The Court: These all start out as probationary appointees, I guess, just as if they were coming into the system?

The Witness: Yes, for the first time in Denver.

The Court: So, having no seniority, they must accept whatever assignment they are given?

The Witness: To the best of my knowledge, yes.

The Court: They have no right to request any particular one?

The Witness: No, sir.

• • • • •

1421] Q. In terms of numbers in the elementary schools r the period in question, what has been happening to absolute number of Anglo pupils? A. The absolute nber of Anglo pupils has decreased [1422] from approximately 41,000 in May, 1962, to approximately 32,500 September of 1969.

. In the meantime, what has been happening to the pano category? A. In May of 1962 there were approximately—I'd say—9,000 Hispano students. In September, 1969, approximately 13,000.

. And the Negro category? A. In May of 1962 there e approximately 6,000 Negro elementary school pupils in September of 1969 approximately 8,000.

. And then, showing you Exhibit EE, Mr. Temple, this show that same data in terms of percentages? A.

. Similarly, has the percentage of Anglo membership ined during that period in elementary schools? A.

. And similarly has the percentage of Hispano and ro membership increased in the schools as a whole? Yes.

The Court: But not to a commensurate degree? The overall population is decreasing? Everybody?

The Witness: Yes. Well—

The Court: The decrease in the Anglo—

The Witness: The total number of membership, [1423] though, has increased to some degree.

The Court: Oh, has it?

The Witness: In the period, I believe. Hasn't it? From 1962 to 1968 or '9?

The Court: You said the Anglo pupils decreased from 41,000 to—

The Witness: Yes.

The Court: —32,000.

The Witness: I thought you said, Your Honor, that the total membership for all races had decreased over the years.

The Court: Well, I meant the total overall population in the elementary schools.

The Witness: Oh, in the elementary schools?

The Court: On the decrease?

The Witness: I would have to check this record. I think it has, though.

The Court: Would you say so?

Mr. Creighton: Well, the Exhibit D, Your Honor, shows it's leveled off.

The Court: We may be gaining some seats then, you think?

Mr. Creighton: Well, the record is that generally speaking, Your Honor, memberships have leveled off. It is somewhat different as among the three levels. I think the [1424] best evidence we have in this case is the Exhibit D, the Gilberts report, which has a graph to that effect.

Mr. Brega: Your Honor, the total school population—we do have the figures in the exhibit. In 1962 it was 96,370. And in 19—in September, 1969, it's 96,534. An increase of maybe some odd—.

The Court: That includes every level?

The Witness: Yes.

The Court: We're just talking about—

Mr. Brega: I have to say the figure I read for 1962—excuse me—was a projection for 1962 estimate. 96,370.

The Court: Well, that undermines it somewhat.

(Whereupon, Defendants' Exhibits EA, EB, EC, ED, EE, EF, EG and EH were received in evidence.)

Mr. Creighton: Our next offering, Your Honor, is Exhibits EM, EN and EQ, all of which—

Mr. Greiner: No objection.

The Court: They will be received.

(Whereupon, Defendants' Exhibits EM, EN and EQ were received in evidence.)

Q. Mr. Temple, let me just show you as an example of these three exhibits, EM. Is that a bar graph? A. Yes, sir.

[1425] Q. What does it show? A. That shows the expenditures of federal project funds in the elementary schools from the period of September 1968, to August 31st, 1969.

Q. And does it give us the total amount at the elementary level? A. Yes, it shows in the left-hand side—the bar shows the total amount of federal project funds that were spent in all the elementary schools in Denver.

Q. About how much was that? A. Nearly $600,000.

Q. And then have you selected two categories of schools for your next two bars? A. Yes.

Q. What were those categories? A. The second category—those are the schools the plaintiffs had selected as minority schools and I think there were 20 schools in that group.

Q. And the next bar? A. Those were the elementary schools that the plaintiffs had selected as Anglo schools.

Q. Then the final and fourth bar shows what? A. That shows the amount of federal project funds that were spent in all of the other elementary schools in Denver during that same period.

[1426] Q. During that period how much of these funds was spent or received by the so-called 21 selected Anglo schools? A. I believe at that particular level it was zero.

Q. And how much was spent at the so-called selected minority schools? A. A little over $500,000.

Q. And the other two categories show the same data, arranged the same way for the junior and senior high school levels? A. Yes, sir.

Mr. Creighton: Next, Your Honor, we offer Exhibits CG and CI.

Mr. Brega: Your Honor, could I correct that figure now? I do have the totals in 1962. It's 90,438, as opposed to the present 96,000 some.

The Court: You were right in principle, though.

Mr. Brega: Well, I didn't want it to be said I was trying to mislead the Court intentionally.

The Court: Well, that never occurred to me as a possibility.

Mr. Greiner: We have no objections, Your Honor.

The Court: CG and CI will be received.

(Whereupon, Defendants' Exhibits CG and CI were received in evidence.)

Q. Placing before you, Mr. Temple, Exhibits CG and CI, [1427] do they both relate to the same general subject matter? A. Yes.

Q. What is that? A. The people participating in limited open enrollment in the Denver schools from 1965 through 1968.

Q. The first of the two, Mr. Temple, Exhibit CG, shows what? A. That shows the actual number of pupils by ethnic group now participating in limited open enrollment program and also the total number of pupils participating in the limited open enrollment program during those four years.

Q. And what are the three ethnic groups? A. Hispano, Negro and Anglo.

Q. Does the total of the line graph indications for those three groups then equal the total shown near the top of the graph of the overall total. A. Yes.

Q. Can one tell from that then in 1968 how many pupils in the Denver schools were participating in limited open enrollment? A. Approximately 970.

Q. And how many of that group were Negro? A. Approximately 470.

Q. And the other two groups are similarly shown, is that right? [1428] A. Yes.

Q. Then, turning to Exhibit CI, Mr. Temple, what does that show about limited open enrollment? A. This shows the percent of the total Anglo, Negro and Hispano groups that were participating in limited open enrollment program during the same years.

Q. Is that a percent of the group itself?

The Court: This is from 1965 to 1968?

The Witness: Yes, Your Honor.

Q. And the percentage appears—for example, the Negro percentage—is that for all the Negroes in the city who participated in LOE? A. That's correct.

Q. Taking, for example, 1968, Mr. Temple, does that indicate what percentage of Negro students in the Denver schools were participating in LOE? A. That is correct.

Q. What is that percentage, approximately? A. The average is over three and a half percent of all the Negro pupils in Denver schools in 1968 that were participating in limited open enrollment program.

Q. How does that compare with the Hispano category? A. Of all the Hispano pupils—about—I would say one-half of one percent were participating in limited open enrollment.

[1429] Q. How about Anglos that year? A. That would be a little bit less than—probably—less than one-half of one percent. About four-tenths of one percent.

Q. Mr. Temple, you previously indicated you had worked up enrollment figures. Have you had occasion to study the kinds of figures the school district uses in its enrollment projections for planning purposes? A. Yes, I have.

Q. First of all, where does the data come from? A. It comes from—once again, the principals to the office of planning, research and budgeting.

Q. And do the principals send in that at certain intervals? A. Yes, they do.

Q. Is any particular data selected for planning and tabulation purposes? A. It seems to me that the end of the fourth week, that is really the second report there, there is usually one report sent in about the end of the first week of school and the second one is sent in at the end of the fourth week of school, and that seems to be the one that is used quite often for future planning.

Q. Mr. Temple, I show you Exhibit 20, which is the Voorhees report, and particularly in its appendices, [1430]

beginning at Page 21 of the appendix, where membership data for the various schools is given, what date is used there? A. 9/28/62, and 9/27/63.

Q. And I show you Exhibit 405, which is the 1962 planning study. Are you familiar with this document? A. Yes.

Q. Have you studied it—the sources and nature of the 1961 actual membership shown on the various tabulations there? A. Yes, I have.

Q. What principals' report was used for that? A. I'm sure that this was the late September report, the one after the fourth week of school.

Q. Now, the plaintiffs have used average daily membership, Mr. Temple, from time to time, in discussing memberships. Can you tell the Court how average daily membership is determined by the schools? A. Well, they take the membership for all of the days of the school year when their pupils are in school. They take that sum and divide it by the total number of days that the pupils are in school.

Q. When can that tabulation be made? A. At the end of the school year.

Q. Is it made in the summer? [1431] A. Yes.

Q. Could that figure ever be available during the school year? A. No.

Q. I also show you Exhibit CF, which is the sequel to 405. What membership figures does it use for its current actual membership? A. 9/28/62.

Q. Is that, again, the fourth-week-in-September report? A. Yes.

[1432] Q. Now, Mr. Temple, have you studied pupil memberships in the various schools for other years than the years mentioned in 20-405 and CF I just mentioned? A. Yes, I have.

John E. Temple—for Defendants—Voir Dire

Q. And have you made a study of how capacities of schools are determined in the planning documents I just mentioned, Exhibits 20-405 and CF? A. Yes.

Q. At the elementary school, Mr. Temple, during those years covered by those exhibits just mentioned, which would be 1961, '62 and '63, how were capacities of elementary schools figured? A. The number of classrooms, including libraries but not gymnasiums, was multiplied by 30, and that is with the exception of rooms that are designated as kindergarten rooms are given a capacity of 60 and rooms designated as special education rooms are given a capacity of 15 pupils.

Q. Now, have you studied the capacities and memberships at Columbine, Harrington, Park Hill, Stedman, and Barrett in the years 1958, 1959 and 1960? A. Yes, I have.

Q. And I show you an exhibit marked for identification Defendants' Exhibit CA, and ask you if you compared that? A. Yes, I did.

[1433] Q. And is that prepared from official School District records? A. Yes.

Q. And the analysis you have just described? A. That's correct.

Mr. Creighton. Exhibit CA is offered.

Mr. Greiner: I would like to examine the witness briefly, if I may, Your Honor.

The Court: All right.

Voir Dire Examination by Mr. Greiner:

Q. What was the formula used to show or to determine the capacity reflected on Defendants' Exhibit A for Columbine in 1958? A. In 1958, for the room counts, I used some room tabulations reports that have been in use in

Planning Services, and then I used—I took that number of rooms, multiplied it by 30, and also from the membership reports at the end of the fourth week, 1958, I found the number of pupils that were at Columbine in kindergarten classes, and also the number if any that were in special education.

Q. Now, is it true, Mr. Temple, that in 1958 the School District was using a formula different from the one that you have just described that you used? A. I don't think so in 1958. There have been other [1434] formulas used, different formulas used. For example, I know the formula used in the planning report in 1955 and the one for 1962 used different formulas than mine, but I believe from about '58 on I didn't see any reports just telling me what the formula was.

Q. Well, do you recall what the '62 planning report showed for the capacity of the schools listed on the exhibits?

Mr. Creighton: Is counsel referring to Exhibit 405?

Mr. Greiner: Yes.

Mr. Creighton: Will you show it to him?

Q. I just wanted to see if we can confirm that the same formula was used. A. Columbine, the adjusted capacity they say was 1185. Now—

Q. Pardon me, but what do you show the capacity—of course, that spoke as of what date? 1962, and the only other planning report we have is 1955, is that right? You don't have the subsequent planning reports between '55 and— A. No.

Q. Do you have those back at your office? A. No.

Q. Were there some? [1435] A. Not to my knowledge. This stated the capacity. The ones that I have used are these actual room counts, this '62 report, and I have also looked at '55 and '62 reports.

Q. I notice that Exhibit 405 shows that the capacity of Columbine as of February, 1962, was 1185 students, yet Defendants' Exhibit CA shows the capacity at Columbine to be 570. Now, was part of that differentiation due to an addition built on Columbine? A. That's correct.

Q. When was that addition? A. Well, there were two additions, one in 1959 of seven rooms and one in 1961 of fifteen rooms.

Q. Now, is there also an addition built to Harrington between—that's another of the schools listed on CA— between 1958 and 1962? A. These room count sheets show that there were six additional rooms added on to Harrington in 1963.

Q. But not in 1962? A. No.

Q. Well, I note that Exhibit 405 shows Harrington with a capacity of 570 from the published data of the School District, and Defendants' Exhibit CA shows it at 450. Now, can you explain that difference?

Mr. Creighton: Counsel, if you are reading from [1436] page 9, you get 570, but if you read from page 8 you get 450.

Mr. Greiner: I am sorry. Am I reading from the wrong page?

Mr. Creighton: A different page.

Mr. Greiner: It just says adjusted building capacity on page 9.

A. Harrington shows a capacity of 450.

Q. 450. Park Hill— A. Park Hill, 660.

Mr. Greiner: Park Hill, 660, and the next school, Stedman, 630. Very good. Then we have no further questions as to this exhibit, Your Honor.

The Court: We will receive it.

(Defendants' Exhibit CA was received in evidence.)

The Court: I have to call a halt, and I am sorry it worked out this way. I don't know whether I made it clear last night that we were going to have a short session this afternoon.

Mr. Greiner: Yes.

Mr. Creighton: We understand, Your Honor.

The Court: We will take up Monday at 1:30, because I have arraignments Monday morning, the criminal arraignments, and I think we will be able to finish next

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[1440] • • •

The Court: Mr. Temple, you have been sworn. So, just be seated.

Direct Examination by Mr. Creighton (Cont'd):

Q. Mr. Temple, when we broke off last week you had just testified regarding Exhibit CA which is now in evidence. Have you prepared a bar graph with respect to the data shown on Exhibit CA? A. Yes.

Q. I hand you an exhibit marked for identification Exhibit CB. And I ask you if that exhibit shows the data in tabular form on Exhibit CA. A. Yes.

Mr. Creighton: Exhibit CB is offered.

Mr. Greiner: No objection, Your Honor.

Mr. Brega: No objection.

The Court: CB will be received.

(Whereupon, Defendants' Exhibit CB was received in evidence.)

Q. Now, Mr. Temple, I have before you Plaintiffs' [1441] Exhibit BA and BB, which show the elementary boundaries respectively in 1959 and 1960. Now, the Barrett School was opened what year? A. 1960.

Q. In Exhibits CA and CB, Mr. Temple, you have shown Columbine, Harrington, Stedman and Park Hill for all three years and then Barrett, finally, in 1960, the year it was opened. What is the relationship among these schools? A. Well, the relationship is that Stedman, Columbine and Harrington are all adjacent to where the new school was constructed in 1960.

Q. Drawing your attention to Exhibit BA, is there an optional area in the vicinity of the Barrett site? A. Yes.

Q. And what is that optional with? It's Code I. Can you read from there?

The Court: Now, let's see—you're talking about Columbine, Harrington and Stedman?

Mr. Creighton: Yes, sir.

The Court: You remember, we have been out of action for a few days, and so if you will just slow down a little bit, I think we can get organized here.

A. I believe it's optional between Columbine and Harrington, isn't it?

Q. Well, the code reads Columbine and Park Hill. [1442] A. Yes.

Q. All right, Mr. Temple. Your Exhibits CA and CB then relate to Columbine School, Harrington School, Sted-

man School and Park Hill School; is that correct? A. That's correct.

Q. And you testified that Columbine, Harrington and Stedman are adjoining the Barrett site, and Park Hill's relationship with that site is what again? A. A little bit southeast.

Q. And is it within an optional area covered by the Barrett site? A. Yes.

[1443] Q. Now, would you just summarize for the Court the capacity utilization situation among Columbine, Harrington, Stedman and Park Hill two years before Barrett opened in 1958? A. 1958, Columbine' capacity utilization was 148; Harrington, 141; Park Hill, 128; and Stedman, 113.

Q. Now, the next year, was there a change in Columbine's capacity utilization?

The Court: Are you talking about percentages?
Mr. Creighton: Yes, sir, these are percentages.
The Witness: Yes.

A. Yes, there was a change in Columbine's capacity.

Q. What brought that about? A. It was an addition. I believe it was about seven rooms.

The Court: What year was this?
The Witness: 1959.

Q. So what happened to Columbine's capacity utilization between 1958 and 1959? A. Well, it decreased from 148 in '58 to 161 in '59.

Q. Meanwhile, between those two years, '58 and '59, Mr. Temple, what was happening to Harrington's capacity

utilization? A. Well, Harrington kept increasing the next year from 141 in '58 to 153 in 1959.

Q. And where was Park Hill's capacity utilization in [1444] these two years, '58 and '59? A. It stayed pretty much the same. It was 128 in 1958 and 130 in 1959.

Q. And those are percentages are they? A. Yes, sir.

Q. How about Stedman's for those two years, 1958 and 1959? A. Well, Stedman decreased a little bit from 113 in 1958 to 109 in 1959.

Q. And were all four schools you have been testifying concerning overcapacity in 1959? A. Yes.

Q. Now, in 1960, do you show the situation among those four schools plus Barrett? A. That's correct.

Q. And were all five schools overcapacity in 1960? A. Yes, Park Hill was very slightly over.

Q. What happened to Stedman between 1959 and 1960? A. It increased from 109 percent to 121 percent.

Q. Was some relief given to Harrington, which had been 153 the previous year? A. Yes, from 153 in 1959 to 121 in 1960.

The Court: You skipped over that optional area between Park Hill and Columbine. Wasn't that the one you spoke of, you asked him about a few moments ago?

[1445] Mr. Creighton: Yes, I asked him—

The Court: That was before the building of Barrett, is that right?

Mr. Creighton: Yes.

The Court: Of course, that went as soon as Barrett was built, is that right?

Mr. Creighton: Yes.

Q. Mr. Temple, following the opening of Barrett as shown on Exhibit BB, was the optional area formerly be-

tween Columbine and Park Hill still in existence? A. No, it wasn't.

Q. And, Mr. Temple, have you examined the School District records to determine approximately how many—

The Court: We grappled with that problem in the preliminary injunction, remember?

Mr. Creighton: Yes.

The Court: And we found some fault with the decision to build Barrett and to change these students from Park Hill to Barrett.

Mr. Creighton: Yes, these two exhibits, Your Honor, are specifically being offered in connection with the Barrett findings of last summer.

The Court: Right, okay.

Q. Mr. Temple, did you check the School District records to determine the approximate numbers of pupils going [1446] from the Option Area I on Exhibit BA, which was in the Columbine area that year, to Park Hill? A. Yes.

Q. About how many in 1959, the year before Barrett? A. I think t was about 200.

Q. And do you know whether they were going by bus? A. Yes, I believe they were being bused.

Q. Now, Mr. Temple, let me show you two exhibits put in evidence by the plaintiffs, being Exhibits 215 and 215-A.

The Court: Your point is that this was the necessity, the crowding of the situation produced this decision, is that right?

Mr. Creighton: Yes, Your Honor, we think the last two exhibits show that all the schools having a relationship to the Barrett site were overcrowded,

that the planning of Barrett achieved exactly what it was designed to do, namely, to equalize the capacity utilization of the related schools, and further to show that Stedman in the year after the change actually increased in its capacity utilization.

The Court: To a point where it was impossible to accommodate everybody at that school?

Mr. Creighton: Yes.

Q. Mr. Temple, I am showing you Exhibits 215 and 215-A, which taken together are capacity utilization tables at the junior high level from 1951 to '63. Have you examined those [1447] exhibits? A. Yes, I have.

Q. Now, Exhibits 215 and 215-A shows, does it not, a major addition at Smiley effective in 1952? A. Yes, according to that exhibit.

Q. I hand you Exhibit 24, Mr. Temple, a Plaintiffs' Exhibit, and directing your attention to page 53, I will ask you if that shows the date of construction and the date of additions to Smiley. A. Yes, it does.

Q. And what was the date of construction? A. 1928.

Q. And what was the next addition? A. 1950.

Q. Have you checked the room count figures and data of the School District in connection with Smiley? A. Yes, I have.

Q. Does it show an addition in 1950? A. Yes.

Q. Does it show an addition in 1952? A. No, it does not.

Q. Have you recomputed the capacity utilization percentage for Smiley for 1951, using the same capacity as 1952? A. Yes.

Q. And I hand you two exhibits marked for identification, [1448] Defendants' Exhibit 215-B and 215-C and ask you if you prepared those. A. Yes.

Q. And what have you done in preparing those two exhibits? A. I just changed the capacity of Smiley back to 1447, clear back to 1951, instead of 1952, as it was.

Q. And have you used copies of the plaintiffs' original exhibits for that purpose? A. Yes.

Q. And what is the corrected percentage capacity utilization for Smiley in 1951? A. I computed it to be 85 percent.

Mr. Creighton: Defendants' Exhibits 215-B and 215-C are offered.

Mr. Greiner: No objection.

The Court: They will be received.

(Whereupon, Defendants' Exhibits 215-B and 215-C were received in evidence.)

Q. Mr. Temple, I show you Exhibit marked Plaintiffs' Exhibit 210, received in evidence, which is the capacity utilization table for Manual-East during the period 1951 to 1961. Have you examined that exhibit? A. Yes, I have.

Q. Does Exhibit 210 show that certain years are missing [1449] for the computations? A. Yes, I believe there are three years that are missing.

Q. And what would those be? What years? A. 1955 and 1957 and 1959.

Q. Now, Plaintiffs' Exhibit 210 uses what figure for their memberships? A. They use the average daily membership.

Q. And that is computed at what time of the year? A. During the summer after the completion of the school year.

Q. Do you know what membership figure is used for staffing purposes at schools? A. It's my understanding

that it's the membership figure at the end of the fourth week of school, in the fall.

Q. Is that membership report regularly reported to budgetary services? A. Yes, it is.

Q. Is it available for all years shown on Exhibit 210? A. Yes, sir.

Q. Have you made a determination what the capacity utilization figures would be for the years covered by Exhibit 210 if the fourth week in September membership figures were used? A. Yes, I do.

[1450] Q. And does this change the capacity utilization figures from those shown on Exhibit 210? A. Yes.

Q. In general, what direction does the change occur? A. Well, for Manual—

Q. Just in general, Mr. Temple. Is it higher or lower? A. It's generally higher.

Q. And this is because you use the September figure rather than the average for the whole year? A. Yes.

Q. I hand you an exhibit marked for identification, Defendants' Exhibit 210-A, and ask you if you prepared that. A. Yes.

Q. What do you use for your base document? A. Plaintiffs' Exhibit 210.

Q. And have you added anything to that? A. Yes, sir, I have.

Q. What have you added, Mr. Temple? A. Well, I added the membership for all of the years using the fourth week of school membership, and I also computed it for the missing years, 1955, 1957, and 1959. And I computed a revised percent capacity utilization.

Mr. Creighton: The defendants offer Exhibit 210-A.

Mr. Greiner: No objection.

The Court: It will be received.

[1451] (Whereupon, Defendants' Exhibit 210-A was received in evidence.)

Q. Mr. Temple, you testified generally that capacity figures were increased. More specifically, can you tell the Court from Exhibit 210-A what the low figure is for Manual during that period? A. Using my new—

Q. Yes, using your data based on the fourth week in September figures. A. 1953 was 71 percent for Manual.

Q. And what does that percentage at Manual do for the next few years? A. It generally increases.

Q. Now, in the meantime at East in 1953, what was your recomputed capacity utilization? A. 101 percent.

Q. What does it do during the next three years? A. It increases also.

Q. Is there a sharp break in the capacity utilization of East at any time later in that decade? A. Yes, between 1959 and 1960 there is quite a break.

Q. Do you know what caused that? A. The opening of the three senior high schools in 1960.

Q. Mr. Temple, is teacher data available from the same [1452] source which you get pupil data for the various schools? A. Yes.

Q. Have you examined the files in budgetary services with resepct to teacher data at the various schools? A. Yes, I have.

Q. Have you determined pupil-teacher ratios first of all at secondary level and specifically Cole, Smiley and Morey during the decade of the 50's? A. Yes, I have.

Q. Taking Cole, Mr. Temple, what is the range of pupil-

teacher ratio during the period 1950 to 1959? A. From a high of 23 to a low of 21.

Q. Now, would you tell the Court what that number means? A. Well, it means the number of pupils and membership at that school not including special education pupils. That number is divided by the number of classroom teachers assigned to that building.

Q. Do you include such special ed. teachers? A. No, we did not. I did not.

Q. So the range at Cole is from 21 to 23 during the decade of the 50's, is that correct? A. Yes, that's correct.

Q. What was the range of pupil-teacher ratio at Smiley during that same ten-year period? A. From a low of 23.9 to a high of 26.2.

[1453] Q. Does that mean, Mr. Temple, that there are during the ten-year period you have mentioned—there are relatively more pupils per teacher at Smiley than at Cole? A. That's correct.

Q. And similarly, Mr. Temple, at the senior high level have you studied pupil-teacher ratios at Manual and East during the decade of the 50's? A. Yes, I have.

Q. And what is the range at Manual during that ten-year period? A. From a low of 22.3 to a high of 24.7.

Q. And similarly at East during that period what was the range? A. From a low of 24.5 to a high of 25.6.

The Court: May I have that again?

The Witness: From a low of 24.5 to a high of 25.6.

Q. Mr. Temple, let me show you Exhibit marked Plaintiffs' Exhibit 406 which has been received in evidence. This, Mr. Temple, is labeled Capacity Utilization, Negro Population, at Columbine, Harrington and Stedman from 1949 to 1954. Have you studied that exhibit? A. Yes, I have.

Q. Now, Mr. Temple, have you also looked at Plaintiffs' Exhibit 371, being the board minutes of a meeting on January 16, 1952, and particularly pages 12 and 13 thereof relating [1454] to the three schools just mentioned in that year? A. Yes.

Q. Now, Mr. Temple, turning back to Exhibit 406, is the capacity table for Stedman for the four years involved incomplete? A. Yes, it is.

Q. And what years are missing? A. 1949 and 1950.

Q. Now, were you present in court when Mr. Klite was testifying with respect to this exhibit? A. No, I wasn't.

Q. That was the first day of the trial, was it? A. Yes.

Q. Have you studied the sources of Dr. Klite's capacities and memberships with respect to Exhibit 406? A. Yes, I have.

[1455] Q. Do you understand that he used average daily membership for the first semester in all cases for his enrollment? A. Yes.

Q. Do you understand that he used the capacity statements in a 1952 bond planning study for the elementary schools for these years? A. Yes.

Q. Now, then, was there a change in capacity at Harrington effective in 1950? A. Yes, there was.

Q. Now, you will notice Exhibit 406 says that the capacity was 450 in 1950, the year of the edition, and Exhibit 406 also asserts that the capacity the previous year was 300. Do you see that? A. Yes.

Q. Now, have you studied the room count tabulations of Harrington for those three years, 1949 and '50? A. Yes.

Q. Using the standard applied in 1950, what would be the—what have you determined to be the capacity of Harrington in 1949? A. Well, Harrington had seven rooms

in 1949, and there was a kindergarten session, so I determined the capacity of Harrington to be 240 in 1949.

Q. And applying Dr. Klite's average daily membership [1456] figure, what do you get as a percentage of capacity utilization for Harrington in 1949? A. 146.

Q. And turning back to Stedman, where the figures are missing, have you determined the capacity utilization for Stedman for those two years, using Dr. Klite's average daily memberships and the capacity figures that you determined? A. Yes.

Q. And what have you determined to be the percentage capacity utilization for Stedman, first of all, in 1949? A. 168.

Q. 1950? A. 139.

Q. Now, turning back to Exhibit 371, being the Board minutes, Mr. Temple, do those Board minutes disclose what the enrollments were in January, 1952, immediately prior to the optional area changes made that year? A. Yes.

The Court: What page are you on?

Mr. Creighton: This would be, Your Honor—

The Witness: Page 13.

The Court: This is Exhibit 371?

Mr. Creighton: Yes, sir, and specifically page 13.

Q. Now, Mr. Temple, have you taken the capacities at Columbine, or, rather, the enrollments at Columbine, [1457] Harrington and Stedman at the time of this Board meeting? A. Yes, sir.

Q. And have you applied that to the same capacities that Dr. Klite used that year? A. Yes.

Q. And what do you get? Have you computed these capacity utilizations? A. Yes.

Q. For that point in time? A. Yes, sir.

Q. Let me hand you, Mr. Temple, an instrument marked for identification Defendants' Exhibit 406-A, and ask you if you prepared that in the light of your testimony a moment ago regarding capacities and utilization at the schools? A. Yes.

Q. What have you used for your base instrument in preparing those? A. Defendants' Exhibit 406—I mean Plaintiffs' Exhibit 406.

Q. And have you added certain changes and figures to that? A. Yes.

Mr. Creighton: Defendants offer Exhibit 406-A.

Mr. Greiner: No objection, Your Honor.

The Court: It will be received.

[1458] (Whereupon, Defendants' Exhibit 406-A was received in evidence.)

Q. Mr. Temple, would you point out to the Court then what the capacity utilization computations would be for these three schools at the time immediately prior to the Board action in January, 1952? First of all, as to Columbine, what was its utilization? A. 123.

Q. Had that increased since the previous fall? A. Yes, from 114.

Q. And, meantime, what had happened to Harrington and Stedman? A. Well, Harrington remained at 104 and Stedman at 95.

Q. All right, Mr. Temple, were you here in the courtroom the other day when Senator Brown was testifying regarding a school site out near the Hallett area? A. Yes, I was.

John E. Temple—for Defendants—Voir Dire

Q. Have you checked the School District site index records to determine where sites have been owned by the School District in the northeast part of Denver? A. Yes.

Q. I show you an instrument marked for identification Defendants' Exhibit HB, and ask you if that's a record you have taken from the School District files. A. Yes.

[1459] Q. And what is it, Mr. Temple? A. It is the school property sites in numerical index.

Q. As of what date? A. April 18, 1968.

Q. And does it show in numerical order all of the School District sites owned up to that time? A. Yes.

Q. Does it show even those that have been disposed of and sold prior to the date of the exhibit? A. Yes.

Mr. Creighton: Offer Exhibit HB.

Mr. Greiner: I don't believe we have seen this before, have we?

Mr. Creighton: I handed it to you the other day.

The Court: What's the purpose of this?

Mr. Greiner: May I briefly examine, Your Honor?

The Court: Let me ask Mr. Creighton, what's the object of this?

Mr. Creighton: I will be happy to explain, Your Honor. This exhibit will show there was indeed a site about six blocks from the airport and about 26 blocks from Colorado Boulevard, a little east of Hallett, which was purchased in 1948 and which was sold in 1952.

Voir Dire Examination by Mr. Greiner:

[1460] Q. Mr. Temple, what is the time period covered by Exhibit HB? A. I am not sure just what the total

time period is on this. I know that this particular one was issued April 18, 1968.

Q. Did you prepare this? A. No, it came from Mr. Geer's office in the Denver Public Schools.

Q. Do you know how often such tabulations are prepared? A. No, I don't know.

Q. And you don't know the time period that purports to be covered by the exhibit? A. Not specifically.

Mr. Greiner: Well, Your Honor, subject to that infirmity, we have no objection.

The Court: It will be received.

(Whereupon, Defendants' Exhibit HB was received in evidence.)

Direct Examination by Mr. Creighton (Cont'd):

Q. Mr. Temple, Exhibit HB does show all the numerically numbered sites, beginning with Site No. 1, does it not? A. Yes.

Q. Now—

The Court: I think you ought to put a mark on the [1461] site that you referred to.

Mr. Creighton: Yes, I will ask the witness to.

The Court: An "X" or cross. There is not point—I think when you are offering something for pinpoint purposes, it ought to be pinpointed.

Mr. Creighton: I am going to ask him to pinpoint it for the Court and for all of us.

Q. Turning to page 2 of Exhibit HB, Mr. Temple, do you have a copy before you? A. Yes.

Q. And specifically to Site 104. Where is that site said to be located on the exhibit? A. From Magnolia to Niagara, from 30th to 32nd Avenue.

Q. That's consecutively numbered immediately after the Barrett site, is that correct? A. That's correct.

Q. What was the Barrett site number? A. 103.

Q. Do you know when the Site 104 was purchased? A. It was purchased July 30, 1948.

Q. Now, does Exhibit HB show that it was sold? A. Yes, it was sold October 21, 1952.

Q. And the exhibit itself says what in that connection? A. It shows that it was—

Q. Does it give the full date of the sale? [1462] A. No, it just says "Sold in 1952."

Q. And your investigation shows it was sold on a specific date that year? A. Yes.

Q. Mr. Temple, I am putting before you a copy of Exhibit 402, which is a plaintiffs' exhibit, being a map in October, 1951. Can you describe so that the Court can follow it on the original copy of this exhibit where Site 104 is? A. Site 104 is approximately seven blocks to the east and I think two blocks north of the Hallett site.

Q. And where is it with respect to the airport? A. That would be about—I think it is about—looks on this map like it would be about six blocks west of the boundary of the airport.

Q. And what street again was that on, Site 104? A. From Magnolia to Niagara—

Q. That would be about how many blocks from Colorado following the alphabetical rotation? A. Probably be around 26, wouldn't it? Something like that.

Mr. Creighton: All right.

The Court: That's close enough.

Mr. Creighton: You may examine.

Cross-Examination by Mr. Greiner:

[1464] • • •

Q. Now, is it fair to say, Mr. Temple, that the original Plaintiffs' Exhibit 210 showed that throughout this period, at least up until 1958 that Manual was underutilized while East was either at or over capacity; is that correct? A. Yes.

Q. That picture is exactly the same as depicted on your exhibit, is it not, on 201-A? A. Yes.

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[1472] • • •

Q. Now, turning your attention back to Exhibit 215-C, I take it then that the only change that you made in plaintiffs' exhibit was this adjustment to the Smiley capacity back in 1951, is that correct? A. That's correct.

Q. Would you agree that between the years 1952 and through say 1958—Let's take it up until 1956 as depicted on Exhibit 215-C—that Cole throughout that period was underutilized; is that correct? A. That's correct.

Q. And Smiley throughout that period was either close to or over capacity? A. Yes.

Q. Is that right? A. That's correct.

Q. And Morey was also underutilized during that time period? A. That's correct.

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[1485] • • •

Mrs. Jean McLaughlin, called as a witness by the defendants, being first duly sworn, on her oath testified as follows:

The Court: Will you please take the witness chair? State your name and address, please.

The Witness: I am Mrs. Jean McLaughlin. I live at 634 South Galena.

Direct Examination by Mr. Creighton:

Q. Mrs. McLaughlin, are you presently employed by School District No. 1, the City and County of Denver? A. Yes, I am.

Q. And when were you first employed by the School District? A. In 1945.

* * * * *

[1487] * * *

Q. Then, after Eagleton, what was your next principalship? A. I went to Stedman Elementary School.

Q. What was the date of that change? A. I went to Stedman in February of 1958.

Q. Would that be the commencement of the second semester of that year? A. It was right after the beginning of the second semester.

Q. And then what was your next principalship? A. My next principalship was at Philips School in 1963.

Q. Commencing that fall? A. Yes, sir.

Q. And after that assignment, Mrs. McLaughlin? A. I went to Cory School in 1967.

Q. Is that where you are now? A. Yes, sir.

[1488] Q. Did you grow up in Denver? A. Yes, I did.

Q. Did you go to the Denver Public Schools? A. Yes, I did.

Q. Where did you do your college work? A. I went to the University of Denver.

Q. Mrs. McLaughlin, where were you residing during

the forties and fifties? A. In 1948 we bought a home at 2945 Albion.

Q. And how long did you live there? A. We lived there thirteen years.

Q. Until when? A. Until 1960.

Q. And then where did you move? A. To 6015 Montview Boulevard.

Q. And you lived there until when? A. Until 1968.

Q. And then did you move to your present address? A. Yes.

Q. Mrs. McLaughlin, your Albion Street address, where you lived until 1960, is that near Colorado Boulevard? A. Yes, sir, it was a block.

Q. How far? A. One block.

Q. Do you recall the widening of Colorado Boulevard in [1489] the late 1950's? A. Yes, sir.

Q. Were you in a position to observe the traffic on the street after the widening? A. Yes, sir.

Q. How would you characterize the traffic on Colorado Boulevard after it was widened?

Mr. Greiner: Your Honor, I don't believe the witness has been qualified as a traffic engineer.

The Court: No.

Mr. Greiner: I believe she is now being asked to give an opinion for which there is no foundation laid.

The Court: I don't think she needs to be an expert to express herself. It will save us time.

A. It was a dangerous situation.

Q. Was the traffic heavy? A. Yes, it was.

Q. You were principal at Stedman at that point in time? A. Yes.

Q. Were there shopping facilities on Colorado Boulevard opposite your address in the 2900 block? A. Yes.

Q. On both sides of the street? A. Yes, sir.

[1490] Q. Did you patronize those shops and stores? A. Well—

Q. Did you? A. Yes.

Q. Did the opening of the widened Colorado Boulevard have any effect on your ability to use those shopping facilities? A. Yes.

Q. What was that? A. Well, it was difficult to get across the street.

Q. To which side? A. To the west.

Q. And you resided on the east side? A. That's right.

The Court: Probably equally difficult to get by on the other side?

The Witness: That's right.

Q. Did you have trouble getting back? A. Yes.

Q. Was anything done about it? A. Yes, they installed some lights.

Q. And where was that? A. In the 2900 block.

Q. Can you give us any time that that was done? A. No.

[1491] Q. Later, after the widening? A. After the widening, yes.

Q. Now, as an elementary principal at that time, Mrs. McLaughlin, would you have an opinion as to the hazard of that street for elementary pupils?

The Court: She has already testified, hasn't she, that it was dangerous? She gave that right off the bat.

Mr. Creighton: Well, that was, Your Honor, as

to herself and adults. I am trying to focus in on elementary kids now.

The Court: Well, a fortiori—

Q. All right, Mrs. McLaughlin, what year again did you move from the 2945 Albion Street address? A. 1960.

Q. Were you familiar with the neighborhood, specifically the block in which you lived at that time, in 1960? A. Yes.

The Court: Was that at 30th and Albion?

The Witness: 29th and Albion.

Q. Do you recall anything about the racial makeup of those residing in your block, in the 2900 block of Albion Street, in 1960? A. Yes, our neighborhood was changing.

Q. And specifically in 1960, could you estimate the—well, first of all, were there Negro families living in your block? [1492] A. Yes.

Q. Could you estimate the proportion of Negro families living in your block? A. There were more Negro families in our block than white families in 1960.

Q. Now, could you say anything about the racial proportions in blocks in, say, the block immediately east of you? A. Well, there were more Negro families in our block and on Ash than farther east at that particular time.

Q. Now, that particular year, 1960-61 school year, Mrs. McLaughlin, you were principal of Stedman that entire year? A. Yes.

Q. Even though you moved during 1960, is that right? A. Yes, that's right.

Q. Were there Negro children in Stedman School in 1960-61? A. Yes.

Q. Do you know what part of your school subdistrict

they lived in? A. Well, they lived in the area where I was residing.

Q. And was that on the extreme west side? A. That would be on the west side of Stedman.

[1493] Q. That year, 1960-61, were Negro pupils coming from other parts of your Stedman subdistrict? A. No, not a lot of Negro children, no.

Q. Could you tell us where the bulk of the Negro students at Stedman that year were coming from within your subdistrict? A. In 1960 we had children coming from the Hallett area.

Q. No. Now, I'm just—I'm asking you about the Negro children in your school in 1961, and what part of your subdistrict they were coming from. A. I would say they were coming in from the west side.

Q. Now, Mrs. McLaughlin, moving ahead to the school year 1962-63, do you recall whether your school, Stedman, was crowded that year? A. In 1962-63? Yes, we were crowded.

Q. Were any students being bussed into your school? A. Yes.

Q. Where were they coming from? A. From the Hallett district.

Q. How did that come about? A. There had been an arrangement with a previous principal at Hallett and Stedman and the Administration Building, that children from the Hallett area should be bussed [1494] to Stedman because there were children on the waiting list in the Hallett area.

Q. For what? A. Kindergarten.

Q. And that was made prior to your arriving there in February of 1958? A. That's right.

Q. About how many children in 1961 school year were coming in from the Hallett area to Stedman? A. A busload of children.

Q. How many would that be? A. Approximately 70 youngsters.

Q. And this had gone on for how long? A. Well, for a good many years, because we had children from kindergarten through the sixth grade when I was at Stedman that were coming from the Hallett area.

Q. Now, later in that school year, in 1961—

The Court: Are you maintaining these were white students who were being bussed into Stedman from Hallett?

Q. Can you tell us about the racial characteristics of the busload of kids coming in from Hallett? A. The majority of these children were white youngsters.

The Court: I thought that was what you were trying to put over.

Q. Now, later that year, in 1961-62 school year, [1495] Mrs. McLaughlin, were there discussions regarding boundary changes? A. Yes.

Q. At the elementary levels? A. Yes.

Q. Were there any meetings in that regard? A. Yes.

Q. What meetings were there? A Well, in the early part of 1962 I was called to a meeting.

Q. Where was that? A. In the administration building.

Q. Anyone else called there? A. Yes.

Q. Who? A. Yes, there were other principals called at that time and we were told they were contemplating some proposed— these were proposed boundary changes.

Q. About how many principals do you recall were at that meeting? A. About thirty.

Q. And where was it held again? A. The Administration Building.

Q. Where in particular? A. In the board room.

[1496] Q. And were you told anything about these proposals at that time at that meeting? A. Well, we were given some materials and they said that these were proposed boundary changes.

Q. What were you supposed to do about it? A. Look at them, study them, and if we had any information that would be pertinent to changes, we were to communicate with the administration.

Q. Were you asked at that time for any racial data to your school? A. No.

Q. Now, did you comment on these changes? A. I did not.

Q. Were you told what the purpose of the changes were? A. To relieve overcrowded conditions.

Q. Did you believe the changes under discussion—well, first of all, were there any changes at that time under discussion for Stedman School at that meeting? A. Yes.

Q. Did you believe those changes were necessary in light of your numbers of pupils? A. Not at that particular time, no.

Q. Do boundary changes, Mrs. McLaughlin, have any effect on the kids involved? [1497] A. Oh, yes. They're very disruptive.

Q. Were you aware of the enrollment situations in the schools adjoining you and in particular, first of all, Hallett? A. Yes.

Q. Were you in touch with the principal there? A. Yes.

Q. Did you have frequent conversations with these principals in your area? A. Yes.

Q. At the time of these early 1962 boundary proposals and discussions, did you have any information on the relative crowded conditions of, say, Hallett? A. Well, I knew from talking to the principal at Hallett that they were crowded.

Q. How about the Park Hill School? A. Yes, sir. We were aware of the overcrowded condition in that particular area.

Q. And does this apply to Smith School? A. Yes.

Q. Now, later that year, Mrs. McLaughlin, were the boundary changes under discussion early in the year made with respect to Stedman School, later that year, in 1962? A. Were they made?

Q. Yes. [1498] A. No, they were not.

Q. Did you believe they should have been made? A. No, I did not.

Q. Now, let's see, Mrs. McLaughlin—you went to Philips in the fall of 1963, did you not? A. Yes.

Q. And when you got to Philips in the fall of 1963, how was the enrollment situation there with respect to your facilities? A. We were not overcrowded. We were at capacity but we were not overcrowded.

Q. And Mrs. McLaughlin, were there some boundary changes affecting Philips the following year, 1964? A. Yes.

Q. Now, Mrs. McLaughlin, in front of you is the defendants' Exhibit BF which shows the elementary boundary lines effective in the fall of 1964 and also shows with arrows and lines the changes made that year. Now, also I want to show you in that connection Plaintiffs' Exhibit 71.

First showing you Plaintiffs' Exhibit 71, Mrs. McLaughlin —have you seen that before? A. Yes.

Q. Have you seen this particular exhibit? A. Yes.

Q. This was introduced in evidence last summer, Mrs. [1499] McLaughlin, in connection with this case. Do the changes shown there on 71 reflect what happened that fall at your school, Philips? A. Yes.

Q. Now—please take a look at Defendants' Exhibit BF. Does that show the same changes that year? A. Yes.

Q. Now first calling your attention to the change in the southeast corner of your district—that represented a change to what school? A. That's Ashley School.

Q. Was a part of the Philips subdistrict changed to Ashley? A. Yes, that's right.

Q. Are you familiar with that part that was put in the Ashley district? A. Yes.

Q. Can you describe to the Court what the north half of that district consists of? A. That's Temple Buell College.

Q. Are there any elementary children coming out of that district? A. No.

Q. Do elementary children come out of the south half of that Ashley change? [1500] A. That's right.

Q. And are you familiar with the geography and the area there involved? A. (Nods affirmatively.)

Q. Can you tell us the comparative distances between the middle of the south half of the area changed to Ashley and the distance to Philips itself? A. It was about the same.

Q. The same distance? A. Yes.

Q. Now, Mrs. McLaughlin, take a look at the area that was moved into your district from Hallett. Do you see that on Exhibit BA? Is that in the southeast corner of the Hallett district? A. Yes, that's right.

Q. How does the distance from the center of that Hallett change compare as between its distance to Hallett School and the distance to your school and Philips? A. It was the same.

Q. Was that distance such that the children from that area were entitled to a bus ride? A. Yes, sir.

Q. Do you know whether they were being bussed the previous year, 1963 ('64) to Hallett School? A. Yes, sir.

Q. After the change were they bussed to your school? [1501] A. Yes, sir.

Q. How many busses? A. One.

Q. Do you know what its capacity was? A. 72 passengers.

Q. Now, was that bus filled, the bus that came in from the former Hallett area to your school in 1964? A. There were approximately 70 children.

Q. Now, Mrs. McLaughlin, have you studied enrollment cards at Philips School made at the time you were there as to the children coming out of the former Hallett area? A. Yes, sir.

Q. What kinds of study did you make? A. Well, I went over the registration cards for that school year.

Q. And that was what year again? A. That is in 1964-65.

Q. And did you find the cards the children who came from the former Hallett area? A. Yes, sir.

Q. And you know those children well enough to know by their name what their race would be? A. Yes.

Q. Did you make a determination of the race of the children who came out of the former Hallett area? [1502] A. Yes, sir.

Q. Do you know how many of them were Negro? A. Approximately 50.

Q. Out of how many? A. 70.

The Court: I believe this will be a convenient time to take our afternoon recess.

Mr. Creighton: Very well, Your Honor.

(Whereupon, the trial recessed at 3:13 p.m.)

[1503] (After a recess, the court reconvened at 3:35 o'clock p.m.)

The Court: I expect we are ready to continue.

Mr. Creighton: I believe we are, Your Honor. Mrs. McLaughlin, will you come forward?

By Mr. Creighton:

Q. Mrs. McLaughlin, we found during the recess Plaintiffs' Exhibit 76. Showing you this exhibit, Mrs. McLaughlin, this exhibit was admitted into evidence last summer in the preliminary hearing.

The Court: Isn't it any good, Mr. Creighton?

Mr. Creighton: We are going to discuss that, Your Honor.

The Court: All right.

Q. (Continued) This was prepared, Mrs. McLaughlin, by a mathematician and it is the map of your Philips subdistrict showing the changes in 1964, and the mathematician declared that the area shown as being detached from Hallett and put into your district contained 20 percent Negro pupils. Now, is that a correct estimate of the percentage of Negro pupils coming from the Hallett area in 1964?

Mr. Greiner: Your Honor, I object. I believe that mischaracterizes Dr. Bardwell's testimony at

the summer hearing. It was that the population of that area was 20 percent Negro, not the student population.

Mr. Creighton: I have to differ, Your Honor. The record itself at page 215 of last summer's transcript has [1504] this exchange:

Question to Dr. Bardwell: "All right, then, taking your example, the Hallett-Philips area, you figure that 20 percent of those moved were Negro?"

Answer: "That's right, sir."

The Court: Well, you can ask her whether 20 percent were moved. Wouldn't that suffice?

Q. Mrs. McLaughlin, based on your study of the pupil records and what you have previously testified concerning the racial identity of the children coming from the Hallett area in 1964, what percentage did you find of those moved were Negro? A. Approximately 70 percent.

Q. Now, Mrs. McLaughlin, that same year, 1964, did your school, Philips, experience an increase in membership? A. Yes, sir.

Q. Was it a large increase? A. Yes, sir.

Q. Were you crowded that fall? A. Yes.

Q. At the beginning of that year, how many pupils did you have in some of your classes? A. Over forty.

Q. Did you have adequate staffing at that point? A. Yes, because we had two teachers assigned to these [1505] rooms that were so overcrowded.

Q. Was anything done later in the school year to deal with this increase in membership? A. Four mobile units were constructed.

Q. When did they get in operation at your school? A. The latter part of November.

Q. Did this permit you to reduce the class size within the building? A. Yes.

Q. What age level did you put in the mobile units? A. Second and third grade children.

Q. Now, what was your planning behind that? A. Well, I felt that it was better to have the kindergarten and the first graders in the main building and the second and third grade youngsters out in the mobile unit. Younger children were in the building, the very youngest.

Q. All right, in addition to relieving the large classroom size in the biulding, did the use of the mobile units have other effects within your building? A. Well, it was a very practical situation because it relieved the hall situation, the lavatory situation, because our mobile units had drinking facilities, lavatory facilities. It was a much better situation.

Q. Now, as a principal in a school where there are and were mobile units used, Mrs. McLaughlin, have you [1506] observed the teaching situation within the mobile units as compared with the brick and mortar classroom? A.Yes.

Q. How would you compare the teaching situation in a mobile unit classroom? A. Well, it is the same, because they are very adequate. As I mentioned they have their own lighting system. They are connected—the fire alarm is connected to the main building. It is just another room.

Q. Now, Mrs. McLaughlin, in connection with this crowding situation, does crowding in elementary schools occur uniformly throughout the K-6 grades when it occurs? A. No.

Q. Specifically, in connection with back at Stedman in 1961-62, you mentioned crowding. Where was your crowding that year? A. In the primary grades, in the first and second grades.

Q. How did you deal with crowding that year at Stedman? A. I went on double session.

Q. For all classes? A. Only for the first and second grades, because that's where our enrollment was the heaviest.

Q. Mrs. McLaughlin, as elementary principal this year, [1507] were you asked to make an estimate of the ethnic proportions within your elementary school this year? A. This year?

Q. Yes. A. Yes, sir.

Q. You have been doing that as principal for a number of years? A. Yes.

Q. Have you always done this as a principal? A. As a principal?

Q. Yes, in recent years. A. In recent years, yes.

[1508] Q. Did this request for ethnic information begin back in the sixties? A. Yes.

Q. Do you recall when you first got a request for ethnic information as a principal? A. It was in 1962.

Q. And how did you handle that request? A. Well, I asked my secretary to go into each one of the classrooms and to make a count.

Q. An announced visit or— A. No, I didn't want any fanfare. I did not want the teachers involved.

Q. Why didn't you want the teachers involved? A. Because I think that teachers should not think of children in terms of their racial background.

Q. Now had this ethnic estimate requested—had this existed prior to your teaching career? A. Well, when I first started teaching school in our class register, we were asked for this information.

Q. And you entered it in the class register as a teacher at that time? A. Yes, sir.

Mrs. Jean McLaughlin—for Defendants—Cross

Q. Now, Mrs. McLaughlin, you have been a principal at Stedman and Philips and Cory. And, as a principal of a school, do you determine your needs as to materials and [1509] supplies at your school? A. I don't. I work with my teachers in determining our needs and supplies.

Q. Are there limitations on how much you can get in the way of materials and supplies? A. It's figured on a membership.

Q. How is that figured, Mrs. McLaughlin? A. You are given so much money for each child in your building.

Q. Is that based entirely on—is the amount based entirely on the number of children? A. Yes, sir.

Q. Is it the same for all elementary schools? A. Yes.

Q. And then given that amount, Mrs. McLaughlin, how do you determine which materials and supplies you get with that budget amount? A. Well, you confer with your teachers, your staff.

Q. And then where do you request your materials and supplies? A. To the Administration Building.

Q. Have you ever experienced as a principal, Mrs. McLaughlin, any difficulty in getting materials and supplies you requested at the schools where you were principal? A. No, sir.

[1530] • • •

Cross-Examination by Mr. Brega:

Q. Mrs. McLaughlin, you went to Stedman in 1958? A. Yes, sir.

Q. You stayed until 1963? A. Yes, until spring of 1963.

Q. All right, during that period of time you were principal at Stedman? A. Yes, sir.

Q. All right. During that period of time were there any boundary changes at Stedman? You will have to answer. A. Wait. Oh, no, I am sorry. I shook my head.

Q. And also I presume that during that period of time [1531] the boundary of Stedman was well publicized so that the people in the area knew where it? A. Yes.

Q. Could you tell us now when you first went to Stedman, I presume it was predominantly Anglo or white? A. Yes, sir.

Q. At the time you left in 1963, had it changed predominantly to black? A. Yes, sir.

Q. Will you tell the Court how rapid that transition was? That may be awfully difficult to do, but I mean instead of slow, was it— A. No, it was a fast movement.

Q. All right. At the time in 1960 that Barrett was built, I presume that in 1960 Stedman was still predominantly white? A. Yes.

Q. All right. Had the boundaries been put across to, let's say, Ash, the second street over on the east of Colorado Boulevard, what predominantly would that have taken in as far as black or white students? A. It would have taken in the Negro children.

Q. In other words, the Stedman area which was still predominantly white would have had less black in it, had the boundary been across? [1532] A. Yes, sir.

Q. And I presume likewise the black students then would have gone to Barrett? A. Yes, sir.

Q. At the time the 1962 proposal was delivered or mentioned or discussed, were the principals and teachers allowed to comment to the superintendent about the proposals involved? A. Yes, sir.

Q. They were allowed to express their opinions on the needs of the school and the capacity? A. Yes.

Q. The utilization? A. Yes.

Q. During this discussion, were there any discussions about race or ethnic background of any of the students involved? A. No, sir.

Q. In other words, what you were talking about is pupils and how best to handle the number in the school? A. That's right, overcrowded conditions.

Q. Now, during the period of time that you taught in Stedman when it was changing from predominantly white to black, was there an influx of black students from out of the city or out of the state? [1533] A. Yes.

Q. How do you know that? A. Well, from the registration cards and the information on the registration cards.

Q. Well, did these black students present any unique problems to the teaching of students at Stedman? A. Many of these youngsters were lacking in opportunities and experiences, yes.

Q. They had come from out of state? A. Yes, sir.

Q. And in other words, the education that they had received prior to coming was not on the same level that we have here? A. Yes.

Q. Is that a fair statement? A. I think that's a fair statement to make.

Q. And did you have then to try to bring these children up to the norm of the children in the school that they were in, in Stedman? A. We tried, yes.

Q. Did you recommend—excuse me. A. That's a teacher's challenge.

Q. Did you recommend as you went along during this period of time and as you went from Stedman to Philips any special teaching programs for children? [1534] A. My advisory committee recommended a reading improvement center, a mobile unit, when I was at Philips School.

Q. What was the purpose of that recommendation? A. To help children with reading difficulties.

Q. Now, at the time that you were at Stedman, I believe that there were some mobile units placed at that school? A. No, not when I was at Stedman.

Q. At Philips? A. At Philips.

Q. All right. Did you have any discussion with the parents on the mobile units that were placed there? A. Yes, they wanted the mobile units.

Q. Did you show the teachers or the students the mobile units along with their parents? A. Oh, yes.

Q. How did you do that? A. Well, we had our back-to-school nights when we opened our mobile units, for our parents, but we watched—the faculty and I watched the mobile units being built and put together right there on the school ground, but our parents were anxious to have these mobile units because they knew that it was going to relieve an overcrowded condition.

Q. And they saw these on the parent-teachers night or [1535] something? A. Yes, at back-to-school night in November.

Q. What was it? Four units that you had? A. Four units.

Q. Did you find any obstruction to giving the same type of teaching equality in a mobile unit that you saw in the classroom or the regular building? A. No.

Q. In your opinion, is there any difference between the quality of education that one can obtain in a mobile unit? A. No.

Q. Were these mobile units air conditioned and self-sufficient? A. Yes, sir.

Mr. Brega: No further questions.

The Court: Mr. Creighton?

Dr. Harold A. Stetzler—for Defendants—Direct

Redirect Examination by Mr. Creighton:

Q. Mrs. McLaughlin, at that meeting down in the board room in early 1962, were principals there from all over town? A. Yes, sir.

Q. Not just from the Park Hill district? A. Oh, no.

[1536] Q. And do you remember at all how many boundary changes were under discussion at that time over the city? A. Well, there were approximately thirty of us down there, so it must have been at least thirty.

Q. Now, Mrs. McLaughlin, you were asked something about the racial movement in Park Hill. In 1960 and '61, at that time, did you feel you could predict ahead as to the size of the movement? A. No, sir.

Q. Could you at that time predict the geographic extent of the movement? A. No, sir.

Q. And again, regarding that movement, could you at that time have foreseen how fast it would take place? A. No.

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DR. HAROLD A. STETZLER, called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

The Court: Please take the witness stand. Please [1537] give us your name and address.

The Witness: I am Harold A. Stetzler. I live at 1436 South Yates.

Direct Examination by Mr. Jackson:

Q. Dr. Stetzler, would you review for us briefly, please, your educational background. A. My teaching experience?

Dr. Harold A. Stetzler—for Defendants—Direct

Q. No, your own educational background. A. Oh, I went to Denver Public Schools, graduated from West High School, attended Denver University to the Bachelor's and Master's degrees, and I have a Doctor of Education degree from Indiana University.

Q. And are you at present employed by School District No. 1? A. Yes.

Q. And what is your present position? A. I am director of elementary school personnel.

Q. And would you explain to the Court briefly what your duties are in that position? A. My duties have changed somewhat over the years. I first became—came into the position in 1964. At that time, the primary duty was the recruitment, assignment, transfer of teachers, concern with their grievances. I also had the duty of recommending pupil assignments. I did deal [1538] with parents in terms of complaints. I also made recommendations concerning transportation of the elementary schools.

Q. Now, you have been in this position, you say, since 1964? A. Since January of 1964.

The Court: Are you able to hear the doctor?

Mr. Greiner: It is a little marginal, Your Honor.

The Court: I think it would be helpful if we moved that lecturn behind counsel's table. There would be no problem of blocking anybody out and there would be some assurance that the witness would speak up at least loudly enough so that his voice carries to that place.

(Counsel moved lecturn.)

The Court: Is that any better, do you think? We will try it out, anyway.

Mr. Jackson: As long as I don't need glasses, Your Honor, I think we will get along all right.

Q. Dr. Stetzler, at the time you took over your job in 1964, did you receive any special instructions regarding your responsibilities and duties at that time? A. Yes, I received a number of instructions relating to the duties. The most pertinent one here would be related to the assignment and employment of minority teachers. At this time the Assistant Superintendent for Personnel requested that we reduce within existing policies as much as we could [1539] any concentrations of minority teachers.

The Court: What year was this?

The Witness: In 1964, and that we assign minority teachers throughout the district to a great extent.

Q. Now, at that time you were concerned primarily with elementary school personnel? A. Only elementary school personnel.

Q. Do you know whether or not the policy was the same for the secondary schools as you have just described it? A. Yes, it was.

Q. Now, do you know, Dr. Stetzler, whether or not the same general recommendations were made by what has been referred to here as the Voorhees Committee, which reported in 1964 regarding the concentration and transfer of minority teachers? A. I recall that it touched this subject in the same vein.

Q. And you took over your responsibilities in January? A. Right.

Q. I will hand you that Voorhees report, which is Exhibit 20. Does that bear a date on the front of it? A. This is March 1, 1964.

Q. Some three months after you assumed your job? A. Yes. Actually, I had gone to the position for orientation in late November, so I did have some opportunity [1540] to observe the operation of the position during the month of December.

Q. Now, Dr. Stetzler, you had some responsibility, I believe you indicated for hiring new teachers? A. Yes.

Q. And what generally is the method of hiring new teachers? A. Either through interviews, application interview in our office or the applicant arranges for an interview after they have submitted an application and completed it through references and transcripts, or through our visiting colleges arranging through placement officers to interview interested applicants.

Q. And did you perform any of the interviewing functions when you took over this job in 1964? A. Yes.

Q. And what generally did you do in the interviewing field? A. Interviewed teachers primarily for the elementary schools. However, at other colleges I would interview for elementary and secondary both.

Q. Did this involve any traveling? A. Yes.

Q. And generally what area did you visit? A. My out-of-state area was Minnesota, Wisconsin, [1541] Michigan, Indiana, Ohio, Illinois.

Q. Did you also interview within the State of Colorado? A. And then we visited the colleges in Colorado, Boulder, Greeley, Fort Collins, of course, Denver University, Loretto Heights, Temple Buell.

Q. During this period of 1964 to the present, how many interviewers have there been generally at one time that

have been performing this one function? A. This has ranged from probably four or five up to over twenty.

Q. Now, does the interviewer, as he is talking with the teachers, have any authority to enter into contracts ?A. Recently, yes, in the last two or three years. Prior—

Q. Are these then subject to any further action by the administration? A. These are just subject to school board approval.

Q. They all must be approved by the board itself? A. Yes.

[1542] Q. Now, during this same period, Dr. Stetzler, has there been any change in emphasis on the recruiting of teachers? A. We made continually greater efforts to recruit a larger number of minority teachers. In fact, this has probably been the greatest change in our efforts in recruiting during the period of time I've been in the position.

Q. In addition to the emphasis on minority teachers, have there been any other changes in terms of the qualifications or types of individuals that you are seeking as teachers? A. Increasingly, we discuss with our applicants our diversification. We have 92 elementary units to which we assign teachers. A number of those units are in neighborhoods where we would have numbers of minority students. And we have increasingly tried to find out at the interview the qualifications of these people to deal with minority students; their empathy for education of these youngsters; their general feeling about teaching in this kind of neighborhood.

Q. Has there been a corresponding change in emphasis in the curriculums offered by the various colleges in this area? A. The colleges have made efforts to educate teachers for this position. There hasn't been a tremendous

number of teachers available through these programs. It is increasing.

[1543] Q. Has there been a corresponding change in emphasis regarding teachers with advanced degrees or previous teaching experience? A. No, we have not set any recruiting quotas for teachers either with experience or with Master's degrees.

The Court: When you say minority teachers that you are recruiting, I guess you mean Spanish as well as Negro?

The Witness: And oriental.

The Court: Do you have any difficulty finding Spanish origin teachers?

The Witness: This is the most difficult of our jobs.

The Court: Are you able to hire very many of them?

The Witness: No, again, this number is increasing as we learn some things to do to find them.

By Mr. Jackson:

Q. Dr. Stetzler, I hand you Defendants' Exhibit DA, which has already been admitted into evidence and ask you if you can explain to the Court what that shows regarding the percentage of teachers employed from the years 1962 through 1968 that had prior teaching experience? A. This ranges from a low of about 37 or 38 percent to a high of approximately 50 percent. The average probably is, I would guess, 40 some percent; a little over 40 percent.

Q. So then, from the period 1962 until 1968, approximately [1544] 40 percent of all teachers hired by the district had prior experience? A. Yes.

Q. Now, directing your attention to Defendants' Exhibit DB, which has already been admitted into evidence, would you tell the Court, please, what that shows with regard to the percentage of new teachers with three or more years' teaching experience? A. This ranges from a low of about 18 percent to a high of approximately 24 percent.

Q. And again— A. An average would be about 20—21 percent.

Q. And what is the time period, again, covered by this exhibit? A. 1962 to 1968.

Q. So approximately 19 percent then of all the new teachers have at least three or more years' teaching experience? A. Yes.

Q. Now, handing you, Dr. Stetzler, Defendants' Exhibit DC, can you tell the Court what that shows with regard to the new teachers with advanced degrees? A. It shows that we employed teachers wtih Master's degrees from 1962 through 1968, a range of approximately four percent to ten percent. The last few years show [1545] an average of about nine percent or better.

Q. So, although there has been no specific emphasis on obtaining teachers with prior experience, the record indicates that a great percentage of teachers do have prior experience? A. Yes.

Q. Now, Dr. Stetzler, in connection with your duties regarding the assignment of these new teachers, when do you do the bulk of the assignments for the new teachers? What point in the year? A. Well, of course, our greatest number of vacancies occur for September, so we begin to make assignments in late June, early July. The largest number would be made, I would say, within the two or three-week period of late June until mid-July.

Q. Now, at the time that you make these assignments, what do you have before you in the way of information regarding the teachers who are available for an assignment? A. We use primarily a summary on the interview card. Of course, we do have the other references and transcripts available to us. We rely on the summary from the interviewer and the indications he has made on the interview card. Of course, we have the list of vacancies.

Q. Now, does this information on the interview card always show the race of the individual? [1546] A. Recently, almost always. Up until very recently, almost never.

Q. So there was a period of time during your tenure when you had no racial information on all teachers? A. That's right.

Q. How do you determine or how is it determined, Dr. Stetzler, the number of vacancies that you have to fill within the school system? A. This is a result of resignations, leaves of absence, and the transfer process would also enter into this where the vacancies would finally occur.

Q. Dr. Stetzler, I hand you what's been marked for identification as Defendants' Exhibit HH and ask you if you can identify it? A. This is a report put out by the Department of Personnel Services concerning resignations as—and there shows the number of years' experience the person has had and the reason for the resignation and also shows, by sex, men and women.

Q. What period of years is reflected in Exhibit HH? A. This is September, 1960, through October, 1969.

Mr. Jackson: At this time we offer Defendants' Exhibit HH.

Mr. Greiner: No objection.

The Court: It will be received.

[1547] (Whereupon, Defendants' Exhibit HH was received in evidence.)

Q. Is this within that exhibit, Dr. Stetzler, the total each year of the resignations throughout the district? A. Yes.

Q. Would you thumb through this and indicate to the Court, please, what that total is for the various years. A. In 1962 the total would be just over—510.

In 1963, it's 445.

In 1964, it's 445.

In 1965, it's—

Mr. Brega: Doctor, I believe there is a total in the top right-hand corner.

The Witness: I'm looking in the wrong place. Here we go.

—418. They changed the place of the totals over the years.

In 1966, 420.

In 1967, 523.

And in 1968, 595—'69. There is no 1967 figure here.

Q. How are those reports received by the central administrative officer, Dr. Stetzler, regarding vacancies? A. Through a resignation card. You mean—

Q. Are they sent in by the principals—the vacancies [1548] in the schools? A. The individual teacher—Well, the individual teachers, of course, must send in resignation cards, requests for leave of absence or whatever. We do in the elementary schools get from each principal in about February of each year—we call it a request for faculty—

and it does show their needs for the following year and has the teacher listed and any changes that they contemplate.

Q. Now, after you have determined what the number of vacancies you have to be filled in any one given year are, do you have certain priorities on the assignment of teachers to those vacancies? A. Well, the first thing that happens to the vacancies of course, is that we must—

Q. I'm speaking now, Doctor, only of those assignments where you are assigning a new teacher to a vacancy. A. When the vacancy list is final in September, yes, I always assign the minority teachers and the men teachers before I make any other assignments.

Q. Why is that? A. They're both priority items. We employ very few men teachers or fewer than we would like to for the elementary schools, and we have employed fewer minority teachers than we wished to in the past, so we must make these assignments with extreme care.

[1549] Q. Where, for example, would you assign a man teacher? A. Probably where there were no men teachers or where a man teacher might have been lost through resignation or transfer.

Q. Where, for example, might you assign a minority teacher? A. In the same fashion; where there probably had been no minority teachers or where a minority teacher has—Well, this would be different. We would not assign minority teachers in those schools that had some concentrations of minority teachers. So, we would look for schools that have not had a minority teacher or may have had one or two and that has decreased.

Q. Are there any other priorities on the assignment of these new teachers? A. We would then begin to look for those teachers who could probably function best in schools

with minority youngsters, what may be described as disadvantaged neighborhoods, culturally deprived. There are a number of terms for it. And determine on a tentative basis which of our new teachers might do a fine job in those neighborhoods. Our next step there is to invite the principals of those schools to come in and review those assignments with us. Usually this happens about late June.

[1550] Q. How do you identify, in the first instance, a teacher that you feel might do well in one of these impact areas? A. From the summary at the interview, but this would be indicated through either a special program in their college work; prior experience, or experiences outside of school, Vista, Head Start, Peace Corps. These kinds of things that have given these people some experiences with these kinds of youngsters.

Q. And you indicated, I believe, that this was always reviewed with the principal before the assignment was actually made. A. The principals are invited to come review this assignment before it's final.

Q. Are there any other priorities in the teacher assignments that you take into consideration in assigning the new teachers? A. Once we have this group of schools taken care of, then it is a matter of—Well, we look, of course, at the teachers' experience and backgrounds. They apply for certain grade levels. And so we would assign them—they usually give us three choices so that this would become a priority of a—of assigning teachers to where—into the positions that they have applied.

Q. Is there an attempt on your part to assign the [1551] new teachers with previous experience to schools with the greatest number of new teachers? A. This would mark

that new teacher as a prime consideration at least for assignment to a minority school.

Q. Now, you indicated earlier that—

The Court: You don't pay any attention to teacher requests at that stage, I take it?

The Witness: As teachers are employed, it is indicated to them that at the time they sign the contract we have no way of assigning them to a specific school. And so, they will be assigned in the best interests of the school system with the vacancies that exist.

The Court: But, later on, a teacher can pretty much write his own ticket, can't he?

The Witness: Later on, the teacher would have the privilege of requesting transfer through our regular transfer procedure.

[1552] The Court: If a vacancy existed, why, he would be entitled to it?

The Witness: On a seniority basis.

The Court: All right, that's all I have.

By Mr. Jackson:

Q. You indicated earlier, Dr. Stetzler, that you attempted to assign new teachers either by their previous experience or upon the recommendation of the interviewer were those who you felt would do well in areas that you described I believe as culturally disadvantaged areas or impact areas. Are these areas identified in any other way, as, for example, through any federal programs? A. Yes, through the various titles these schools receive either additional personnel or additional materials through the supplementary appropriations of the federal government.

Q. And it is into these schools that you are attempting to place these teachers? A. Right.

Q. Now, are you always successful—

The Court: These are what you call culturally deprived areas of the city, or these schools?

The Witness: Yes, these schools are identified by the federal government through such things as student mobility, the number of youngsters that would be on Aid to Dependent Children, these kinds of criteria.

[1553] The Court: Go ahead.

Q. Are you always successful in making your assignments as you indicated? A. No, you finally may run out of people who have had the kind of experience that would be preferred either through their prior teaching or through their college experiences, and then you must go on to a group of people through the interviewing process that you feel would adjust well to these kinds of situations and again be successful.

Q. What about the situations in the individual schools, Dr. Stetzler? You testified that one of the requirements of your job from the beginning was to break up the concentration of minority teachers wherever they existed in terms of being consistent with the then current policies. What problems if any do you have in terms of the existing minority teachers in these schools?

The Court: You mean in transferring them?

The Witness: Yes.

The Court: To move any teachers? Schools which do not have a concentration? Go ahead.

A. To move any teacher, once they are assigned, unless there is an administrative reason concerned with either their performance or a change in pupil population, we just don't move them without their request, so although minority teachers have the same procedure for requesting transfer, not very [1554] many of them have requested transfer unless it would be between levels, but, generally, in the same area of the City.

Q. Generally, what is the transfer policy that now prevails within the school district, Dr. Stetzler? A. This was changed. As it exists now, we publish a list of known vacancies in April.

Q. I mean, is this embodied in any written document? A. We have a negotiated agreement concerning the transfer policy, yes.

Q. And do you know or recall when that agreement first became effective? A. The first negotiated agreement would have been in—'65 or -6.

Q. I hand you Defendants' Exhibit E and ask you if you can identify that. A. Yes, this is the agreement between the School District No. 1 and the Denver Classroom Teachers Association.

Q. And is this the agreement to which you refer? A. This is November 1, 1967.

Q. Prior to the negotiated agreement, was there any written transfer policy within the school district? A. Yes, I believe Policy 1617A was the policy.

Q. And you indicated that you experienced some difficulties in minority teachers transferring out of their present school? [1555] A. Not very many request such transfer, right.

Q. Was there any special effort put forth on your part or on the part of others to encourage these minority teachers to transfer from those schools with concentrations of minority teachers? A. Yes, from time to time I have asked the director or the executive director of our school community relations office if they could encourage minority teachers to transfer out of the culturally deprived or minority schools, and, if so, to let me know their names or help me make appointments with these people to discuss this possibility with them.

I have also had occasion from time to time to have an opportunity to discuss this with a minority teacher on my own.

Q. You mentioned the director of the community relations division. Who is that at the present time? A. Mr. Kruder.

Q. Do you know who preceded him in that office? A. Miss Mildred Biddick.

Q. Did you have this same conversation in contact with both of them? A. Yes.

Q. And what success did this bring about in terms of minority teachers transferring away from minority schools? A. Almost none. I can recall only one or two [1556] conversations as a result of this with minority teachers.

Q. Had there been during this period of time minority teachers who had transferred into schools with existing concentrations of minority teachers? A. Yes.

Q. Have you had any occasion to discuss with these teachers their applications to transfer? A. From time to time I have asked the person to reconsider this, yes, this transfer.

Q. And have you met with any success in that program? A. No.

Dr. Harold A. Stetzler—for Defendants—Direct

Q. Now, Dr. Stetzler, you indicated that your charge was to attempt to reduce the concentration of minority teachers in certain schools and to further the placement of minority teachers throughout the system. At the time you assumed your duties in 1964, how many elementary schools were there with one or more Negro teachers to your knowledge? A. Approximately 15,

Q. And do you know where these were located? A. In the central part of the city.

Q. And in 1970, today, how many elementary schools are there in the city with one or more Negro teachers? A. About 70.

Q. Pardon me? A. About 70. It varies from time to time.

[1557] Q. So, from 15 elementary schools in 1964 to 70 today? A. Yes.

Q. Where were these schools located, Doctor? A. They are all over the city.

The Court: I would assume that means qualified minority teachers are on the increase? There perhaps is also competition to get their services?

The Witness: It is a very competitive thing to recruit a minority teacher.

Q. Dr. Stetzler, I am handing you what's in evidence as Defendants' Exhibit DG and ask you if you would tell the Court, please, generally what that describes. A. This is the percentage of Negro teachers from 1964 until 1968 in elementary schools with faculties 20 percent or more Negro as of September 1964.

Q. What are the schools noted on that exhibit, Dr. Stetzler? A. These are for Barrett, Columbine, Crofton, Ebert,

Fairview, Gilpin, Harrington, Mitchell, Stedman, Whittier and Wyatt.

Q. And what does that exhibit show regarding the percentage of Negro teachers in those schools for the years indicated, '64 through '68? A. Let's see, in every case other than Barrett Elementary School, the percentage of Negro teachers has [1558] decreased.

Mr. Greiner: I am sorry, Your Honor, I can't quite hear.

The Court: He says that in every single school except Barrett the number of Negro teachers has decreased according to that exhibit. What's the number of that one?

Mr. Jackson: DG, Your Honor.

The Witness: It has remained—well, the '64-'68 percentage for Stedman is the same. The others have decreased except Barrett.

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[1561] • • •

By Mr. Jackson:

Q. I believe yesterday, Dr. Stetzler, you testified that when you assumed your duties there were approximately fifteen elementary schools with one or more Negro teachers. A. Right.

Q. And these were again located where within the city? A. Primarily in the central area of the city.

Q. And what are the comparable figures for 1970? A. We have approximately 70 elementary schools that have one or more Negro teachers, and these are spread throughout the city.

Q. Now, Dr. Stetzler, directing your attention once again

to Exhibit DG, and I believe you have a copy of that exhibit before you, do you not? A. Yes.

Q. You testified yesterday of the general decline in those particular schools of the percentage of Negro teachers. [1562] Did you in the course of your investigation make a detailed analysis of the situation at Barrett School, which is shown on that exhibit? A. Yes, I did.

Q. And would you recite again, please, for the Court the trend which is shown on that exhibit for Barrett and the years indicated? A. In 1964 Barrett was approximately 39 percent Negro teachers. It rose to a high of about 58 percent in 1967 and dropped back to about 52 percent in 1968.

The Court: In 1967 it was what?

The Witness: In 1967 it was approximately 58 percent

The Court: And what else?

The Witness: And in 1968 it dropped to 52 percent approximately.

Q. And do you know what that percentage is today? A. As of now, I believe it's right at 50 percent exactly.

Q. And do you know how many teachers there are on the staff at Barrett School? A. I do. I guess I do not. There are—

Q. I believe there are eighteen, are there not? A. Yes, there are eighteen teachers.

Q. And what did your investigation regarding the [1563] situation at Barrett disclose, Dr. Stetzler, during this period? A. During this period we made assignments of twenty-six teachers. There were twenty-six vacancies at Barrett School. Nine of the twenty-six teachers were Ne-

gro. The remainder of them were Anglo; one Hispano. Of the nine Negro teachers assigned, five of them were assigned by their own request for transfer or by their request when they returned from leave. Four teachers then were—Negro teachers were assigned initially to Barrett, but upon receiving their first contract during that period. Of the four assigned on initial contract, one of them had come to Barrett through the first semester as a substitute teacher.

When a vacancy occurs after the beginning of a semester, we do appoint a teacher on a long-term substitute basis to complete that semester. That person was recommended by the principal to remain at Barrett and recommended for contract, and so we did that.

One other teacher would have been a fine gift for any school. He was a man who could teach fifth and sixth grades and also could teach music. This is a difficult combination to find. And in addition to that—at the time we did not have identification. I did not know this person was Negro. A third person, assigned to Barrett, had been a Denver Public School employee; had resigned; had done [1564] a considerable amount of work in reading and reapplied for contract, and we placed that man there to do a reading maintenance and improvement job. This is a special program.

Then the fourth teacher had twenty-one years' experience prior to coming to Denver; had quite a background in reading and was assigned in the teaching in reading program at Barrett.

Q. I believe you testified, Dr. Stetzler, that one you did not realize was a Negro at the time of the initial assignment, is that correct? A. That's right. We have had some considerable difficulty over the years in identification. When

I first assumed this position there was quite a force to not identify teachers and not identify persons prior to employment because of possible discriminatory practices. Consequently, the practice of requiring a photograph with an application was stopped. We were requested a number of times to be sure that no separation of applications or any of this kind of thing was done.

Two or three years ago—I believe it's two years ago—we were even required to remove the birthplace from our application so that no identification of race might be gained from that. With this, we had concern that if we identified applicants by race, even after we had seen them, on our interview card or in any other way, we might be [1565] held to be discriminatory.

So during most of the time that I have been in this position, we have had a difficult time making sure as we placed people what their race was.

[1566] Q. Was this impetus for taking off the birthplaces and not utilizing photographs—did this come from the Denver Public Schools or from outside agencies? A. This came from outside agencies, as either requests or directives, I believe, from the Colorado Civil Rights Commission.

Q. Now, are you continuing to receive requests for minority teachers from those schools which have a high percentage of minority students in them? A. For transfer?

Q. For initial assignment or for transfer, yes. A. Yes, as we interview minority teachers they quite often indicate that their preference would be assignment to minority schools because they believe they have something to offer there. They often summarize it, "And I want to go back and help the youngsters where I grew up." Also, teachers

assigned initially outside of the minority schools frequently after a year or so request transfer to minority schools.

Q. Dr. Stetzler, we have had quite a bit of testimony regarding teacher experience and percentages of new teachers versus teachers with three years or ten years of experience. How would you consider the new teacher of today with the new teacher of, say, five years ago? A. Well, first of all, I think we are dealing with a generation of young people with a much greater social awareness. [1567] This has become evident to me in recruiting over the past six years. Secondly, they are more apt to have been exposed during their college career to additional courses required by the college in sociology, urban problems, and this kind of thing. Also, the preparation of elementary teachers, I believe, has gotten considerably better over the years and so our new teachers coming to us each year we have reason to believe are somewhat better prepared than the teachers of five years or even four years before.

Q. How about the minority teachers? Are they good teachers? A. They are fine teachers. They meet the same requirements. All of our teachers are screened with the same requirements in mind, and they all meet those qualifications.

Q. In your discussion of Barrett School, you indicated that certain of the teachers transferred into Barrett. Would you tell us, please, what the transfer policy is, how it works? A. The transfer policy?

Q. Yes. A. We publish a list of known vacancies in April and again in May to all offices in the School District, and at that time teachers may submit a request for transfer on a regular teacher's request for transfer form. These come to our offices, are printed out from automatic data

processing, giving the teacher's present school, the request for transfer— [1568] they may request more than one school to which they would like to go—the number of years experience that they have had and the number of years in their present position. At the time of the deadline for receiving transfers, this data is accumulated, and we work from the printout then with, of course, particularly in elementary school seniority being the prime factor, because people are equally qualified.

Q. How does seniority come to be the prime factor, Dr. Stetzler? A. This is stated in the negotiated agreement concerning transfer.

Q. Prior to the negotiated agreement, was it also contained within the Policy 1617A? A. Yes.

Q. Backing up for a moment, you indicated that you publish a list of vacancies. How are these vacancies established? A. These are established through my office when we receive the resignation from teachers or the approval for leaves of absence. Then we know on our list this needs to be a replacement for the following year.

Q. And in any given year, are these vacancies spread out throughout the city, or are they concentrated in any specific areas? A. This varies considerably from year to year.

[1569] Q. Are you familiar with the Traylor Elementary School? A. Yes.

Q. Do you recall when that school opened? A. In January of 1968.

Q. This was in the middle of the year? Did this present any particular problem regarding teacher assignments? A. Yes, midyear assignments, of course, are quite a different matter from September assignments in that we don't have the alternatives. We don't have the number of vacancies.

Generally, we don't have the number of new teachers needed or even available. The January assignment of teachers is a quite different operation from September.

Q. How was the staff at Traylor selected? A. We determined that the fairest way to open Traylor was to publish the list of vacancies or the list of teachers needed at Traylor, as we publish the list in the spring of each year. So we did again print this list and sent it to all offices within the district and asked people to submit their request for transfer in the usual fashion.

Q. And how did you determine which teachers, assuming they had qualifications, would be assigned to Traylor? A. The same as in the spring, by seniority.

Q. Dr. Stetzler, I hand you what is in evidence as Plaintiffs' Exhibit 267, purporting to show the median years teacher experience at the minority elementary schools and at [1570] Traylor Elementary School. What does that exhibit show? A. In the twenty minority schools, the median experience would be just under four years, and at Traylor about eleven years.

Q. And you indicated that the assignments to Traylor were done on the basis of seniority? A. That's right.

Q. So the teachers that were assigned would be those teachers with the greatest experience for the particular opening that was available? A. Yes, who wished to move. Another factor, many times people might not wish to move mid year, although they might even have liked to have gone to Traylor. They feel loyalty and concern for the class they are teaching and do stay.

Q. What effort, if any, did you expend toward encouraging minority teachers to transfer to Traylor? A. We had one minority teacher who did make a request for transfer to Traylor in the position of teacher assistant. This is a

position that is just what it says. It is a teacher assistant to the principal. This person has no classroom duties. He is assigned to the office to assist the principal with the routines and administration of the school. This requires a Master's degree and five years of experience in Denver. This person did not have the five years of experience. Also, this position is selected by the principal, so we would [1571] give the list of names for such a vacancy to the principal and ask him to make selections. But I did call the person, and on a couple of occasions, and asked if that person would not go to Traylor in a regular classroom, and he decided that he would not go to Traylor.

Q. Was the community relations office able to furnish you with any minority teachers desiring a transfer to Traylor? A. No.

Q. Now, are you familiar, Dr. Stetzler, with the opening of Montbello School? A. Yes.

Q. And when did that open? A. We opened the smaller unit in, I believe, January of 1967, and then the larger unit in September of 1967.

Q. Now, in the September opening, how were the teachers assigned to Montbello School? A. Through, first of all, the publication of a list of vacancies and the usual transfer procedure.

Q. Were you able to encourage minority teachers to transfer to Montbello? A. Yes, as we opened the larger unit at Montbello, we did open with three minority teachers.

Q. Out of a total teacher staff of— A. It would have been a total of ten, eight at the larger unit and two at the smaller one.

[1572] Q. Now, did the fact that Montbello opened in the fall of the year make your job any easier than when

Traylor, for example, opened in the middle of the year? A. Yes, I would say so, because the request for transfer would be greater. People that had desired to move would feel it a better time to transfer than they do in January.

Q. In your position as the director of elementary school services since 1964 was there a period of time, Dr. Stetzler, when you were responsible for elementary pupil services? A. I was responsible for making recommendations concerning pupil services, yes.

Q. And what did this invlove? A. The assignment of pupils, the transfer of pupils, the administration of the boundary lines, the exceptions to boundary lines, the transportation of pupils.

Q. In what period of time did you have this responsibility? A. From '64 until reorganization began to be effective sometime in the '68-'69 school year.

Q. With regard to the assignment of pupils, Dr. Stetzler, what is the main problem with regard to assignment of students? A. Space, particular the assignment of students that we had gained through annexation over the number of years. The annexations come in sometimes rather rapidly. Housing is [1573] built rapidly. It is a continually fluid situation as you move through the years.

Q. What is your responsibility for children who are residing within an area that is annexed to Denver? A. To get them into schools generally immediately upon the effective date of the annexation.

Q. What considerations do you take into account in determining what recommendations you will make as far as the school to which these pupils will be assigned? A. Primary concern, of course, would be where is the space; secondly, where is the nearest space; and, thirdly, what does this do to the total transportation system? We usu-

ally have conferences with the supervisor of transportation to make certain space available on buses.

Q. The question of space, Dr. Stetzler, would you tell us how you determine what space is available throughout the city? A. Through looking, first of all, at the membership reports that come to us during the year and then through conferences with those principals at those schools that would appear to have space. A primary source, of course, is the principal at the time we want to utilize the space.

Q. You say compare those schools that appear to have space? Are you familiar with the formula approach to determine rated space at schools within the Denver system? [1574] A. Yes.

The Court: You don't seek to transfer them necessarily to the schools nearest to them?

The Witness: From the annexations, we attempted to get youngsters into the school that would be the closest to that annexation.

The Court: Regardless of whether—I thought you said space was the primary—

The Witness: Nearest school with space, yes.

[1575] The Court: If you were following out the neighborhood school principle, you would give priority to the school that was nearest their place of residence, wouldn't you?

The Witness: That's right.

The Court: You don't do this?

The Witness: Yes.

The Court: You mean to say you don't haul them past these schools to other schools that have vacancies frequently?

The Witness: We would take them to the nearest

school that had available space.

The Court: If it had space, then, that is the—

The Witness: Yes, right.

The Court: That's the real problem?

The Witness: Right.

The Court: Okay.

By Mr. Jackson:

Q. On this matter of space, Dr. Stetzler, you say that you are familiar with the rated capacity of the school and that you then compare the rated capacity with the membership? A. Yes.

Q. And then you discuss this with the principal? A. Right.

Q. Is the fact that a school has, for example, fifty [1576] children less than its rated capacity—does that necessarily indicate that you can select any group of fifty students and transport them or assign them to that school? A. Not necessarily. It would depend upon the time of the year when you needed to utilize that space; would depend upon the facility itself; would depend upon the grade level membership in that school. So a number of factors could enter—

The Court: The only thing I'm suggesting is that this is a compromise with the neighborhood school principle or policy. If you were adhering to that primarily, you would move them to the school closest to them and avoid busing, them, if possible.

The Witness: This would mean that the school closest would probably go on double sessions and become overcrowded and so forth.

The Court: Yes.

The Witness: Right.

Q. Dr. Stetzler, are there neighborhood schools within these areas that are annexed? A. Well, of course, in the annexed areas there are almost no schools. Particularly, of course, they—when they are annexed, there aren't any.

Q. Is there any effort to keep children from the same general area together in terms of placing them in a [1577] school? A. Yes. This is a tremendous problem because once you start youngsters from an area to a school, we have attempted to keep them in that school. But finally, if that school runs out of space, you set a cutoff date and then youngsters moving into that neighborhood after that date are assigned to another school. It can be after two or three years that you have youngsters going to four or five schools from the same general area.

Q. What effect does the educational program of the receiving school have upon the spaces available at that school? A. Again it would depend upon the time of the year. If there are special programs in a school, even though it would be below capacity as rated, we would probably not consider it a school to receive pupils. Again, the January-September kind of concern enters into this. You mentioned fifty spaces—If this is in January, it may mean a complete relocation of the pupils within the school to take a particular area. In September this is an easier matter where youngsters are going to be reassigned to classrooms, anyway.

Q. What about the class size and pupil-teacher ratio at the school with apparently some capacity? A. This would be another factor in discussing space available with the principal. We would look at class size and [1578] pupil-teacher ratio in terms of keeping a reasonable educational program in that school, also.

Q. Do you look also to the annexation areas as well as the area surrounding the receiving schools? A. You must also consider the potential of the annexation so that, if you start out with a few youngsters, we are aware generally of the speed within which the builder intends to erect homes and have some idea of the final potential of that area.

So we also need to look in the future to attempt to save some space in the school where those children are being received for the additional youngsters that are sure to come in.

Q. And you plan that at both ends of the line? A. Yes, by looking at the school on space and the annexation and how much potential it has.

Q. Is this busing from the annexed areas a temporary thing? Or is it a temporary thing until schools are built? A. Well, I'll say—obviously with the opening of Traylor, those youngsters were no longer transported to another school. So it is a temporary kind of thing until a school is built in that neighborhood.

Q. And would the same principle apply to the Montbello area? A. Yes. You see, they initially were transported until [1579] the unit—the larger unit was completed. And then those youngsters began to attend the Montbello unit.

Q. Approximately how many students are you required to accommodate each year from these annexation areas? A. This would vary, but something between 2,500, 3,000 youngsters must be accommodated from an annexed area in the elementary schools.

Q. And do the annexations themselves fluctuate in terms of rapidity or in terms of— A. Oh, sure.

Q. And have you experienced instances where areas have been annexed to the city and then disestablished and re-annexed? A. Yes, we have had a couple of these that I can

recall that we didn't know whether the youngster belonged to us or not, over a period of a number of months.

Q. And you have to take that into consideration also in your planning? A. Right.

Q. Dr. Stetzler, with regard to the transfer of pupils which you testified was within your domain for a period of time, what are you speaking of when we talk about transfer of pupils? A. We do, of course, have some exceptions to the elementary boundary lines and they would be summed up where [1580] children may attend school where there is a baby-sitter. And, if a mother is working full time and does have a baby-sitter who resides in another school subdistrict, the youngster may go to school from the baby-sitter's address, again depending upon the space available in that school.

We also make exceptions for medical reasons, both physical and mental health. We would make exceptions through the courts if sometimes the courts do recommend a change of school for youngsters.

Q. What about overcrowding in a particular school? A. And if a school became overcrowded, we might move, yes, some students from that school to another one.

Q. How would that process take place with regard to those schools which were overcrowded? A. Our first step would be to make sure that the present facility is fully utilized and again in conferences with the principal and other people, see if there are changes and program changes in scheduling. Changes in the use of space that would permit greater number of youngsters to remain there.

The second consideration would be mobile units or an addition.

A third consideration then would be transportation to another school.

[1581] Q. What about double sessions? A. Yes, earlier in 1964, '65, '66, we tried to avoid double sessions just as much as we could. Later we began to consider it also as a means of retaining youngsters in their school.

Q. Was there a general policy at that time of attempting to keep children within their own neighborhoods? A. Yes.

Q. And did this form one of the bases for your consideration of transportation, for example, or the placement of mobile units or additions? A. Well, the sequence would be to keep children in the school and to the utilization; then possible double sessions; and then mobile units or an addition, and then transportation being the last consideration.

Q. Once it was determined that it was necessary to remove some of the children from their neighborhood either because of lack of money or additions or other causes, how did you determine the school to which these children would be transferred? A. Again, look at the school nearest to their neighborhood with available space.

Q. And when you speak of space, did the same considerations apply as we discussed earlier with regard to the assignment of students from annexed areas? [1582] A. Yes.

Q. I take it then, Dr. Stetzler, that the determination of space is not a pure formula and mathematical approach to the question? A. No, it is not.

Q. Why is this? A. The mathematical approach to space available is just that. It's an indicator. But it really doesn't tell you the kind of programs that are being conducted within the schools. It didn't tell you very much about the facility itself. And some schools, particularly older ones, have smaller rooms than others; have other difficulties with special programs. So, it's a beginning point.

The Court: So space is not the whole criterion?

The Witness: Not just the mathematical availability. That's right.

The Court: You had said a moment ago—indicated a moment ago that this was just about the sole criteria; availability of space. But you do look to the school; as you say, you determine from a number of criteria whether the students should go to that school, is that right, or the group of students?

The Witness: Yes, the mathematical formula would be the beginning point. Then you need to have the conference with the principal and, of course, we're aware of the [1583] schools as you work with them, the kinds of space available and the programs in the schools. But you must talk with the principals and others to make sure what the situation is at the time that you want to utilize additional space.

The Court: What do you mean? What situation?

The Witness: Well, you see, our reports are generally we get a membership report in right after school starts and another one about the 1st of October.

The Court: Well, could you just list the other criteria that you take into account.

The Witness: All right. This is one. What's happened to the available space since my last report? The school may have grown indeed from its neighborhood.

Second thing would be what special programs are going on in that school.

The Court: Like what?

The Witness: Like a special reading program, special education, team teaching. These kinds of

programs that might—may utilize space in a different fashion.

The Court: In other words, special education?

The Witness: Special kinds of education, yes.

The Court: What else?

The Witness: The organization within that building indeed would have something to do with the space available, also, in terms of the movement of youngsters. The platoon [1584] versus the self-contained classroom.

The Court: You mean whether they move them from class to class for particular subjects?

The Witness: Yes, if you have a departmentalized school or a platoon.

The Court: Then you use a homeroom type of—

The Witness: Yes, and you can get more youngsters in that school.

The Court: You use that in the elementary level?

The Witness: In some schools, yes.

The Court: Okay. What else would be important?

The Witness: I believe those are the primary considerations.

Q. Do you also look, Dr. Stetzler, to the type of transportation available? A. Well, existing transportation.

The Court: Public transportation?

The Witness: Not for elementary schools, no. We would have to look at our own utilization of transportation and how it might fit.

Q. Is it important also to determine where the overcrowding exists in terms of the grade level or age of the

students? A. Yes, particularly if you're going from school to school. So you must determine the school that is overcrowded. [1585] Are there grade levels that particularly are overcrowded? And then look at the receiving school to see if they can indeed receive youngsters from those grade levels or that grade level.

Q. And does this become an even more difficult problem in the secondary level in terms of where the spaces are or where the need is? A. I have not dealt with secondary—

Q. You indicated that as with the assignment of students from the annexation areas, that with the transfer of pupils, you attempt to assign the pupils, if necessary, to the closest school with available space, is that correct? A. Right.

Q. Is that same policy followed in the Northeast Denver area? A. The same consideration of utilization and so on would be followed, yes.

Q. I mean, in terms of the receiving school that would be selected? A. Yes, primarily. We make sure—Would you restate your question?

Q. Is the same policy of transporting children to the closest school with available space followed, also, in Northeast Denver? A. Primarily. There would be some exceptions to [1586] that.

Q. And what would some of those exceptions be, Dr. Stetzler? A. The available space that might be closest would be schools where—either they would be crowded—with available space, it would be schools that had a rather large number of special programs that in schools in which we have attempted to reduce class size and pupil-teacher ratio.

Q. Are you attempting also to transfer those students to the closest available Anglo school with space? A. In some cases, yes.

Dr. Harold A. Stetzler—for Defendants—Direct

Q. Dr. Stetzler, I have placed on the easel Plaintiffs' Exhibit 390 and 390-B showing the busing in the elementary school for the year 1968. I would ask you if you would leave the witness stand and come over to this exhibit for a moment.

We have had previous testimony, Dr. Stetzler, that on the base map which is Exhibit 390, the schools with red circles represent schools that are at least 51 percent Anglo that were ten or more undercapacity in 1968. The schools with blue circles are schools who had at least a pupil population that was 51 percent minority, and again, had a capacity utilization representing ten percent or more available space.

Now, would you please, for the Court and for counsel, indicate generally on this exhibit the areas that you have been discussing with regard to students from areas annexed to the City and County of Denver? A. This would be the general southeast and southwest areas of the city.

[1588] Q. And would you locate for us on that exhibit Traylor Elementary School? A. This is the Traylor School.

Q. And this exhibit does not show any busing from Traylor in 1968, does it? A. That's right.

Q. Do you recall, Dr. Stetzler, where those Traylor students were transported prior to the opening of Traylor School? A. Before Traylor opened, the youngsters from this area were transported to University Park, Cory and Asbury Schools.

Q. Would you locate those schools for us, generally? A. This is University Park, Cory and Asbury.

Q. Now, Dr. Stetzler, directing your attention to the Cowell area as shown on this exhibit, this indicates busing from the Cowell district to Johnson, which bypasses both

an Anglo school and a minority school, does it not? A. Yes, it does.

Q. And can you tell us the reason for that? A. The Anglo school is Perry with a total capacity of about 150 youngsters. It is a very small school and really part of an administrative unit with the Westland School. The Westland School is one of the schools in which we have attempted to keep class size and pupil-teacher ratio minimal and in which there are some or have been some special programs. When we moved youngsters from Cowell, Cowell had become [1589] crowded and we utilized the space as best we could there and considered the matter of mobile units, and the site at Cowell does not lend itself—

The Court: I am just curious as to where Cowell is. Is it Barnum or some place?

A. (Continued) It is at 10th and Vrain, I believe, yes. This would be Sheridan Boulevard here. The site at Cowell is a multi-level site and did not lend itself to the establishment of enough mobile units to take care of the crowding, and it was determined then through meetings with the staff and the community that rather than go the double-session alternative that first graders would be moved. So we took, I believe, some ninety youngsters from Cowell School to Johnson School, because at Johnson there were at that time two empty rooms.

The Court: Where is Johnson?

The Witness: Johnson is at Irving and Jewell. So, we passed up Perry School. Ten percent below capacity there might mean fifteen youngsters. We passed Westland School because of our special programs and our attempts to keep teacher-pupil ratio and class size at a minimum at Westland School.

Q. In directing your attention to the middle portion of the map, which indicates students being bused out from Elyria School with at least 51 percent minority, pupil population under capacity, to Swansea, can you tell us why that [1590] busing occurs? A. Elyria-Swansea once again is an administrative unit. It has the same boundary lines and same principal. Elyria has only five classrooms and has not had kindergarten within my experience. The kindergarten youngsters are transported to Swansea and back.

Q. You took into consideration just first graders from Cowell when those were bused to Johnson and just kindergarten from Elyria to Swansea? A. Yes, sir.

Q. Directing your attention to northeast Denver and in particular to Smith and Stedman Schools, would you locate those on the map for us, please. A. Smith School and here is Stedman School.

Q. Now, the pattern as shown for the transportation out from Smith and Stedman Schools, the receiving schools for those children are located where? A. Primarily in the south half of the city.

Q. And in the primarily Anglo portion of the city? A. Yes.

Q. And is this a specific practice, to move these students to Anglo schools? A. The Smith and Stedman transportation are again a little different.

The Court: I think that's an important question [1591] that ought to be answered directly. Do you ever take into account the presence of minorities when you are making these decisions as to transportation, and have you ever, and when did you start, if you did? I think we are all interested in this.

The Witness: The transportation from these two schools, the primary consideration was to transport youngsters to schools of primarily Anglo attendance areas.

The Court: Was that the first time you have done that with that in mind? I have been led to believe here that the only motiye you had was the existence of space plus special programs, organization and building.

The Witness: Yes, when these—

The Court: I concluded from what you said that whether they are minorities or not or whether they are in the receiving school was not considered by you.

The Witness: I would say up until the time of the Stedman, Smith and the Philips transportation, this would be true.

The Court: With the exception of these three?

The Witness: Right.

The Court: Very well.

Q. Now, this exhibit shows not only that transportation which is being conducted because of overcrowding but shows also inter-district busing, does it not, within various [1592] subdistricts? A. Yes.

Q. And would you give us some example of that? A. Well, you mentioned Traylor there. There are youngsters bused who live more than a mile from Traylor. Youngsters are transported to Brown who live more than a mile from Brown. I think there is some over here. The Asbury youngsters in the southeast corner living more than a mile are transported, and from Garden Place these youngsters are within the boundary but live more than a mile from the Garden Place School and are transported to Garden Place.

Q. Does that type of busing bear any relationship at all to annexation or overcrowding? A. No, we have an established policy that youngsters in elementary schools living a mile or more from school are eligible for transportation to their school.

The Court: When you said that you sometimes assign to the nearest Anglo school—do you remember saying that? He asked you if you ever did and you said yes. Did you mean to say that?

The Witness: I would have to go back to the question. I am—

The Court: Well, Mr. Jackson walked up to the map and he said, "Do you sometimes make assignments in this transportation effort to the nearest Anglo school?" You said [1593] Yes.

The Witness: From northeast Denver, yes.

The Court: In other words, you had reference to Smith-Stedman-Philips, is that—

The Witness: Right.

The Court: When you made that answer?

The Witness: Yes.

Q. And the pupil population in Smith, Stedman and Philips, the pupils being transported, are you familiar with their racial composition? A. The majority of those youngsters would be Negro.

Q. And the reason for their being transported from Smith, Stedman and Philips is because those schools are overcrowded? A. Yes.

Mr. Jackson: You may examine.

Cross-Examination by Mr. Barnes:

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[1598] • • •

Q. Turning your attention to your Exhibit DG, I'd like to ask you whether or not that shows whether there has been any increase in the total number of minority teachers in the elementary schools in the period 1964 to 1968? A. This does not relate to the total number of teachers.

Q. You recall, do you not, that in 1964 the percent of minority teachers in the elementary schools was nine percent? A. It was low.

Q. And that in 1968 it was still nine percent? A. I would agree that this is about right.

Q. And that is not contradicted by Exhibit DG, is it? A. No.

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[1599] • • •

Q. You referred, Dr. Stetzler, to the use of photographs in the teachers' files. Can you tell us more specifically when that program began and when it ended? A. I don't know when it began. It was in force when I assumed the position.

At that time on the application there was a request that the person submit a picture with their application. Shortly after that, I would judge it to be in 1965 or 1966, we removed that request from the application.

Q. And do you now have photographs in the files? A. We do request a photograph after a person is employed and has signed a contract.

Q. And that—is that before or after he is assigned to a school? [1600] A. It could occur either way. In many cases the photograph arrives in September. We make requests for these. If the person has not complied with any

of the requirements we do make requests to complete the application so it may occur at any time after they have signed the contract.

Q. And it may occur before he is actually assigned to the school? A. It may.

Q. Does it typically occur before he is assigned to a school? A. I don't know. Sometimes the photograph is there when we're making the assignment and sometimes they're not.

Q. You also mentioned that for some years race was identified in the file and for others it is not.

Could you specify what years the race has been identified in the file? A. The race is identified only through the photograph that was requested with the application. We have never on the application itself identified race.

Q. Does the photograph typically show up in every file? A. After we have employed the person, yes.

Q. After the person has been employed? A. Yes.

Q. And prior to the person being employed, you have [1601] an interview? A. Right.

Q. So you always know the race of the person prior to employment as well, don't you? A. Somebody does. The interviewer would.

Q. Whoever hires him does? A. Right. This would be in question, by the way.

Q. Are there some cases where you can't be sure? A. That's right.

Q. But not the majority of cases? A. Not the majority of cases.

Q. During what years, if any, Dr. Stetzler, while you have been in your present position has it been necessary to notify a principal in advance of the race of a teacher? A. It has never been necessary.

Dr. Harold A. Stetzler—for Defendants—Cross

Q. Has it ever been the practice? A. No. We begin by telling principals that they would receive teachers and they would receive good teachers and that they should be aware of our practice of increasingly assigning minority teachers all over the city.

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[1606] • • •

Mr. Barnes: I think that's right, Your Honor.

Q. I'd like to turn your attention, Dr. Stetzler, to Defendants' Exhibit E, Article 14 of the agreement between the School District No. 1 and the Denver Classroom Teachers Association, which is in evidence, and ask you if the agreement does not require the approval of the superintendent for transfer of teachers? A. Or his designee.

Q. Or his designee. And in Section 14-4-4, does it not indicate that some transfers may be requested by the administration? A. Yes, there is a procedure for administrative transfer.

[1607] Q. And it indicates that transfers may be requested because of changes in enrollment or other unusual situations, doesn't it? A. That's right.

Q. So that in the case of a serious educational problem the superintendent might have the authority to make whatever transfers he thinks are educationally necessary, mightn't he? A. He has—according to the agreement, he has the authority to make transfers in unusual circumstances or when there is a change in pupil population within a school subdistrict.

Q. You indicated that it was the policy of the district, I think—I think you indicated that it was the policy of the district not to enforce transfers on teachers against

their will or without their initiating the request. Is that accurate? A. That's right.

Q. But yet you have the authority under this agreement to do that, don't you? A. Under the—

Q. The superintendent does? A. Under those circumstances set forth in the agreement.

Q. Now, is there a policy of the district that probationary teachers will remain in their school, first [1608] assignment, for three years? A. Not now.

Q. Has there been in the past? A. In the past, there was a statement indicating that teachers should remain in assignment three years after their initial assignment or after transfer.

Q. Does that typically occur, still, today? A. It is no longer in the agreement.

Q. Is it the usual circumstances that a new teacher stays in her first school three years? A. With reference to the transfer, she may request transfer at any time after initial assignment. I would suggest that most teachers remain in their initial assignment for some period of time.

Q. Does the district discourage reassignment or transfer of probationary teachers? A. Not by the agreement. We have suggested to people that there are some disadvantages to them of transferring, particularly during their second or third year of probation.

Q. Is there any disadvantage to the school or to the pupil? A. In most cases, I think not.

Q. Do you recognize some advantage in teacher stability in a school? A. Given some other things, like teacher willingness [1609] and teacher empathy, teacher skill, and these kinds of things in that particular school this may be well.

Q. When there is not teacher willingness or empathy in a school, you might allow transfers—a transfer out of that

school sooner than three years, is that correct? A. Under the present agreement, we would allow a transfer upon request under three years.

Q. And the grounds for granting that request might be that the teacher simply didn't want to be at that school? A. As you will note, there are no reasons for transfer stated in the agreement. The reason is not a consideration.

The Court: Are transfers as readily given while a teacher is on probation as they are when he is not?

The Witness: Well, they have the seniority factor—probably more teachers on probation are not transferred at their request, you see, because they do not meet the seniority of others teachers requesting transfers.

The Court: So there is less inclination for the school board to honor a request if a teacher has not served the three years?

The Witness: We would be less inclined, yes.

By Mr. Barnes:

Q. And the purpose of that resistance is to improve the educational offering at the school, isn't it? A. Part of that would be. It's also a matter of [1610] the probationary period where we would like a person to remain in an assignment with a principal who is evaluating that person's effectiveness over a period of time long enough to indeed be able to evaluate the person.

Q. You have testified concerning your efforts in hiring of minority teachers. Can you give us some idea of how successful you have been in increasing the percentage of minority school teachers in the various levels? A. As circumstances change, we are becoming more successful as

we learn more ways of recruiting and contacting minority teachers. We have made considerable efforts in the past few years to increase our number of minority teachers through those efforts.

Q. Plaintiffs' Exhibit 245 which is in evidence indicates that between 1964 and 1968 the percent of Negro teachers in elementary schools has remained constant at nine percent. And I think you said you didn't disagree with that, is that correct? A. Right.

Q. That same exhibit indicates that the percent of Hispano teachers between 1964 and 1968 has gone from one to two percent. Would you disagree with that? A. No.

Q. Plaintiffs' Exhibit 276 indicates that between 1964 and 1968 at the junior high level the percent of Negro [1611] teachers has gone from six to nine. Would you disagree with that? A. I have no knowledge of it. I assume it's right.

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[1613] • • •

Q. Exhibit DG shows that there are a great many schools with 20 some percent minority teachers. There are also schools with 30 percent and more, are there not? A. Yes, there are.

[1614] Q. Such as Columbine with 33 percent in 1968? A. That's right, and I would suggest in that connection that these teachers are very fine teachers and that because there are 20 percent or more of Negro teachers in a school certainly would not indicate that it is a poor faculty. They are very fine teachers.

Q. In the assignment of teachers, isn't it a fact that the first decision about where a new teacher goes is made by your office? That is, for elementary schools? A. The initial assignment, yes.

Q. So that even though you have had difficulty transferring them out, part of the concentration which is already

there results from their initial assignment, doesn't it? A. Those concentrations, if you want to use that term, that existed in '64 were, of course, from initial assignments.

Q. Well, then, there has been other assignments since you have been in your position of Negro teachers, haven't there, to Negro schools? A. Yes, there have.

Q. Hispano to Hispano schools? A. Yes, there have. The primary assignment practice has been not to assign minority teachers to minority schools, but we have made exceptions to that.

Q. I take it that your discussion of the Traylor experience indicates that the system was not geared up in a [1615] way to put minority teachers in Traylor; is that correct? A. We went through our usual procedure of publishing vacancies.

Q. It just illustrates, does it not, that senior teachers tend to move out of less desirable positions into the more desirable positions? A. I don't think that particular example does. Most of those teachers I believe you will find came from University Park, which is not an undesirable situation.

Q. But, few of them came from minority schools? A. They probably did.

Q. And there were no minority teachers, were there, in Traylor? A. As I testified, only one minority teacher requested transfer. We talked with that person more than once, attempting to get him to agree to a transfer to Traylor.

Q. Do you have any plan or any new way which will better accomplish the movement of minority teachers out of minority schools? A. We are beginning to talk with people about a teacher exchange. Part of the requirement would be moving from a minority school to a school out of

that area, and part of the hope here being that we would also get people of different races to move on an exchange, so they can become acquainted with other areas, and our hope would then be that indeed they [1616] would request transfer to that school or a similar school. We are right now exploring this whole matter with two teacher committees, hoping that we can gain from them some ideas and some help that will further advance our efforts.

Q. When did that program begin? A. This is in the exploratory stages. We have contacted some teachers as a pilot kind of thing, to see what kind of considerations would need to be made before we did this on a citywide basis.

Q. Concerning the assignment of pupils, Dr. Stetzler, I think you indicated that space is the main consideration or at least that is part of what you indicated. Do you recall whether any Anglo children were ever moved into minority schools where there was space? A. I don't.

Q. If we look at Exhibit 390 and the overlay, 390-B, and identify the Montbello area out here, do you recall when that area was brought into the School Disrict? A. Yes.

Q. When was that? A. I believe it was January 1967 when we first—no, it was before that because they were—we opened the first unit there in January '67.

Q. In January of '67, and were there any schools out there—you opened the first unit, I am sorry— [1617] A. Yes, so it must have been in September, probably September of '67, that we first began to receive youngsters from there.

Q. Where did those youngsters go? A. They went for the one semester to Palmer—

The Court: You mean they had gone prior to the opening of Montbello? Is that what you are inquiring about?

The Witness: No.

Mr. Barnes: Yes, sir.

The Witness: Oh, yes, sir.

The Court: Do you understand?

The Witness: Yes. I know they went to Palmer, and I am not certain that some of them were transported to Teller. Palmer was the—

Q. Palmer being down south of Colfax? A. Yes.

Q. And Teller being even farther south? No, it is not. It is about equal latitudinally, isn't it? It was farther to the west. Do you recall that there were empty spaces at that time in Columbine School? A. Columbine School, of course, made empty spaces, but would be in that group of schools where we would be or have been attempting to lower the pupil-teacher ratio and the class size and to provide special kinds of programs.

Q. And one of the special programs was not integration [1618] of students, was it? A. They were educational programs designed in such areas as reading and mathematics and other kinds of material, kinds of things, at Columbine School.

Q. Was there any consideration that these children might be taken to Columbine? A. We would not consider those schools in that area because of our attempt to provide a lower pupil-teacher ratio and the special programs.

Q. Did you have anything to do or do you have any knowledge of the busing of the junior high school children out of the Montbello area? A. No.

Q. You do not know that they went past Cole Junior High School, which was empty, all the way over to the Lake—

Mr. Jackson: If the Court please, he just indicated he didn't any special knowledge of that.

The Court: Sustained.

Q. In the identification of schools with space, does the principal have the final say as to whether or not his school has space? A. Probably not, if it came to a matter of just a final say. This is a cooperative kind of seeking between central administration and the principal. Often, they would be urged to take youngsters when they might have felt a little [1619] differently, but I guess I would say probably not the final say.

Q. What kind of a conference occurs between the administration and the principal to discuss whether or not there is space? Does he come to your office or you to his, or do you call him on the phone, or how is this discussed? A. Usually, it is a conference in an office in the central administration when we would ask the principal to bring current enrollment figures and assignments and so forth so we could look with the principal at the situation as it exists at the time.

Q. And do you discuss such things in addition to those you have mentioned as achievement gaps? A. No, sir.

Q. Do you consider such things as discipline problems? A. This is—I can't remember this being a matter of concern for a receiving school.

Q. You mean that—have you had a number of these meetings? This occurs fairly often, doesn't it? A. Yes.

Q. And that in none of these meetings, no principal ever raised the issue of—perhaps you are not saying it that strongly. Did any principal ever raise the issue of discipline or the changing character of his school? A. Not that I recall.

[1620] Q. Well, how do you explain the fact that there have not been any—or, how can you explain the fact that there have not been any transporting of Anglo students into Negro schools? A. Well, if you are talking about

the schools designated here with the blue circles, we would not call the principal and ask him if they would receive youngsters because of the efforts that I have mentioned of reducing the pupil-teacher ratio for the special programs in those schools.

Q. You indicated with regard to Cowell busing that you had meetings with parents and representatives of the community to discuss whether or not to bus out or to go on double sessions? A. Yes.

Q. Is that kind of a meeting a common occurrence? A. Yes.

Q. Can you indicate other schools in which such sessions with parents and representatives of the community have been held? A. I remember going to, let's see, Ashgrove School, where crowding occurred, at the McMeen School prior to its addition, I remember going to the Hallett School.

Q. When was that? In 1966? A. I guess the Hallett School meeting was where they were able to come off double sessions, and the parents were so sold on double session that we met with them to try to get [1621] them to utilize the new space on regular session.

Q. Do you make a continuous effort to follow what you regard to be community opinion in these choices? A. When youngsters have to be moved or—yes, then in some fashion the principal or principal and representative from the central office would be discussing this with either PTA representatives or a meeting of the community.

Q. What do you mean, when youngsters have to be moved? A. A school becomes so crowded that decision has to be taken to remove youngsters to relieve the crowding, then there has to be communication of the parents involved.

The Court: Excuse me, Mr. Barnes. We will take our morning recess now.

(The court recessed at 11:00 o'clock a.m.)

[1622] (Following a recess, the trial resumed at 11:22 a.m.)

By Mr. Barnes:

Q. Dr. Stetzler, I think before the recess we were discussing the offering by the district of transportation to some school communities where there was overcrowding. Do you always discuss with the parents transportation before children are in fact transported? A. Certainly, the principal would, at least.

Q. Do you always discuss mobile units with them before mobile units are put in? A. Yes. I do not, but the principal, again, or some persons from the central office would.

Q. Do you solicit their opinion or follow their choice? A. It's not always a matter of following their choice. This is not really the kind of thing that you can take a vote about and do. It's a matter of discussion with people over circumstances and what the alternatives are at the time.

Q. Do you offer mobile units to—

The Court: Let's pursue this. You mean to say you oftentimes have to decide on a policy and then you undertake to sell the parents on that policy? Is that right, because of what you regard as the alternatives?

The Witness: We would have—yes, we would have some alternatives that are impossible that the parents might prefer, but we cannot provide that. That's right.

Dr. Harold A. Steteler—for Defendants—Cross

[1623] The Court: And so, then, when you do institute a busing program, it is not always with the consent of the people who are bused?

The Witness: That's right. It would not always be.

The Court: So it would be mandatory busing sometimes, in effect?

The Witness: Yes.

The Court: I mean, to relieve overcrowding?

The Witness: Yes. In most cases.

By Mr. Barnes:

Q. You have had mandatory busing relieve overcrowding between Anglo schools, have you not? A. That's right.

Q. Have you ever relieved overcrowding at Carson and Knight by busing? A. Carson and Knight—

Mr. Brega: I'll object to that. I believe the facts show a great percentage of the students at Knight are bused in.

[1624] The Court: Well, let him answer, why don't you, without any suggestions from you, you know?

A. This was a fact. At Knight School I believe you will find that at various times half the school population is transported in and that Carson School receives youngsters from a number of areas and other schools from time to time because they have not—they have had space.

Q. Where are they transported in from? A. Southeast Denver where there are no schools.

Q. Are they all transported in from annexed areas? Some of them are not, isn't that true, that some of them are

transported from other areas in central east Denver? A. No, I don't think that's right. I think the Stephen Knight and Carson Schools have almost always received youngsters from southeast Denver.

Q. Has there ever been any of that transportation deferred to minority schools? A. These were the schools that were closest to southeast Denver with space.

Q. Did you offer those parents in those annexed areas mobile units as opposed to the transportation? A. When you don't have schools, you don't have sites on which to put mobile units, which require facilities that are in schools.

Q. You said that there are certain schools to which [1625] you would not consider transporting Anglo children because of special programs. How do you identify what those schools are? A. I would like to correct your statement. We wouldn't consider transporting pupils at all into southeast schools, primarily the ones with the blue circles on the map, because it has been our extreme effort in those schools to keep class size low, to keep pupil-teacher ratio low. They are the recipients of special programs, partially funded by federal money, and it would be in opposition to what we are attempting to do in those schools to transport additional youngsters into them.

Q. You said, I think, that you do not even contact the principals in those schools to ask them. A. That's right, because of the kinds of considerations we already have in staffing those schools and in the programs in those schools, it would be foolhardy to consider.

Q. How are those schools identified? A. They are identified primarily through—

Q. They are minority schools, are they not? A. Well, we set criteria for receiving additional staff and materials

and programs through monies provided by the federal government under various titles.

Q. Well, are those all the schools where there are federal assistance and not other schools? [1626] A. The schools that are marked by blue on the map are not all of the schools that receive federal assistance, but these—

Q. When you are making these decisions, do you have a list of the schools that receive federal assistance in front of you to which you do not refer Anglo children? A. I wouldn't have a list. I know the schools and programs that are in them and the kinds of programs that are there, and these would not enter into our thinking.

Q. They include some schools which are not receiving federal aid, don't they, the list of schools to which you do not refer Anglo children? A. I am not sure I know what you are saying.

Q. Well, do you ever refer Anglo children to any predominantly minority schools?

The Court: Haven't we been through this before? I mean, has't he said that they don't, do not, isn't that correct?

The Witness: Yes.

The Court: In other words, Montbello is the one we were discussing, and I think we concluded from the answers that you gave that there you elected to send the children to Palmer and to Teller, because you said even though there were openings in the schools west of Colorado Boulevard, because there you had special programs and you were seeking to reduce [1627] the student-teacher ratio?

The Witness: That's right.

The Court: And this is a policy that's been followed pretty much?

The Witness: We would have gone past the other predominantly minority schools because they are crowded.

The Court: The ones in Park Hill, you mean?

The Witness: Yes.

Q. Are all the Negro children in the minority schools in special classes, in special programs? A. No, all the youngsters in a school designated this way are in a special program.

Q. Could you add Anglos to those classes without limiting the level of attention that they would receive? A. This is not my area—it has not been the area in which I have dealt over these years. Certainly, through our department of instruction and elementary education we would not have added pupils to those schools that we had been attempting for quite some time to reduce the class size and the pupil-teacher ratio.

Q. Well, Anglo children with higher pupil-teacher ratios tend to get less attention, don't they? A. I guess I wouldn't agree with that.

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[1634] * * *

Cross-Examination by Mr. Brega:

Q. Dr. Stetzler, in discussing Exhibit 390 and the round blue tab schools in 390, you specifically mentioned Columbine and why Columbine was not considered in the busing [1635] of the people from the Smith-Stedman area. You didn't mention the other schools which are in blue: Gilpin, Whittier, Crofton, Ebert, Elmwood, Fairview and Elyria.

Would you tell the Court how those schools compared to Columbine in the programs that you have and the special education that are going on in those schools? A. Well,

these schools would have even more special programs than Columbine, particularly Mitchell, Gilpin, Ebert, Fairview. Elmwood, I believe, you mentioned, would have a greater number of programs probably over the years than Columbine.

Q. And would it be fair to say that the capacity of the schools below ten percent, but the schools are being utilized to this—to their fullest capacity according to the administration views of what should be done in these schools? A. Yes. The special programs many times take additional space, a team teaching kind of thing; where, if you're going to reduce the pupil-teacher contact to 15 to 1 or 12 to 1, you need another room. If you're going to have such a program as we have had, an orientation room where youngsters initially, when they come to the school, are assigned to that particular room for orientation and some kind of assessment as to where they would best fit in the school and—this takes space. This room is limited or has been [1636] limited to a few pupils at a time.

Q. In other words, under the special education programs going on at the blue tab schools, the pupil-teacher ratio of 30 to 1, which we have had testimony is a general thing, then drops down to some lower figure? A. Right.

Q. So it's what? 15 to 1? Or in that area generally? Or is there a set figure? A. Class size and pupil-teacher ratios are different. But, for parts of the day it was the attempt, particularly for reading and maybe arithmetic, to get the pupil-teacher contact down to 15 to 1 or lower.

Q. In other words, you would take a class, say of 30, but in this class you would divide it—you try to divide it into two groups of 15? A. That's right.

Q. So that each would have a teacher so there would be more concentration on them? A. Right.

Q. And this is one of the reasons that you didn't want —or the administration didn't want to bus these people into these blue tab areas? A. That's right.

Q. Now, considering these areas, they are all located in the old Denver. Are these the schools that are primarily [1637] classified as the poverty area under the federal program? A. Yes, called various things: target area, culturally deprived.

Q. And part of this program, I presume, is based then on the income of the students in the school? Supposedly there is some cutoff figure in that regard? A. Yes, one of the factors is the number of children receiving Aid to Dependent Children, yes.

Q. The number of children in the school? A. Right.

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[1641] * * *

Q. How many people do you have in your interviewing that actually are here in the Denver office of the administration? A. There are three of us that take care of the majority of interviewing in our offices.

Q. As I understand it, when you went on your program in 1964, you began to enlarge the area where you recruited teachers? A .Actually, we began to enlarge that particular kind of area a year or so later.

Q. And where did you go? Down South and Southwest? A. Yes.

Q. During this period of time did you write to teacher institutions to attempt to promote interest in [1642] teachers for minority schools? A. We did some of this and I believe that's a directive of the 1964 study that the superintendent send a letter to a rather large number of colleges and universities indicating our concern.

Q. Now, in your placement of the teachers in these elementary schools, do you have a special compensation for teachers who do extra work in the elementary school at these target areas or disadvantaged schools? A. Yes, and in some of them there are programs that go on either before or after school for which teachers are paid an hourly rate.

Q. And for—that's for teaching at extra times, before and after school? A. Yes.

Q. Do you have summer reading programs by these teachers in the elementary schools for these schools? A. The summer reading programs are for the total city and cover the total city so that a center will be placed or a number of centers will be placed. I believe we will have sixteen of those this summer. So that youngsters from all over the city may participate in those programs.

Q. Do you have an intercity tuition grant for elementary teachers in trying to promote their interest in these disadvantaged schools? [1643] A. The school district has from time to time initiated workshops with universities or colleges and also are instrumental in getting information to teachers about grants available generally through NBEA federal funds.

Q. And you would encourage the teachers to get themselves involved in this summer—in these summer programs? A. That's right.

Q. In the minority schools or the disadvantaged schools, do you employ teacher aids to help the elementary teachers? A. Yes.

Q. Tell the Court how that works and what the purpose of that is? A. Aides have been assigned to faculty for a number of reasons, primarily to relieve teachers of duties so that they could spend additional time at their teaching

duties. Aides have been employed in the elementary schools to do such things as supervision of playgrounds and run lunchrooms.

They have been employed to actually help teachers at a grade level, prepare themselves, put up bulletin boards and this kind of thing.

They have been employed to indeed supervise youngsters and help in some ways after they have received instructions from the teachers. This kind of thing is the point of hiring lay aides.

Q. Do you also employ and staff certain of those [1644] schools with additional superintendents or assistant superintendents or principals? A. We've only got one superintendent. In some of these schools we have assigned an assistant principal when the school would not normally qualify for an assistant principal.

Q. Well, give us an example or two of this? A. We have an assistant principal at Whittier School. We have an assistant principal at Gilpen School, and we have an assistant principal at Westwood School. The initial policy of assignment of assistant principals in the elementary school was to those schools that had a thousand pupils or more. And these schools do not at present have a thousand pupils or more.

Q. Now, in the disadvantaged elementary schools you mentioned the orientation room. What's the purpose of that? A. An orientation room is established in a school that has a higher factor of pupil mobility. So they may be receiving youngsters that have attended even that current year two or three schools. And the idea is to do just what probably introduce that youngster in a personal fashion the name bespeaks, to orient the youngster to the school; to the principal and the nurse and the custodian and other

people around the school so he feels comfortable. And also to assess his level of achievement at that point so [1645] that the orientation teacher has some idea of where this pupil may function best in that school. The youngster is assigned there from a few days to a few weeks. If achievement seems to be particularly low, the youngster will spend his time there with that teacher primarily, for instance, in reading or arithmetic, to bring that youngster as near grade level as possible, but certainly to bring that youngster to the level of some group within that grade level in the school when he is assigned and oriented to what's going on and has a better total orientation to his school situation.

[1646] Q. In other words, you attempt to put this child that comes into school in the best possible environment for him? A. That's right.

Q. Do you use team teaching in going about this process? A. This particular process is a teacher and they work, of course, in a team fashion with the other teachers in the building, discussing the assignment of the youngster, making sure the youngster is acquainted with that teacher.

Q. Do you also have special library augmentation for these type of schools and rooms? A. Yes, this room would have additional reading materials available to the teacher for instruction of these youngsters that have difficulty with reading.

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[1648] * * *

Q. Is there a great deal of competition to obtain minority teachers at this time? A. Extreme competition.

Q. And how about with regard to the Hispano or Spanish-American? A. This is, yes, more difficult. We have found fewer of these people to interview. Fewer of them percentagewise apparently are attending colleges and also not

only other school systems but business and industry are recruiting, spending much time, spending their recruiting efforts, so they indeed will also interview people with an educational background and employ them for their particular business.

Q. Is it the policy of the School Board at this time that if an applicant says he would not teach in a minority school that the administration would refuse to hire him or [1649] offer him a contract, or her? A. This would be just almost tantamount to no employment, right.

Mr. Brega: You may examine.

Redirect Examination by Mr. Jackson:

Q. Dr. Stetzler, have you personally interviewed all the teachers that you have assigned during your period in this office? A. No.

Q. Do you have Exhibit 424 in front of you? A. Yes.

Q. Directing your attention to the first paragraph of that exhibit, Dr. Stetzler, does that indicate the school year for which those figures are given? A. It indicates requesting transfer at the close of the '62-'63 school year and—

Q. And that was prior to the time that you assumed your present job? A. That's right.

Q. And that was prior to the time that you received your instructions from the administration regarding concentrations of minority teachers and the assignment of new teachers? A. That's right.

[1650] Q. On cross-examination by Mr. Brega, you indicated that you had assigned or that there were assigned assistant principals to, I believe, you mentioned, Whittier and Gilpin, although they did not fit the district arithmetic criteria of 1,000 or more students. What was the reason

for assigning those assistant principals? A. This is another attempt to give those schools where we have special programs a sufficient administrative staff to administer the programs and be as sure as we could that they were effective.

Q. You mentioned also under the current agreement between the Denver Classroom Teachers Association and the School District that you would have to have a reason for arbitrarily transferring a teacher without the teacher initiating the request, is that correct? A. That would be correct.

Q. Is there also within that agreement a grievance procedure if they disagree with your reason? A. Yes.

Q. And this is not unlike the grievance procedure in any other union or civil service? A. Where a person feels that we have not administered according to the agreement, they have a process for review, yes.

Q. One other item, Dr. Stetzler, on this question of space and how space availability is determined in any given [1651] school. Is each one of these schools in the same categroy? Does it have the same programs or the same considerations present? A. The receiving schools?

Q. Yes. A. Oh, look, this happens all the time, and none of these kinds of situations are precisely alike. We may be wanting to change an attendance area on December 8th and youngsters after that time go to a new school. The kinds of things that you must consider in each move often are—you do not need to sit down and discuss each item because I have an educational background, the principal does, and we are aware of the situation. Each time you do something like this, depending on the time of year and all kinds of things, it is just a different problem to solve.

Q. Is it ever possible to do it on a pure mathematical approach? A. That would make it very neat, and I would

have a few less gray hairs if it were. No, it is not a mathematical thing. We are dealing with little kids and their education, where they are going to school.

Mr. Jackson: I have nothing further.

* * * * *

[1652] * * *

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 426 was received in evidence.)

Q. Do you see there an indication of a number of Anglo students that might be transferred from Stedman-correction, the number of Negro students that might be transferred from Stedman to any given Anglo school, in the last paragraph and the last sentence? A. Just indicates that a total of ninety additional pupils—these are not identified as to race.

[1653] Q. Doesn't your memo suggest that only three to four students should be put in a particular class in an Anglo school of these students that are discussed in that memo? A. This suggests that as in relation to Mr. Kruder, who had been working with us on the Stedman transportation. You see, this is the result of a capacity study at Stedman School where at this—prior to this time it was determined maybe there are some ways of determining capacity other than the list of rooms times thirty. The principal and the staff at Stedman were given an opportunity then to develop some other kinds of criteria, and this is the result of their indication that additional transportation would be necessary if they were to meet that total number they felt they could accommodate at Stedman.

Q. Well, this indicates that small numbers of Negro students were being bused—small numbers of students from

Stedman were being bused to a large number of schools. A. That's right.

Q. Would you read the last sentence in your memo? A. "There are empty rooms at Stevens and Beech Court, but the use of the rooms for thirty pupils from Stedman would require a larger number of Stedman in classes at Beech Court and Stevens than the three or four which Mr. Kruder has suggested."

Q. Do you know why three or four only were suggested [1654] by Mr. Kruder? A. Mr. Kruder had worked with us very closely through the office of school-community relations and had indicated that upon initial assignment of minority students, as we began this kind of move, that they should be—I believe he called it—well, the exposure should be probably at the rate—initially at the rate of three or four pupils per classroom.

Q. Is that the policy of the District now with regard to that busing? A. No.

Q. How long was that policy? A. I am not sure that "policy" is the word to use. This was a suggestion from a person who dealt with these kinds of matters. This was his expertise. He suggested we begin this way.

Q. Are you aware of any cases in which more than four or five or six minority students were placed in a single classroom in an elementary school? A. Yes.

Q. Are there many such cases? A. You are speaking of presently?

Q. Yes. A. Yes, I am sure there are.

Q. Is it accurate to say that presently the minority students being bused from northeast Denver are being spread [1655] fairly thin? A. This would depend on grade level and numbers going to a school. I suppose this is right.

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[1657] • • •

LIDELL M. THOMAS, called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

The Court: Please take the witness chair and give us your name and address.

The Witness: Lidell M. Thomas, 1951 South Oneida.

Direct Examination by Mr. Jackson:

[1658] Q. Mr. Thomas, by whom are you employed? A. Denver Public Schools.

Q. And what is your present capacity? A. Presently the assistant executive director of secondary education.

Q. And how long have you been in that position? A. Since August of 1969.

Q. And how long have you been employed by the Denver Public Schools? A. Since January of 1948.

Q. And what was your first assignment with the schools? A. Teacher at South High School.

Q. And how long did you remain at South? A. I remained there as a teacher from 1948 until 1955, with a year and a half off, being recalled by the Marine Corps during the Korean war, so I was no longer a teacher after January, '55.

Q. What subjects were you teaching at South? A. Primarily science and chemistry, physics, mathematics.

Q. All right. Then, after your return from the Marines did you return to South High School? A. Yes, sir.

Q. And in what capacity? A. Well, again, I returned as a teacher. This was in 1952, and then in 1955 I became the assistant principal.

[1659] Q. And that was at South? A. Yes.

Q. And how long did you remain as assistant principal? A. 1966.

Q. And then what was your assignment? A. I then became the principal at Hill Junior High School.

Q. And how long did you remain at Hill? A. For only one year, and the following year I became the principal at South High School.

Q. And you were the principal at South until your appointment as assistant executive director of secondary education in August of 1969? A. Yes, sir.

Q. Mr. Thomas, would you describe generally for the Court your duties in that position? A. Well, primarily, this is—well, obviously, I am the assistant to the executive director, but our basic job is the assisting in the day-to-day operation of the secondary schools in the Denver Public Schools, liaison between central administration and the individual high school principal and junior high school principal. We deal with personnel to a degree, budgeting, the budget allotments to the various schools, some areas of curriculum in that we assist in the development of new curriculum and the attempt to make it [1660] citywide in the offerings.

Q. Just so that the record will be complete, Mr. Thomas, the secondary schools are the junior and senior high schools of the district, is that correct? A. Yes, sir.

Q. Now, within the area of curriculum, generally, do you have any specific responsibilities? A. Basically, in my position I am now involved with a—there are four groups of committees that are made up both of faculty and administrators from various districts within the city. They develop, review and request deletions to certain curricular offerings or additions. These are then forwarded

to the central instruction committee, of which I am the chairman. We review their requests and findings and then make a recommendation to the staff of the central administration that we would like to innovate a certain new curricular offering in a certain individual school or maybe in all of the junior high schools or senior high schools, so in this capacity I am involved indirectly in curriculum, yes.

Q. Is it possible to break down the general subject of curriculum into specific areas of instruction? A. Well, basically, I would say that the traditional or academic type subjects, English, social studies, math, science, would be —and this is more in recent years—this would be one facet. Another facet would be what we characterize now [1661] as the vocational arts, which primarily involve industrial arts, home economics and business education. Then there is another area of elective subject matter such as the—if you want to classify them, as the fine arts, language, art, music. Then there is physical education. That's kind of an entity of itself.

Q. Are there also some special programs within the general curriculum in various schools? A. Very much so, yes, both in the—I would say primarily more in the vocational arts area than would be in the academic or traditional, but there are special programs in all areas, yes.

Q. And are these the same in all schools, the special type programs? A. Not necessarily. There are many that are universal throughout the system, but there are also many very special specifics for certain individual schools.

[1662] Q. What is the philosophy behind this? A. Well, primarily you're dealing with young men, and your men especially in the secondary level, that the desire is to give them the best education that they have that is available to them, but we can have the tradtional reading, writing

and arithmetic, but we must also deal in the areas of their interest and their desires and their abilities, and as a result special programs have to be instituted in this area to assist them in completing the type of education that we think is the best for them.

Q. And this has been different at each of the secondary schools? A. Very much so, yes.

Q. Now, Mr. Thomas, how does a youngster approaching either junior high school or high school become aware of the various curriculum offerings available to him? A. Well, the normal procedure is that in the sixth grade or in the ninth grade, depending upon grade level, as they are planning to progress to the next level of education they are given a booklet, primarily a guidance booklet which gives them a listing of all the normal types of curricular offerings that are available to them, either in the junior high or senior high.

Q. Mr. Thomas, I hand you what have been marked for identification as Defendants' Exhibits HF and HG.

Mr. Jackson: Your Honor, I believe there is no [1663] objection to the authenticity of these documents.

Q. Would you please tell us what those documents are, Mr. Thomas? A. Yes, sir. The green one, HG, is a guidance handbook primarily designed for the use of junior high students and their parents. The red one is the similar type of a booklet, however, designed for senior high school students and parents.

Q. And are these the booklets currently being utilized by the District? A. Yes, they are.

Mr. Jackson: I would move the admission of those two exhibits, Your Honor.

Mr. Greiner: No objection.

The Court: They will be received.

(Whereupon, Defendants' Exhibits HF and HG were received in evidence.)

The Court: Now, these apply to all the junior high and high schools?

The Witness: Yes, sir.

The Court: And where there are variations, I take it those books will specify what they are?

The Witness: Individual variances—

The Court: Only at South or East or Manual?

The Witness: No, sir, these are the universal [1664] offerings. Exceptions are not found in the individual book.

The Court: But, the cultural courses that you mentioned, that is, language and science, mathematics—do you offer identically the same courses in each of the high schools and junior highs?

The Witness: Yes, sir. I would preface it with this statement—

The Court: These are electives?

The Witness: Not all of them are elective. Well, in order to reach certain graduation requirements, they must elect certain subjects within an offering. For example, they must have a certain number of semester hours of English, but the choice of what English courses that they will elect is a combination between the parent and the pupil, and the counseling teacher as a request for a recommendation of what level is the best for them. There are some roughly 200 offerings, for example, in the senior high school booklet, and of that 200 there

may be certain offerings that are not offered in school A but is offered in school B, and so on.

The Court: I am sorry. Go ahead.

Mr. Jackson: That's all right, Your Honor. Your Honor was anticipating my questions.

The Court: Well, I have been kind of curious about this.

Q. Is there any mention at all, Mr. Thomas within [1665] either of those guidance pamphlets of any limitations upon course offerings of any of the schools, be they junior high or senior high? A. In the booklet the only limitation, if I interpret your question, is that certain courses may not be offered every semester in each individual school because of lack of popularity, if you would like to call it that. In other words, if this is the question you're asking—felt the need for the number of students that request this certain specific course—that has some bearing on whether it will be offered or not.

Q. How is the specific curriculum or school determined each semester? A. Well, very early in the semester the counseling teachers work with the individual pupils and in a like token with the parent indicating the offerings which will be tentatively offered in this school. The pupils with their parents and the counseling teacher then elect the courses at which they feel they would like to take the following semester. These elections then are tabulated in each individual school and a grand total of those requesting each individual subject is listed. On the basis of that, then, the principal and his administrative staff develop a program, a schedule of classes which will take care of the requests of all the students. The administrator is under the problem of—if there aren't enough that elect

a specific class, then he must work to the extent [1666] to say that "We won't be able to offer this certain class this semester," and those children that did elect that class then would have to review with the counseling teacher and their parents and find a substitute class for them. This is an exception rather than the rule.

Q. But the same courses that are available to all junior high schools, the same courses are available to all senior high schools? A. Yes, sir.

Q. Within this academic framework that we have been discussing? A. Right.

The Court: I think we will call a halt now, Mr. Jackson, and we will reconvene at 2:00 p.m.

You will return then, please.

The Witness: Yes, sir.

(Whereupon the trial recessed at 12:28 p.m.)

[1667] AFTERNOON PROCEEDINGS

(The court reconvened at 2:04 o'clock p.m.; the witness Thomas resumed the witness stand.)

Direct Examination by Mr. Jackson (Continued):

Q. Mr. Thomas, just prior to the recess, we were discussing course selection and curriculum offerings in the various schools, and you indicated that after conferences with counselors and principals students made decisions as to those courses which they elected to take, primarily, I assume, the senior high level, is that correct? A. That's right.

Q. Now, on the elective courses where the student has an opportunity to select, what guidelines are established

in terms of whether all of the courses which are in the guidance handbook will be offered in a particular school? A. Primarily, as I stated, as the principal gets the tabbing as to the total number of students requesting a certain subject, he has to take into account if it is reaching a point as to whether it is economically feasible by way of having a teacher teach ten students in a class when you have the problem of overloading in other classes? The principal then makes a decision to evaluate whether it is proper to offer this course. If it is not, they then, the students in this smaller number would have to select a new course. Along with [1668] this, the principal has how many faculty he may have to operate his school, and in many cases in sequential courses he has to be careful to the extent that if there are 18, let's say, requesting to take a sequential course in one semester with the possibility of persons dropping out in the second semester of that sequential course, the numbers might go down, and yet he is obligated to offer this course because the boys and girls have begun a sequential course, and as a result this has some bearing on whether he decides to have the class offered that semester or not. Frequently, it has been expedient to offer a course every other semester. In other words, if children would like to take this one certain course but not sufficient in number to logically offer it this semester, he may hold off and offer it again next semester, hoping that he would have those boys and girls ask for it and then some additional, so that it would make it more economically logical to offer it. So frequently you will find many of them offered every other semester.

Q. Now, we are not talking, are we, about those courses we might classify as being the classical academic offering when we are talking about electives? A. Oh, no, in fact

the classical academic ones, because they are a required type course, the numbers are always sufficient to offer all of these courses.

[1669] Q. And are those the same in each of the schools throughout the system? A. Yes, sir.

Q. And within those academic areas, are all levels, and by that I mean the accelerated level as well as the regular level, taught in each of the schools? A. Yes, that's right.

Q. What happens, Mr. Thomas, if, for example, say, at Manual five to ten students elect to take Russian? A. Well, the principal has the prerogative to make his decision with his staff to either not offer the course or to offer it on the basis of seeking assistance from some other schools. For example, I am aware of the fact that in Manual there was a small number that did request this, and by working with central administration a teacher was transferred on a one-period basis and came from another high school, taught this one course, and then went back to his or her home high school, so to speak.

[1670] Q. Now, you say that you're aware this happened. This is continuing to happen this school year A. Yes.

Q. At Manual? A. Yes.

Q. And is it happening in more than one Russian course that we made reference to? A. Yes, I believe this same thing is being done in Italian. However, it's involved with another teacher from another high school, but the same procedure is involved.

Q. So then if the students elect courses which are at that time not being offered at a particular school, there are ways in which these courses can be made available to these students? A. Another alternative to this as has been done

in some instances, rather than have the teacher travel, we have the student travel. This is done in some cases also.

Q. Now, in the academic area from time to time people have referred to certain aspects of English, for example, as either accelerated, college level, advanced placement, referring to a higher achievement than normal. Does the Denver Public Schools system have complete control over the subject matter of those courses, the testing, the grading process? A. No, to this extent. Now, the individual teacher has the option to teach from the method by which they find [1671] the most success. However, in the ultimate, these accelerated programs are primarily designed to challenge and give the able and ambitious a better offering to educate themselves. However, the ultimate theoretically is so that in their senior year they may be taking college level courses, similar to the freshman year in college. As the result, one of the benefits derived from this is not only a better education or at least a more full education for the individual student, in many cases they are given credit upon entering college from the work that they had been doing in high school, and the method by which this is done —the college then prescribes what tests will be given at the end of the college level course in a senior year. As a result the test is written by college professors and also is scored by them.

So, the teacher in an individual school teaching it does not know the exact questions on the test. They just know the general area in which the child will be tested.

Q. And is this program presently operating in all senior high schools? A. Yes, it is.

Q. Mr. Thomas, you earlier distinguished within the curriculum field between the academic offerings, the vocational offerings and special offerings. Could you give us some

examples of the special offerings at the senior high school level? [1672] A. Unique within individual high schools, you mean?

Q. Yes. A. For example, East High School is presently involved in a course called Senior Seminar, which is quite a unique approach to the normal, traditional type education in which there is a great deal of travel involved, not only in this country but in Mexico. They are studying ecology, urban problems, history, archeology to the extent that a number of them will be or have been in Mexico. They will study the Indian problems in the Southwest. They will take a trip down the Green River following Powell's expedition in making studies there. They study a governmental system here in this state.

There are presently a group involved at the State Capitol, noting how the legislature operates. This is one that is quite a unique program.

West High School has a program in which they are sending boys and girls to the University of Denver and receiving college level courses and are getting high school credits but also would be receiving college credit if they continue to go to college.

Q. Excuse me. That's the same type of program you discussed earlier with the college level courses within the high school? A. No, these are completely divorced from high school. [1673] They actually attend on the campus at the University of Denver and are instructed by college personnel.

Q. Go ahead. Other than that, West High School does also have a tutorial program that might be a little innovative in that they have students coming in from the University of Colorado—coming down and tutor the individual

students right at the high school. Manual High School has quite an extensive list of special programs that are being offered uniquely there.

Q. With regard to Manual, why does it have a different type or a greater quantity of programs than the other schools? A. Well, I think it's basically from several standpoints: One, at the direction of the staff and the administration of Manual High School, seeing a felt need that the traditional type of program seemed not to be too relevant to the boys and girls, and as a result a fairly high dropout rate and poor attendance, which seemingly would be indicative if they were not offering the type of program that the boys and girls could relate with and see value in.

The community also had this similar feelings with the young boys and girls also. So, as a result, through this triangle, I would say, many innovative programs have been and are being produced now to improve the dropout rate—or to decrease it, I should say—to hope that they would retain the boys and girls, to give the boys and girls a better image and [1674] actually give the school a better image.

Q. Can you relate, please, some of those programs to us? A. Well, uniquely within this school that isn't offered at other high schools—I will go back to the D.U. program. It is similar to one at West High School. Manual has boys and girls going to arts and science programs, receiving both high school and college credits for programs taken on the campus. They also have a pre-med program going on in which actually the boys and girls are involved in programs at their own school in the traditional required type subjects and then spend three periods a day, for example, at Colorado General working with the professors, the doctors, nurses, technicians there, investigating possible vocations, professions, in the area of medicine.

A similar program is involved in their pre-law set of classes in which the same general procedure is taken. However they are involving themselves in the actions of observing court hearings, working with lawyers, understanding their type of work in which they're involved, to see if—well, that it may be a relevant thing that they want to become a lawyer. That's the way in which they would determine what the real operations of a lawyer is and whether they are capable of doing it and actually working right with them.

Additionally, they very recently—I'm sure you saw [1675] in the newspapers of the building trades program in which the boys involve themselves in building a house from start to finish, and to the extent that the students drew the plans, ordered the materials, and actually erected the building. They had a corporation in which there are presidents, vice-presidents, business managers, and so forth. In other words, understanding not only in the area of building it as the—as with the typical hammer and nails, but there are many other types of duties and jobs involved.

Presently they have just completed the sale of this house to a person in the area, and now they plan to build five houses under a similar type of program.

The cosmotology program is unique in that it's the only one in the Denver high schools where the young ladies are given a complete program in cosmotology along with their regular high school program, which, at the conclusion of it will allow the girls to not only have a high school diploma but can be certified by the State under the regulations and be certified as cosmotologists.

In talking with Mr. Ward he indicated that there is a possibility that four of them upon graduation are planning

to apply for a small business loan and go into business for themselves.

Let me just see if I have—There are some, I believe, forty-one young men and women attending part time the elementary [1676] schools in the immediate Manual vicinity, really finding out what the elementary education is about. They work as tutors. They work as teacher aids and assistants and work with the youngsters and with this desire, that this may be their area of emphasis, and this is what they might want to go on to.

In other words, Mr. Ward and his staff are trying to show avenues to these young men and women that possibly may have never been afforded them before. They don't understand what the possibilities are that exist for them, and he is trying to let me see that these possibilities are there.

[1677] Q. Do they also have a pre-engineering program? A. Yes, sir, they have pre-engineering, which is again pretty basically like his pre-med, his pre-law, in which they go and work right in engineering concerns on part-day basis and find out what draftsmen do, what engineers do in their job, and assist. I mean, this is not just observation, but they actually are assigned duties where they are capable to assist these people to get actual indoctrination and on-the-job training.

Q. You mentioned the pre-medical program at Colorado General. This is conducted under the auspices of the University of Colorado Medical Center, is it not? A. That's right.

Q. And as a part of this program, are the students engaged in research activities at the Medical Center? A. Yes, actually they have been given at their first approach into this program an overall view of the operation of the

Colorado Medical School, and then as they develop interest and within their area then they will somewhat specialize and work with individuals. They are planning this summer to take on a—well, actually it's a research project, in which they are going to study what—well, try to determine what causes adhesions, which as I understand it has been bothering the medical profession for years. And they are going to actually work with specialists at the C. U. Medical School and [1678] try to come up with some ideas about the cause. This would be, I would assume, pure medical research that they would be working with.

Q. Are you familiar with the filling station operated by the Manual students? A. Yes, sir, there was a rather large corporation that Mr. Ward has been working with, and they have received the use of a filling station in East Denver in which the young men are actually operating it under the guidance of instructors from Manual High School. They have their own board of directors. They must keep books, they must do the purchasing, and, obviously, they have to service the cars. As an offshoot of one of their industrial education programs, which is the automotive section, they have boys that have become quite proficient in their schooling at Manual in the area of automobile maintenance, and as a result they actually can operate under the supervision of the instructors on maintenance of automobiles as you would expect any filling station.

Q. Now, these various programs that you have been mentioning, are these programs in addition to the regular academic schedule of these students? A. Yes, sir.

Q. Has there been any transfer value, to your knowledge, of the experience of these students in the business world back to the classroom in terms of their ability to perform?

[1679] A. Yes, I think that basically they now see, if I get the import of your question, they see a relevancy now to why they have to learn mathematics, what the values of science are, or English, because now they have seen the need and now they have a great desire to go back to the classroom and now improve themselves in areas in which they have found themselves in need. For example—also, for example, in the building trades, there is a great deal of geometry that is actually applied in building a house. If you attacked geometry from the standpoint of the traditional book-learning approach, in many cases it is found that, "I am not too concerned about a right triangle," for example, or, how to determine the length of a hypotenuse, whereas in learning to develop the pitch on a roof, for example, there is a basic geometric method by which they develop it. And so, as they see how they need to have this on a house, it makes the geometry much more relevant and interest is therefore greatly increased.

Q. I would like to direct your attention to page 68 of Defendants' Exhibit D, which is in evidence, otherwise known as the Gilberts Plan for Planning Quality Education, and ask you if you would advise the Court what is shown there on page 68 with regard to Manual High School. A. Yes, this is specifically headed "Manual-College High School."

Q. Would you just generally tell us what it is? [1680] A. Our present superintendent, Dr. Gilberts, in trying to develop Manual as being an outstanding school in the city and a model, proposed that Manual would have some kind of a contact with some recognized institutes of higher learning here in the state and develop a program at which there was sharing between that institution and the high school, primarily to develop the attitude in the student

that college was for them, that they had the ability to work in this area if they had the approach from this standpoint, and basically I would say this was what Dr. Gilberts was desiring to develop.

Q. Are you aware of the present planning with regard to the operation of Manual along with Colorado State College? A. Yes, sir.

Q. Would you tell us about that program? A. About a year ago, approximately, a community—a group of persons from the community developed a committee or task force in relation to working with representatives from Colorado State College at Greeley and members of the administration both from Manual and from the central administration. Their plan was to develop a program in which both the teachers and the students at Manual would benefit, but also the faculty members from Colorado State College would benefit. The plan in essence is this, that Colorado State College has offered personnel from the School of Education to come to Manual High School to work with the students and with the teachers [1681] to improve their curricular offerings, to assist the teachers in better methods of instructing, and one of the real strong points, to contact the boys and girls and to get their understanding as to where the problems lie in Manual. For example, what they dislike and what they like about it.

Q. Is this in line with the recommendation of Dr. Gilberts in that exhibit? A. Yes, sir.

Q. In connection with that program, are college courses offered to the Manual students? A. They will be offered this present semester to the extent that they—a group will be sent actually to the campus at Greeley and work on campus in this special program. At the same time, Greeley has a need to participate in this program, too, because

they feel that possibly they could do a better job of educating prospective teachers to come to an entire city course type school that Manual is, so they hope they may learn from their experiences coming from the college down to the high school, actually teaching the boys and girls and working with them and working with the teachers to find that they may have better methods by which they may educate their pospective teachers and gain that.

Q. The cooperative program at the University of Denver whereby students are taking courses at the University of Denver will be continued also? [1682] A. Yes, it is.

The Court: Under this plan, will the student composition of Manual remain about the way it is now?

A. Yes.

Q. Ultimately, Mr. Thomas is that section of "Planning Quality Education" directed to establishing Manual as the college high school for the entire city? A. Yes.

Q. Now, with these special types of programs and offerings at Manual, what effect have these programs had on factors such as attendance or the dropout rate or the attitudes within the school community? A. Well, basically, I could give you the feeling as I have discussed in talking with Mr. Ward, the principal, and also with a group of people in relation to my capacity as being a representative to the CSC-Manual High School Project, so I do have contact with them, that the image of the school, I think, has been greatly enhanced. The community is extremely eager about the various programs which are going on or are proposed at Manual. Certainly, the attitudes of the students are greatly improved. They feel, I think, that they are getting a more relevant education. It does give them a feeling that they are accomplishing a great deal

at their school. I think it is reflected in the fact that the dropout rate has gone down at Manual in the last year and also the [1683] retention has gone up, which correlates with the dropout.

Q. What do you mean by the retention? Are you speaking about the dropouts who re-entered school? A. Right. In other words, may I go to this extent? This was one of the reasons that these various groups of persons desired to develop this program, because the dropout rate was high, and previously the students that did want to re-enter after being a dropout had the same program facing him when he did come back to school. So the only thing would be a definite change of attitude at which he would work harder to try to succeed and again maybe thinking the program wasn't very relevant it would be a little difficult for him to have this interest, and as a result, by changing the type of offering, it was the desire that they would decrease the dropout rate and also keep the boys and girls in the schools. And this seemingly for the time it has been operating is doing both of those things.

Q. What effect, if any, have these programs had upon the average daily attendance at Manual? A. It has gone up.

Q. Now, Mr. Thomas, are you aware of the percentage of Denver's high school graduates on the average who annually apply for admission into college? A. Yes.

Q. And what is that figure? [1684] A. Those are the graduating seniors in the high schools that at least indicate and make application to college, the city average, is 58 percent.

Q. Now, are you aware of the various percentages for the senior high schools in Denver for the graduates of last year? A. Yes, sir.

Q. And could you tell us, please, what those figures are? A. Estimated—

Mr. Greiner: Pardon me, Your Honor, but I would object unless the source of the information is identified, at least. He seems to be reading from handwritten notes.

The Court: You might lay a little foundation for this, if you will.

Q. All right, what figures are available to you in your capacity in secondary education regarding the seniors from Denver schools that go on to college? A. Well, basically, my—the source could be obtained from each individual senior high school by contacting them. However, we do make a study each year, and this information is passed to members in our pupil services portion of the central administration, and this is where I—

Q. This is a study that is made every year? A. Yes.

[1685] Q. And pupil services maintains this information? A. Yes.

Q. And they have it for years in the past? A. Yes.

Q. Did you go to pupil services to gather the information? A. Yes.

Q. I will ask again then if you can tell us what the percentages were from the various schools last year. A. Shall I just go down the—

Q. Yes. A. Abraham Lincoln was 48 percent. East High School, 59 percent. George Washington, 73 percent. John F. Kennedy, 74 percent. Manual High School, 58 percent. North High School, 41 percent. South High School, 51 percent. Thomas Jefferson, 78 percent, and West High School, 44 percent.

Q. Now, I believe in the letter which you just read, Mr. Thomas, that North, South and West all had a smaller percentage than did Manual, is that correct? A. North, South, West and Abraham Lincoln.

Q. Are you aware of the racial composition of those schools last year? A. Relatively, yes.

Q. And are they all predominantly Anglo? A. I would say with the exception possibly of West, [1686] it could be very close, Anglo-Hispano. I don't know the percentage exactly.

Q. And Manual was right at the citywide average, is that correct? A. That's right.

Q. Now, Mr. Thomas, you testified earlier that you were an assistant principal at South for a period of, I believe it was eleven years, is that correct? A. Yes, sir.

Q. And were principal at South for a period of two years? A. Yes.

Q. In view of your experience as principal and your present job, have you had an opportunity to compare the Manual curriculum and offerings with the other high schools in the city? A. Yes.

Q. And how does it compare? A. Well, specifically, I would say that it compares in every aspect with any other high school and has more to offer than the other high schools.

Q. Has more to offer? A. Yes.

Q. In terms of physical resources and monies, do you know whaether or not Manual received its share of those monies? [1687] A. Yes, specifically, the allotment of budgetary amounts are done on a per-pupil basis for educational equipment and materials, and this is universal throughout the city. In other words, the number of students you have, the proportional amount of money is granted.

Q. Now, directing your attention, Mr. Thomas, to the senior high schools, we have had previously admitted the guidance handbook for the junior high school. Is there as much freedom in the junior high school for elective courses as senior high school? A. No, not to a great degree. Primarily, the junior high schools work pretty much on a block system in that most of the subject matter is required. There is not the great degree of freedom for electives in the junior high as you do in the senior high.

[1688] Q. And by virtue of their being on the block system, the curriculum then I would assume would be almost identical in all of the junior high schools? A. Pretty much so, yes.

Q. Are you aware, Mr. Thomas, of any special programs in the junior high schools? In particular are you aware of any special programs at Cole Junior High School directed towards improving the achievement levels? A. Yes, I believe so. Cole Junior High in studying their problems in relationship to hoping to give the best education that they can for their boys and girls have studied their curricular offerings and the method by which they're doing them, and as a result have recently initiated many programs within the basic guidelines of the curricular offerings. For example, I mean, they are stressing reading as one of the achievement thrusts. Knowing that reading seems to have a very close relationship to success in high education. And, as a result, they are taking in many programs to improve or hoping to improve not only comprehension but speed in the level of reading in their students.

Q. Do you know what form this special program takes at Cole? A. Well, they have what they call a reading laboratory which is specifically designed to work with either the—they categorize it the late achiever or those that have above

[1689] average ability and want to proceed. And this laboratory is open eight periods a day where the students may come in and work directly with teachers who are assigned in there to improve their comprehension, their speed and so forth in the reading lab.

In addition, they have a reading improvement program in the ninth grade which involves a kit—a reading kit in which they have had a great deal of success. It is an active concept, English, in which they again hope to improve the reading level and ability of the students. They have special reading classes in the seventh grade for those that are having difficulties or have indicated reading problems in which they have much more of a tutorial type reading approach with reading specialists and regular English teachers to assist. In this area where they have—are reading below expectancy, they are attempting to offer this child a two period approach in reading; putting more emphasis on hoping this will improve their abilities in the area of reading.

Q. Do you have the special emphasis on any other academic areas? A. Yes, they have the emphasis in mathematics, again involving themselves with late achievers or slower ability levels where they are attempting to make the mathematics more relevant, approaching it from a remedial standpoint, to improve their ability in the area of mathematics.

[1690] Q. Do they also have it in the science area? A. They have it in the science area. They are working in the area of social studies also in trying to develop again for those that are late achievers. This has been in operation for about three years, and it's a laboratory type thing and has been successful enough that it is now initiated in six other junior high schools in the city with the success that they seem to have had.

They are also teaching a few specialized courses. For example, they do have Afro-American history classes in which—and a Hispano class—in which in most cases has been offered in the senior high level, and in most cases they have an urban study class in which it is uniquely the only one offered in the junior high. They are offered in the senior highs, but they are offering it in the junior highs now.

Q. Are you aware of any Cole students that are sent to Manual for courses? A. Yes, there were some that desired French, and they were sent to Manual just to take French and then returned to their own school for the rest of their courses.

Q. Does Cole in fact work closely with Manual in terms of preparing the students for the various programs available at Manual? A. Yes, I think there is very close articulation between the two schools. I think this could be for several [1691] reasons. I suppose that—well, the community is served by both these schools, so their needs are the same. The administration and the staff in the schools have the same attitudes and philosophy so that they work very closely together. There is a great deal of articulation with the fact, I would say, the principal, Mr. Morrison, at Cole is attempting to innovate programs which might even speed up these offerings at Manual because some of them will be filtered down into the junior high school to prepare them a little bit sooner before they get into Manual. Very close articulation.

Q. Are you aware of the effects of these special programs at Cole? A. Yes. I would say this, that again in speaking with Mr. Morrison who is the principal at Cole, he feels that the attitude of the community has improved greatly in relationship to their feelings of the value of Cole Junior High. The faculty has greatly improved the attitude and

desire to work. In fact, he has indicated to me that they volunteer now to bring new programs to him, asking his okay to initiate these which I think indicates their interest. He feels there will be less turnover at Cole this year, teacher request to go to some other school. Students have a much better attitude, happier. They think that the school is a part of their community, and they have a high respect for it. The values specifically that you can indicate—Truancy is 15 percent of [1692] what it was last year. This year it's 15 percent of what it was last year. And as attendance is up 5.4 percent over last year. So, it would assume that the school must be meeting their needs to have this success.

Q. Now, you have mentioned a Mr. Morrison at Cole and a Mr. Ward at Manual. You have identified these individuals as the principals of those schools. Is that correct? A. Yes, sir.

Q. Mr. Ward and Mr. Morrison are both Negro, are they not? A. That's right.

Q. Now, Mr. Thomas, you have indicated that although the academic offerings are the same at each and every senior high school, that the special programs do vary. Is there any way in which a student who feels that a particular course of instruction is the best for him can transfer between schools? A. Yes, this can be done on the basis if it is thought to be a bona fide reason and there is a real desire to obtain a certain type of course from one school to another, it can be done mutually between the principals of the two schools involved with pupil personnel in the central administration.

Q. As a matter of fact, to your knowledge, have students transferred into Manual for this very reason? A. Yes. This fall, I believe, the number was 22 young men and

women that would normally have attended East High [1693] School, did attend Manual on the basis strictly because of class offering or subject offering.

Mr. Jackson: No further questions.

Cross-Examination by Mr. Greiner:

Q. Mr. Thomas, currently there are what, about 1600 students at Manual? A. I would say it's closer to about—a little less than 1500, I believe.

Q. In 1968 there were 1578 students there? A. Approximately. I have no figures.

Q. These pre-med, pre-law, pre-engineering programs which you have described, when were these instituted? A. This last year.

Q. What do you mean by this last year? This year? A. Yes, September.

Q. The 1970 school year? A. That's right.

Q. How many students at Manual are participating in the pre-med program? A. I believe that it is in the forties, I believe.

Q. Is that a program designed for twelfth graders, eleventh graders, tenth graders? A. Primarily twelfth graders.

Q. And there are forty in the pre-med program? [1694] A. Approximately. I can't give you the specifics.

Q. How many in the pre-law program? A. I can't give you the exact numbers.

Q. Can you give us a ballpark figure? A. Twenty-five.

Q. And how many in the pre-engineering program? A. Approximately the same number, twenty-five to thirty.

Q. Now, how are these children selected, Mr. Thomas? A. Purely on their own interest. This was a specific cri-

terion; that ability had nothing to do with it. If they thought they could do it and they were interested in this, this was the method by which they applied.

Q. So you have some very low-achieving children in these courses, is that right? A. The only thing that I can give you basically is that I heard from Mr. Ward that there were fifteen involved in the D.U. program, and fourteen received A's and one received a B. What their levels were, I have no idea. College level course. I mean, they received A's in the course by the professors at D.U. There was no selectivity by way of—that you must have a certain IQ, for example, to participate in this program.

Q. Now, for example, for somebody who was interested in a pre-med program, Mr. Thomas, and this is a twelfth grader now that we're talking about, I assume, do you know what sort of—And it is also true, is it not, that for college entrance [1695] that certain courses are required to be taken in high school, is that right? A. That's right.

Q. And, for example, those would include science courses? Is that true? A. Specifically to be entered into a normal med school, yes, but not to get into arts and sciences colleges, necessarily.

Q. Well, with respect, for example, to somebody who wanted to enter into a liberal arts program, having a credit at college, he would have to have a certain amount for English in high school, is that right? A. Not necessarily.

Q. A certain level of English? A. All of them require English.

Q. And mathematics? A. Mathematics.

Q. And science? A. Not necessarily all. Most of them, I would say, require—

Q. Yes. A. —in the basic four areas, yes.

Q. If a child had only basic science and there is such courses, is there not, in high school, basic science? A. Not specifically by that term.

[1696] Q. It's a very low level science? A. Yes.

Q. That wouldn't be an exemption for college entrance? A. It would not necessarily rule him out of college. It doesn't necessarily have to be a laboratory subject to go to arts and science, a specific school. If you're speaking of college schools, or you're speaking of a pre-med program—in other words, specifically designed out of the arts and science—yes, they would require a minimum of a year of chemistry and a year of physics. This is a normal minimum.

Q. Now, of the children in the pre-med program at Manual, do you know how many of these children have completed those requirements? A. May I enter this—that—

Q. Can you answer my question first? A. No.

Q. You don't know. All right. Go ahead. A. It is not the desire that if they have 25 going to the pre-med program at Manual that they're all going to become doctors. They are working in the area of nursing, in—working in the area of a possible feeling that if they do want to become a doctor—and I can specifically give you an example—one girl was investigating the nursing situation and voluntarliy said she now wants to become an obstetrician. Whether she has the [1697] ability, I cannot say.

Q. Now, what about the pre-law program? Do all the children in the pre-law program plan on being lawyers? A. I have no idea. That is an area of their interest. This is what they want to investigate. This is one of the things this plan is desiring to do, is actually let them see what these programs are, and the typical approach is, "I want

to be a doctor. In my senior year." It is hoped to make the subject matter within the school relevant because they see that they have opportunities in these areas.

Q. Well, Mr. Thomas, these are twelfth graders. Isn't it a little late to start stimulating those children's interest in those programs? A. You're asking me an opinion?

Q. Yes. A. I would say it's never too late. I can give you a typical example of college seniors that haven't decided yet. The sooner the better. I would grant you I would much rather have them identify the situation at the tenth grade than as seniors. Better than that, possibly ninth or eighth grade, if they are mature enough and have a broad enough background, which is one of the reason in which Cole is trying to articulate with Manual so that they may identify in the eighth or [1698] ninth grade.

Q. Now, you mentioned the relevancy or curriculum at such schools as Manual and Cole. Do you recall that? A. Yes.

Q. What are the factors that make a given course relevant? Can you list them for us? A. Well, I would assume that the term basically would mean that the individual that is going to take these courses would see that it fits—would see that it fills the needs of that person. If I can see a reason for taking English, I have to become proficient in English to participate in my future, then it becomes relevant if I study it. To contrast it, maybe this is what I can hope to say. Many young men and women do not see the need for becoming proficient in mathematics. I can look up in a table and I can find out how much it costs and so on. The desire of making it relevant is to have them have experiences in which they see that they may not progress or attain the level that they would like to have without having this basic information. Then it

becomes relevant because they say that I can't be a doctor if I have not had chemistry. Therefore, chemistry has more meaning for me. That's relevancy.

Q. Now, there are other inputs, are there not, Mr. Thomas, other than just relevancy as to a child's ability? A. Absolutely.

[1699] Q. To understand a given course? A. That's right.

Q. Or a given subject? A. Uh-huh.

Q. And as I understand your prior testimony one of the most important aspects of the child's ability to achieve is his reading abilities, is it not? A. I believe that is recognized, yes.

Q. And I take it in—that in tailoring the curriculi at such schools as Manual and Cole, that you take into account the average achievement levels that are currently present in those schools, do you not? A. Yes.

Q. For example, it would be silly, wouldn't it to have at Manual High School nothing but college-bound courses? A. Very much so.

Q. Because most of the children entering Manual could never get into college, could they, many times? A. Did you say most?

Q. That's right. A. Well, I would say that a large number of them wouldn't. Basically last year 58 percent applied, I would say a large number obviously could not be accepted in college.

Q. And one of the problems that those children have, isn't it, Mr. Thomas, is that by the time they enter the ninth [1700] grade at Manual they may only be reading at the seventh grade level? A. Many of them, yes.

Q. And that is the same problem you have at Cole, isn't it? By the time they enter Cole they may be reading

two levels—two grade levels behind where they're supposed to be, is that right? A. The same in every junior and senior high school in Denver.

Q. Oh, is it in terms of proportion, Mr. Thomas? A. Not in proportion, but there are students.

Q. There are more of them in the minority schools, are there not? A. I will agree with that, yes.

Q. Now, you mentioned the dropout rate at Manual. Do you know what it is today; the cumulative dropout rate? A. By definition of "cumulative" what do you mean?

Q. Well, we have an exhibit— As opposed to the annual dropout rate. A. By that, if you mean that if a child drops and then re-enters and drops he is counted as a double dropout—

Q. You've got me. I don't know. But, do you understand what cumulative is? A. If that's what you're asking me, yes, I do understand that.

[1701] Q. Do you know what that rate is at Manual? A. No, I don't.

Q. It's over 50 percent, isn't it? A. I believe it is.

Q. Even today? A. (No answer)

Q. Now, you mentioned the contents of courses offered at various—Let's talk first of the senior high school. Now, as I understand it in the general subject matter of a subject such as English, there are at a particular grade level, there are all sorts and types of English courses which may be offered, is that correct? A. That is right.

Q. Some may be remedial type courses? A. Yes.

Q. Some may be an average English course? Others may get into compositions, is that correct? A. Yes.

Q. And others may get into advanced literature? A. Yes.

Q. So that the contents of these various offerings vary considerably from course to course? A. Yes.

Q. Within the general subject matter of English, is that right? [1702] A. Yes.

Q. Now, a child in order to graduate or to be graduated from Manual—what can you tell us about the level of difficulty—the minimum level of difficulty of the courses which that child must take in order to qualify for graduation? For example, I take it that the child need never have taken an advanced course in any subject, is that right? A. Accelerated, you mean?

Q. Right. A. That's true.

Q. Now, is it also true that you break up these courses, Mr. Thomas? Do you have a regular course and then you have what's called a modified course at the senior high school level, in academic subjects? A. In some areas of English—may I point out for example in the regular types of English, tenth grade, eleventh and twelfth grade, then they have to have them graded, regular and modified and specific courses such as contemporary literature—there's a regular and modified; American literature in most instances, it's just a regular course. There is no modified in that. So, specifically, we do have some subjects in the overall area of English in which there are graduations of ability within a certain type of subject in English.

Q. Now, that's also true in mathematics? A. Yes, it is.

[1703] The Court: Would this modified be a remedial course?

The Witness: Yes.

Q. It is for the slow learners, is it not? A. That's right.

Q. People who are behind? A. Yes.

Q. Do you have those courses in mathematics? A. Yes.

Q. Do you have them in science? A. To a slight degree. Primarily, in science, rather than offering as English-10th grade, English-regular 10th grade, meaning English modified, a typical science course would be regular biology-special materials, which is primarily a laboratory approach, a little bit less depth in the area of biology, a little slower, which would be similar to a modified course in biology.

Q. All right, now, we have covered the three R's. What other areas of courses, Mr. Thomas, that we haven't mentioned yet are broken down into regular, modified and accelerated? A. Social studies.

Q. Social studies? A. Yes.

Q. Now, I take it, in order to be graduated from Manual [1704] a senior must have taken, for example, a certain amount of social studies, is that right? A. This is right.

Q. Can that entire requirement have been fulfilled by taking nothing but modified social studies courses? A. Yes, it could.

Q. Is that also true with the mathematics requirement? A. Yes.

Q. Is that also true with respect to the English requirement? A. Yes.

Q. The science requirement? A. Yes.

Q. So, a child who has graduated from Manual may never have even been in a regular course and is still qualified to graduate? A. No different than any other high school. They all offer the same.

Q. Now, is it also true, Mr. Thomas, that at the predominantly Anglo high schools, for example, at John F. Kennedy— A. Yes.

Q. —Thomas Jefferson, if one examined the master schedules at those schools and compared them with Manual High School— [1705] A. Yes.

Q. —would one expect to find, for example, more sections of college calculus than one would find at Manual? A. If I could read your question, you are—the college calculus would be a wrong one. Probably only one in any school. But if I get the import of your question, you would probably find more accelerated courses at John F. Kennedy and Thomas Jefferson than you would at Manual or North.

Q. This in turn is a reflection on the demand for such courses? It varies from school to school, does it not? A. That is right.

Q. And it is also a reflection of the fact that there may be fewer children who could qualify for such courses in the minority schools, is that not so? A. Would you state that again, please?

Q. Well, for example, what does it take to get into college calculus? A. Well, to have gone through the entire accelerated program from ninth grade on. You must have had the equivalent of two full years of algebra, a year of geometry and a semester of trigonometry, which you can't get in an ordinary four years unless you do accelerate.

Q. All right, and what about getting into a college level physics class? Are they offered in some of the high [1706] schools? A. Not offered in any of the high schools.

Q. Is physics offered in any of the high schools? A. Yes.

Q. What does it take to get into that? A. A year of geometry and a year of algebra.

Q. Is there any sort of advanced biology? A. Yes.

Q. What are the prerequisites? A. To have had the

basic year of biology, the regular biology. In order to take advanced, you must have had the basic biology course.

Q. I think you understand the import of my questions, and it is, is it fair to say that a school such as Manual, just in terms of numbers, are there fewer children at Manual who qualify for these advanced programs? A. Yes, I would say this is true.

Q. Now, Exhibits HG and HF are curricula descriptions. A. Oh—

Q. Yes. A. Yes.

Q. Is that printed each year? A. No.

Q. How often is that printed? A. Oh, I would venture to say maybe every three or [1707] four years.

Q. And what edition are we looking at there? A. I believe it is the 1967, May of '67.

Q. Do you happen to know, Mr. Thomas, how many copies of those are printed up at each printing? A. 40,000? A. Yes.

Q. And are they then distributed to every child in the school district? A. Well, every junior high school student gets one and every senior high school. Not—and they only get them one time. In other words, a tenth grader gets this. It is the desire that this follows him for the three years that he is in high school.

Q. As I understand it, those exhibits are not broken down by school or categorized by school, are they? A. No.

Q. These are the general offerings that may or may not be actually available, but at least they are tentatively offered at all the schools in the district? A. Yes.

Q. And if we wanted to find out what the elective courses were at various schools, what sort of—we wouldn't find the answer in Exhibits HG or HF? [1708] A. No, the actual class offerings would then be found in master schedules.

Q. Now, you mentioned the question of budget allotments. Can you describe for us how it is determined, for example, how much money a given senior high school receives? A. I will try. It is pretty complicated. In fact, we are constantly trying to understand it ourselves. Basically, it is done on the basis of pupil enrollment. So much money is alloted for every child that attends that school.

Q. How much, do you happen to know, for this last school year? A. I believe $2.75 per pupil for books and I believe $4 per pupil for supplies, and this is I believe—

Q. What about for such things as teachers' salaries? A. Well, the school, individual school, is granted a number of teachers that they need, according to primarily, one, the number of pupils they have to instruct, but other extenuating things. If they have special programs, they are given extra personnel there. In other words, they don't have "X" number of dollars assigned to each school for teacher salaries, if this is what you are asking.

Q. Now, as I understand it, there tends to be more less-experienced teachers at these minority schools? A. You said more less-experienced?

[1709] Q. Yes. A. I would say yes.

Q. And those teachers are compensated at a lower rate of pay than are the more experienced teachers of the district, is that correct? A. Yes.

Q. There is a salary scale, is there not? A. This is true.

Q. Based on seniority? A. Yes.

* * * * *

[1711] * * *

Q. All right, you mentioned the Russian and Italian programs at Manual. A. Yes.

Q. How long have they been going on? A. Two years now. At least, this felt need was there. I cannot tell you whether there was Russian offered prior to that time or not.

Q. Are you familiar with the PAR tests? A. Yes.

Q. What is the PAR test? A. It is a test by name, "Proficiency and Review Test," which is a test that has been described by an outside agency, in which it is used as a basis of, one, of meeting—it must be passed in order to meet one of the graduation requirements for the Denver Public Schools, for a diploma.

Q. Could you tell us what subjects are tested in the PAR test? A. Basically, English and mathematics.

Q. Does English include reading ability? A. Yes.

[1712] Q. Vocabulary? A. Yes.

Q. Understanding and comprehension? A. Yes.

Q. Now, do you have any knowledge, Mr. Thomas, of the level of achievement that is reflected in that test? A. Not specifically. I know that it is a basic—it is the lowest level at which they decide to—if they fail it, then sufficient background isn't there to merit the diploma. This is the reason for the test. But, as to levels, I have no idea.

Q. Well, for example, in order to pass the PAR test, a student would have to be reading at least the sixth grade level, isn't that correct? A. It would be an assumption. There again, I—as being a principal, we gave the test. We let the experts that designed it and score it make the level. I don't know. I don't know whether it would be seventh grade or sixth grade. I would have no idea.

Q. But you know it isn't tenth or eleventh or twelfth grade, don't you? A. That is granted, yes.

Q. It is true, is it not, that there are courses offered in certain of the minority senior high schools to help prepare to take this test? [1713] A. I would have to ask you to go

a little farther—if you are inferring a review course in the PAR?

Q. Yes. A. It is offered in every high school.

Q. Aren't there many more sections offered at Manual, for example, than there are at TJ? A. I haven't the slightest idea.

Q. Do you think that might be a possibility, Mr. Thomas? A. It is a possibility.

Q. Now, you said that 58 percent of the students graduated from Manual applied for college, is that right? A. Yes.

Q. How many actually got into college, Mr. Thomas? A. I haven't any idea. This was last year's figure.

Q. So you don't try to follow up on that? A. I don't know.

Q. And do you have any idea of those who actually get into college how many are able to stay in college? A. Specifically Manual in relation to any other school?

Q. Yes. A. No. I might add this. It may have some relevance to your questioning. This is also one of the special programs unique with Manual. They have a full-time counselor from the [1714] Manual High School on the Colorado University campus to do nothing but help counsel their students that have now gone on to Boulder. The prime need, in my estimation and many people's estimation, is that counseling that is given in college is not too strong. I mean, they aren't followed as closely as they are in high school, and as a result this has been developed to work with Manual students at Colorado University to assist them in getting started and staying on the ball. This is also a portion of the CSC program. They will also have this followup counseling if they attend Greeley.

The Court: Are you saying this is a Denver Public Schools employee?

The Witness: Yes, it is. It is a college counselor from Manual High School that is doing work on the Boulder campus to do followup work to assist working with those students.

* * * * * *

[1742] *Redirect Examination by Mr. Jackson:*

Q. Mr. Thomas, Mr. Greiner asked you if a student could progress through Manual taking only remedial courses or modified courses through math, science and social studies and still graduate. Could a student do the same thing at George Washington? A. Yes, sir.

Q. In fact, could a student do that at any of the high schools in Denver? A. Any of the nine high schools.

Q. I believe you have already covered this, but I want to make sure. Did you indicate that the programs at Manual and Cole are in fact pilot programs? A. Yes.

Q. Of recent origin? A. Yes.

Q. And hopefully would be implemented throughout the system if they prove successful? A. Yes.

Q. At the present time, can you tell us what the effect of these special programs at Manual and Cole have had on the motivation of the children? [1743] A. Well, the basis of my conversations with the administration has been it has been very good. The motivation of the students has increased. They relate to the school much more readily. Their attendance is better. As I believe indicated in one case, their estimate of themselves is better.

Q. In fact, this is directed more at giving the opportunity for equal educational opportunity to these students, is it not? A. Yes.

Q. Now, this counseling program which goes on at the University of Colorado, this is in no sense a tuitorial system, is it? A. Not whatsoever.

Q. This is not to get into the academic area, to assist in the achievement in that regard? A. No.

Q. Is this the same type of counseling that we might expect some children to receive at home through parents? A. Yes.

Q. From their own peers? A. Yes.

Q. Is there, Mr. Thomas, a program directed or one that we might classify as a vocational program at all of the senior high schools in Denver? [1744] A. Very definitely. Primarily in four basic areas, industrial arts, home economics, business education and an area called distributive education, which is primarily working in the area of salesmanship, office, working in clerical type work, and this is offered in all schools.

Q. Those are in all schools? A. Yes.

Mr. Jackson: Nothing further.

Recross-Examination by Mr. Greiner:

Q. Mr. Thomas, you said that there was a larger proportion of the modified or remedial type academic sources at the minority schools than at the predominantly Anglo and secondary schools, is that right? A. Well, I could categorize it, let's say, high school, there is really only one minority high school as such, 50 per cent or more, but I would assume where they had a high minority instance, yes, this is true.

Q. And do you think it more or less likely, Mr. Thomas, that a given elective course of an advanced nature might not have sufficient demand at Manual than, say, at GW? A. Possibility, yes.

Q. Do you think the unavailability of those advanced courses coupled with the larger proportion of remedial courses has any effect on the image of the school in the [1745] A. I don't believe so, at this time, no. I believe that you will find that at Manual their image of the school is as high as any other school in the system.

Q. You didn't hear Senator Brown's testimony, is that right? A. No, I didn't.

Q. About the black community's attitude toward Manual? A. No.

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[1748] * * *

Mr. Ris: Dr. Armstrong, please.

CHARLES ARMSTRONG, a witness called by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ris:

The Court: Give us your name and address, please.

The Witness: Charles Armstrong, 1190 South Race, Denver.

By Mr. Ris:

Q. What is your occupation? A. I work for the Denver Public Schools, Assistant Superintendent for Planning and Engineering.

Q. Dr. Armstrong, I hand you a document that's been marked Defendants' Exhibit HC. Is that a statement of your educational background and your job assignments? A. Yes, it is.

Q. Is that correct? A. Yes.

Q. I hand you Exhibit HD, and what is that? A. That's a job description of the job that I am now employed in.

[1749] Mr. Ris: We offer in eivdence HC and HD.

Mr. Greiner: May I inquire of counsel, Your Honor, as to whether Dr. Armstrong is being offered as an expert witness?

Mr. Ris: Yes.

The Court: I assume he is.

Mr. Greiner: In what areas? Education in general?

Mr. Ris: Education in general and in the administrative end of it.

Mr. Greiner: Your Honor, we have not been furnished with these previously. Might we take a few minutes now to look them over?

The Court: Surely.

Mr. Ris: They have copies now.

The Court: Well, we can receive these exhibits, I suppose.

Mr. Greiner: Yes, we have no objection to their receipt, Your Honor.

The Court: This is just for the purpose of saving time.

We will receive HC and HD.

(Whereupon, Defendants' Exhibits HC and HD were received in evidence.)

Mr. Greiner: Well, may it please the Court, as I understand it this witness functions in the areas of engineering [1750] services, the planning of new

school facilities, the administrative supervision of additions to and remodeling of facilities, planning for new sites and additions to existing sites, establishment of pupil attendance areas. As I understood counsel's comments, he was being offered in a much broader area than those which I have just described.

Mr. Ris: Well, he has the qualifications. Whether we will ever get to ask him anything beyond that, I don't know.

Mr. Greiner: Well, we will simply cross that bridge, I guess, when we come to it.

The Court: Right.

Q. Dr. Armstrong, how long have you been employed by the School District No. 1, Denver, Colorado? A. Since 1935.

Q. How long have you been at an administrative level? A. Since 1946.

Q. At which time you were in the department of instruction, is that correct? A. Yes.

Q. And how long have you been in the planning area? A. Since 1948.

Q. And is the planning area as you have described it or as we will talk about it here generally set forth in your job description Exhibit HD? [1751] A. Yes, it is. Now, it was a little broader than that earlier.

Q. And it's now narrower by reason of the organization of the administrative staff? A. That's right.

Q. What year did that take place? A. Actually it was just this last year.

Q. Now, in planning what are there—are there two basic phases in planning? A. Yes, there are. One is to look at

the information that is available now and to analyze it and to make decisions as to what ought to be done; and then to project data for the future, to see what may happen in the future.

Q. Look into the crystal ball? A. And we are from time to time making plans from one to ten years ahead. It's obvious that there are so many variables that enter into these decisions that it's almost impossible to plan ten years ahead or even three years ahead. Nobody can tell what is going to happen to the birth rate or the mobility of population. So, it's difficult.

Q. After you made a planning study and projected ahead various figures, at the end of the projected period have you taken a look at the actualities? A. Yes, we make continuing studies of what actually is taking place after we have made the projections. It's]1752] necessary to do it on a short-term basis.

Q. Have your projections always been accurate? A. No, they have not.

Q. Now, in doing this planning, is this a one-man job? A. No, it requires a team to do this.

Q. Is the administration under the Superintendent broken down into a few small categories or a few small in number, I should say, categories? A. Yes, really departments.

Q. And what are those basic departments? A. The basic ones, of course, planning and engineering would be one; another would be education; another would be business administration or business services; another is the—the present name is planning and budgeting. Those are the major ones, I believe. Oh, there is personnel is the other one.

Q. And in projecting ahead in the years to come, do all of these various categories have to be taken into consideration? A. Yes, all have a part to play.

Q. And you draw on information furnished by the other assistant superintendents who head up the other departments? A. Yes, that's correct.

Q. Do you actually work with those other superintendents [1753] and are your planning projections done on a cooperative basis with them? A. Yes, very closely as among all the departments.

Q. Do you have to consider changes in the educational field? A. Yes, this is extremely important.

Q. Are there changes? A. Yes, always. There is very, very rapid change taking place in instruction and education all the time.

Q. Has it ever been static in the years you have been in the planning, since 1948? A. Not that I know.

Q. Now, with respect to the planning on buildings, site acquisitions and so forth, let's call it just generally housing of pupils and staff. Has this—has that been a static thing since the year 1948 or has there—has this been a fluid type of thing? A. It's been rapidly—a rapidly changing thing.

Q. I would like to discuss with you very briefly the matter of site acquisition, site planning, if you will, Doctor, and in determining the possible location of future buildings, for example, or locations where additions are going to be built to existing buildings, are there various factors or elements that are considered by you and the other superintendents and assistant superintendents who are going to work [1754] with you on such planning? A. Yes, there are many factors. Of course, the major two are how many children need to be accommodated, and I think we need to amplify that a little bit, and then what kind of program is going to be housed in the particular school that will be constructed. This thing of how many children is the one where there is some difficulty in assessing what these vari-

ables are going to do. For example, birth rates in the city have a very marked effect on how many children will be accommodated. The mobility of population within the city has a very important effect, and both of these variables are difficult to assess.

Q. By mobility do you mean people coming in from outside as well as people moving from one part of the city to the other? A. Yes, in Denver from outside the city completely, and people moving out of Denver, and there are people moving about within the city itself. All of these are variables that we have to try to assess.

Q. Have there been variables in the birth rate since 1948—since World War II particularly? A. Yes, that's correct, both the birth and mortality rates. They work together, of course.

Q. And you stated another important element was what you were building for. Can you amplify that, please? [1755] A. Yes, the purpose of a building, of course, is to accommodate educational programs, and so we work very closely with the Division of Education to determine what kinds of programs they will be wanting to accommodate so far as they know now and also try to work with them to see what may be coming in the future so far as building needs are concerned in terms of spaces, the kind of spaces, and the amount of space.

Q. Are there matters pertaining to residence construction and annexation? A. Yes, one of the variables that has operated very markedly over the last—well, ten years particularly, has been that of annexation and residence development within the older areas of the city. In the last ten years—well, since 1960—the size of Denver has increased from approximately 75 square miles to 100. Now, in other words, a twenty-five square mile increase. Many

of these new areas that come into Denver are undeveloped. In other words, they are vacant land. No children. And so as time goes on and the residences are constructed there, children, for example—families move in and we need to accommodate children in those areas.

It's difficult to determine what the rate of development will be for two or three reasons; one is, we do not know what the zoning will be when the thing is finally [1756] developed. We don't know what the financial situation is so far as the developers are concerned, and so it's difficult to know or to assess what numbers of children will be coming in from these annexations. There have been annexations come in that have been almost fully developed so that is relatively easy to count those children in those areas.

Q. What about obsolescence of old buildings as a factor? A. In the older areas of the city or the existing buildings of the city of course become obsolete, not so much from a physical standpoint but from the standpoint of education obsolescence. Now, our maintenance program has operated effectively over the years and we feel that the buildings have been maintained in good physical condition, but as we mentioned before, the educational program is changing and it is important that we try to modify spaces or add spaces that will accommodate the program more effectively.

Q. Dr. Armstrong, what about the availability of capital funds? Is that one of the controlling factors that we have to face? A. In other words, it's easy enough to say that we need so many buildings or so many classrooms, but unless we have money to construct them, there is no real value in knowing what the needs are. We continue to project these even though money is not in sight.

[1757] Q. Can you tell me at the moment what the

bonded indebtedness of the district is approximately? A. Oh, I can't exactly. I know that the 1948 bond issue has been paid off. The 1952 bond issue has been paid off, and the 1956 bond issue will be paid off in 1975.

Q. Dr. Armstrong, I hand you a little booklet that has been marked as Defendants' Exhibit HK. Do you know what that is? A. Yes, the annual publication from the Department of Information and Services of Denver Public Schools.

Q. A 1969 edition of that? A. Yes.

Q. Called Denver Public Schools Facts and Figures? A. Yes.

Mr. Greiner: No objection, Your Honor.

The Court: Very well. It will be received.

(Whereupon, Defendants' Exhibit HK was received in evidence.)

Q. I would ask you to refer to the pages referring to bond issues and state if there is reflected the information on the 1952, 1956 and 1959 bond issues? A. It's 19—yes, 1952, 1956, and the bonded indebtedness as of June 30, 1969.

Q. Could you tell us how much remains due and owing on the principal resulting from each of those issues? [1758] A. Yes, the total principal owed is $23,897,000.

Q. On all three? A. Yes, I believe, yes, that's correct.

Q. Have you added them, Doctor? A. No, I didn't.

Q. They're stated separately there, I believe. A. This is the total, I believe. I am quite sure this is it.

Q. Yes, I guess you're right. I am sorry.

All right. Thank you. Do you recall what the estimated bonded indebtedness required under the so-called Gilberts plan is? A. The amount?

Q. Yes. A. Of capital needs?

Q. Right. A. I don't remember the exact figure. It was something over a hundred—I can't remember.

Q. Would it be around $125 million? A. I was going to say $120 million. Yes, that's about right.

The Court: You're referring to the education report of Dr. Gilberts, is that right?

Mr. Ris: Yes, sir, I believe it's Exhibit D.

The Court: If the total of that were put into [1759] effect?

Mr. Ris: That's correct. Just highlighting the one figure; just if the whole thing would be put in effect; not that it's been approved or intended to be or anything of the sort.

The Court: What's the purpose of all this?

Mr. Ris: As being a very essential element in planning, the funding is one of the major things that has to be considered in any planning of the future at all. That's objective.

The Court: You mean as bearing on the actions that the school board has taken?

Mr. Ris: Yes, sir.

The Court: And its staff has taken through the years, is that right?

Mr. Ris: For example, in the last few years, why they haven't built more buildings.

The Court: What their motives were? Is that what you are coming to?

Mr. Ris: That's what I'm coming to ultimately.

The Court: They did the best they could with the limited funds?

Mr. Ris: If that's going to be conceded by everybody, I won't ask any more questions.

The Court: I suppose that's always a problem in [1760] every unit.

Mr. Ris: It most certainly is. That's all I was trying to establish.

By Mr. Ris:

Q. In connection with such planning on site acquisition and planning additional buildings or additions—or planning new buildings or additions to existing buildings, can you take any one or two of those elements and ignore all the others, Dr. Armstrong? A. No, they are all variables, and if any one of those variables changes or operates differently it makes a difference in the long-range projection. So, it isn't possible to take any one or even two of them and make projections.

Q. Is it possible to take all of the various elements and give each of them a weight and say this weight will apply to every situation that we may consider? A. No, it isn't that easy.

Q. With respect to the site planning, Dr. Armstrong, in the years that you have been involved since 1948 has there ever been a site planned by you or by the administration for the purpose of containing minority students, meaning either Negro, Hispano, or both, in certain schools so as to keep them separate from Anglos? A. No.

Q. Now, with regard to the capacity and utilization [1761] of which there has been considerable testimony, and I don't want to beat a dead horse, Dr. Armstrong, but I would like to cover just a couple of items on this. Many of the exhibits that have been introduced into the case have been on the basis of rated capacity. That's generally been defined, I believe, as the number of classrooms times 30 for the average schools, is that correct? A. Yes, that's correct.

Q. Now, does that necessarily depict the utilization efficiency of a particular school when it hits that particular point, being a hundred percent efficiency? A. No, it doesn't. The major reason for setting up this kind of capacity consideration is that we have some basic points from which we can move. And it is a theoretical kind of thing, but it does give us a base point. But, from that, then, we can move to adjust capacities for the kinds of programs, and after all, this is the important thing about a school building, is the kind of program that it houses. And so with that basic idea of 30 pupils per classroom and variation from that, we can then arrive at some kind of an adjusted capacity or a usable capacity or whatever the term you want to use.

Q. Is there any rule of thumb that has customarily been used by the administration of this school district with respect to a percentage of over-capacity which is within a [1762] permissible limit, for example?

Mr. Greiner: Could we have that defined as to the time period, Your Honor?

Mr. Ris: I said now and in the past has been, was my question.

Mr. Greiner: Same comment, Your Honor.

The Court: Overruled. You can cross-examine him.

A. There was a time when it was in the elementary schools, it was considered that a good educational program could be carried on in some schools, again, depending upon the program. If a school were crowded say 10 percent over or something like that. But, no hard and fast rule has ever been established.

Q. Now, was this 10 percent over capacity a rule of thumb that was used and unless you are over that you wouldn't consider going into any new construction program or double session and so forth? A. No, it wasn't. The needs for future construction are based on these factors that I have talked about here and also whether a building is crowded in terms of the kinds of program that is being carried on. So, that 10 percent wouldn't necessarily apply all down the line.

[1763] Q. Well, then, a reasonable utilization capacity of a building is not the same as a rated capacity on the standard formula of 30 times classrooms? A. No, it is not.

Q. All right, and you take these other factors into consideration in determining the capacity or future planning? A. Yes, we do. That's why we have maintained a close liaison with the Division of Education, because this is their responsibility, to develop the programs, and then they can help us to determine what size the building should be.

Q. All right, sir, thank you. Are you also involved in—

The Court: You are saying you need more square footage to carry on a manual arts program?

The Witness: Yes.

The Court: Then you do college preparation?

The Witness: Yes, generally I think that would be true, depending exactly on what kind of program, yes, sir.

Q. This varies also as to the number of pupils per classroom? A. Yes, it does.

Q. And is that also related to pupil-teacher ratio? A.

Well, that affects the pupil-teacher ratio, yes, [1764] but the type of program is set up on the basis of how best the particular course or offering can be taught.

Q. Are there some instances where you have, say, forty pupils in a grade or class and you assign two teachers to that? A. Yes.

Q. Without breaking up the class? A. Yes, this would be true.

Q. So you may have one classroom with forty students and two teachers? A. Yes.

Q. But still it will be a low teacher ratio? A. Yes. A good example of that, it may not be relevant, but, in gym classes, for example, larger numbers of children can have classes in a gym, but in order to handle the larger classes more teachers are assigned.

Q. Does your responsibility also relate to establishing new boundaries after schools are open? A. Yes.

Q. And reestablishing or redesignating boundaries on existing schools? A. Yes.

Q. Do a great many of the criteria that you previously discussed with respect to site selection also refer to establishing the boundaries [1765] A. Yes, sir, they do.

Q. Are there also other factors that go into the establishment of boundaries? A. Yes, one that has been mentioned before, and that is the walking distance that the children live from the school. The size of the building, of course, enters into it.

Q. All right, and you have natural features? A. Yes, that's right, highways, the man-made features that are—make access to the school difficult or natural features such as gullies and so on that make it difficult for children to move from one place to another.

Q. Now, with regard to the creation of boundary lines

for a new school or realignment of boundary lines for old schools, was there a period of time and up to a certain year during which racial and ethnic population figures were not taken into consideration? A. Yes, there were years—yes, before 1962, I believe, that these factors were not taken into account because the data was not available.

Q. Or was it after the Voorhees report in 1964, Doctor? A. I believe that's right. It was after that report, because we didn't have those data.

Q. And have they been taken into consideration since? A. Yes, they have.

[1766] Q. And again with respect to all the elements that go into establishment or changes of boundaries, can any one or two be taken or isolated from all the others and put through a computer and arrive at an answer? A. No, this is not a strict mathematical process, so it isn't as simple as putting numbers into a calculating machine or computer, because there are social factors involved. We are dealing with human beings and not blocks of wood.

Q. Since you have been in planning since 1948 have there been any establishment of boundaries of new schools or realignment of boundaries for old schools which either you individually or members of the staff or the staff itself had plans for containing minority students in certain schools or to keep them separate from Anglo schools? A. No.

The Court: Just a moment, somebody said this afternoon that on no occasion in an overcrowding situation have white students been bused to a predominantly minority school. Would you agree with that?

The Witness: I would have to think about it. I'm not sure. I just at this point—I don't know.

The Court: Let me ask you a question that might be somewhat embarrassing to you but I think it is on all of our minds. Wouldn't you hesitate because of parent reaction to send a group of white students down into the old [1767] Negro areas?

The Witness: I think what we need to do there is what—

The Court: I mean, you could anticipate a parent reaction, I suppose?

The Witness: I would suppose, or it could happen—

The Court: Would this deter you any?

The Witness: Well, it might, although I think we get almost as much reaction the other way. The reason I say that—

The Court: Well, I'm not concerned about the other way at the moment.

The Witness: Okay. I think we would need to look at the situation and talk with the parents, just as we do with any shift of boundaries or shift of assignment of students and look at all the factors involved, not just the parents' reaction, but the good of the district and so on. I think it is a little more complicated than just the parents' reaction from the group that might be moved.

The Court: I think the testimony was that they refrained from moving them into the Negro schools which were underutilized merely because they didn't want to disturb the special education programs.

The Witness: This might also apply to the situa-

tion you just posed here and that is that probably there isn't [1768] enough room in the minority schools to accommodate these children. In other words, the same types of special education programs and so on.

The Court: Well, they hauled them quite a ways further.

The Witness: Yes.

The Court: From Montbello all the way to Teller and Palmer, which were right beyond the schools which were underutilized, and said, "Well, the reason for it was that they had these special education programs that require more space than other programs."

The Witness: Yes, I think this is part of it. On the other hand, I think, really, a simpler look at the transportation routes. Getting to Teller, for example, is pretty easy. In other words, I-70 to Colorado Boulevard and down there, and those schools, you see, are pretty close to Colorado and are accessible by transportation, whereas you know Columbine or Whittier or Gilpin are a little more difficult to get to, so this is one factor, a minor one admittedly, but we do have to look at it because of the need to utilize our transportation most efficiently, most effectively.

The Court: Well, I know, but you are always maintaining that you pick out the schools closest, regardless of whether you are transporting or whether you are walking, [1769] isn't that right, if you can?

The Witness: Yes, if we can.

The Court: And if you have the space?

The Witness: Right, and for the same reason—

The Court: This is adhering to the neighborhood school concept in a sense?

The Witness: Yes, essentially, that's right.

By Mr. Ris:

Q. With respect to busing, does one bus just pick up one load of students and deposit that load at one school and then take up until school is out? A. No, it isn't possible to do that because of the number of children to be transported and the number of buses we have, so—well, there are really two or three programs. One is a special education program and so we transport the special education children early to utilize the buses for that purpose and then we begin to pick up children who go to the regular programs, and in cases where the bus run is short, then that bus can make as many as two runs, preferably two, more if we can, but they need—the buses need to be utilized for more than one run.

Q. Do some buses on short runs even make more than two? A. I'm sure they do, but I don't know how many.

Q. Is this in your department? A. No, this is Division of Administrative Services.

[1770] The Court: They seem to be moving pretty good whenever I see them, I will say that. They are not moving slowly.

The Witness: No, that's right. I will relay that on to Mr. Olander. He will like to hear that.

The Court: They are keeping up with the flow of traffic, I will say that.

Q. Dr. Armstrong, in some of the past testimony, there has been reference to Dr. Holme and Mr. Ketcham as having been involved in some of the previous planning. Are both of those men deceased? A. Yes, they are.

Q. We have had a lot of testimony about Hallett and Park Hill. Again, I don't want to review all of that in detail, but I do want to ask you one thing, if I may, please.

I refer you to Plaintiffs' Exhibit 52, with particular reference to Pages 16 and 17, to which there has been previous reference made with other witnesses.

First of all, let me ask you what this exhibit is and what you had to do with its preparation? A. Well, this is a preliminary study that was prepared to the 1962 report. I believe it is Exhibit 405.

Q. All right. Now, on the face of this, it says, "For Study Only." What is the significance of that in planning? [1771] A. Well, in any kind of situation where we are trying to establish boundaries or assign children to schools, we need to look at a number of alternatives, and so this is is one of the early studies which has some alternatives in it, before we finally made decisions or the board made decisions or the superintendent as to what should be done in these years.

Q. As these studies are made, are there changes made in some of the details as you go along? A. Yes, they are. From time to time. In fact, there are many changes made in all of them.

Q. Now, in addition to proposed changes that were being studied at the elementary level in the Northeast Denver area, there were apparently others in other parts of the city, were there not. A. Yes, there were many of them. As I recall, there were some 25 or 30 other situations, boundary changes.

Q. Particularly concerned were the three pertaining to Stedman referred to on Page 16 of Exhibit 52. Would you look at that, please? A. Yes.

Q. And refer to the first three items, turning to Maps No. 10, 11 and 12, from Stedman to Smith, to Hallett, Optional Park Hill, Stedman to Park Hill, and the effective date therefor is shown as 1962, is that correct? [1772] A. Yes, sir, that's what's shown here.

Q. All right. Now, if you look at Page 17, you have estimated pupil membership for these schools referred to on Page 16, do you not? A. Yes.

Q. And those refer to what estimated projections would be if the proposed boundary changes had been made? A. Yes.

Q. Now, will you look particularly at Stedman there, and what did that show as to the actual membership in 1961? A. In 1961 the actual membership was 742.

Q. Could you take your pen and just underline that at that point, please? A. (Witness complied with counsel's request.)

Q. Now, if the effective date of any Stedman change was 1962, would that be reflected in the column headed "1962"? A. Yes, it will be under estimated membership.

Q. Was it so reflected? A. No.

Q. What do you show for '62? A. 750.

Q. Was it reflected in your projection for 1963? A. No.

Q. What do you show for 1963? [1773] A. 765.

Q. Was it reflected for 1964? A. Yes, it was.

Q. And what was your projected membership for Stedman that year? A. 651.

Q. Is there a variance between Page 17 and Page 16, your projections? A. Yes, there is.

Q. Do you know which came first, the chicken or the egg? A. Well, I'm sure that the data on Page 16 were tabulated and studied before the numbers on Page 17.

Q. Well, which was the final recommendation then, 17 or 16? A. Page 17. The data on Page 17 reflects what went into the final report.

Q. And somehow or other the data on 16, were not changed to reflect that? A. No, that's right. We normally didn't go back and revise the studies. We—

Q. All right. On Page 17, the four years, the estimated membership for '61, '62, '63 and '64 for Stedman. I think you already underlined the '61 A. Yes.

[1774] Q. Would you underline the other three years, please? A. Yes.

All right. '62, '63 and '64.

Q. Right, and on Page 16, the 1962 effective dates as to Stedman, would you underline those three, please, for emphasis? A. (Witness complying with counsel's request.)

Q. Now, Dr. Armstrong, at the time that you make a study such as this, do you keep a workbook, looseleaf book? A. Oh, yes.

Q. And have you verified these figures on 17 from your workbook? A.Yes, I have.

Q. I hand you what has been marked as Exhibit CE, and would ask you to look at Page 3 of that and would further ask you if that is your work sheets from which the items on Page 17 of Exhibit 52 were ultimately prepared? A. Yes, that's correct.

[1775] Q. So that this Exhibit CE—that's your original source document for Exhibit 52? A. This is 52?

Q. Yes. A. Yes, they are the data that are incorporated here.

Mr. Ris: We would offer Exhibit CE.
The Court: May I look at that 52?
Mr. Ris: Yes, sir.
Mr. Greiner: No objection, Your Honor.
The Court: It will be received.

(Whereupon, Defendants' Exhibit CE was received in evidence.)

Q. Dr. Armstrong, in both 1962 and 1964, what was the policy of the district with respect to the making of elementary school changes? Was that a matter for formal board action? A. No, it was not. It was the responsibility of the superintendent.

The Court: You mean on the elementary schools?
Mr. Ris: Yes, sir.

Q. The board did take formal action on secondary school changes, did it not, at that time? A. Yes.

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[1780] • • •

Mr. Ris: Yes, sir. Before I call Dr. Armstrong there are a couple of court matters that ought to be on record. With respect to the daily transcript that was delivered this morning, I refer to page 1773, on line 7, in reference to "Is there a variance between page 17 and page 18." This should be with reference to "page 17 and page 16.". And I would ask that that be—I mentioned this to Mr. Greiner, and he has no objection.

Mr. Greiner: That's correct, Your Honor.

Mr. Ris: And the same correction should be made at line 15 and also line 18. The "18" should read "16."

The Court: All right. We will change 18 to 16 on each of those lines.

Mr. Ris: All of our discussion at that point was on page 16 and 17. I may have misspoken, but certainly that was the intent of the examination.

Any objection?

Mr. Brega: No objection.

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[1781] * * *

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Mr. Ris: Yesterday the Court requested that we [1782] obtain figures concerning the voluntary open enrollment figures for Manual, for the first semester 1969-70 school year. We have gotten from the school records such figures for both the limited open enrollment, which is a carryover from those who were in LOE originally and even though that was superseded by VOE, those who had already made a change, as the Court will recall, were permitted to carry on. So, I have one exhibit consisting of two sheets, one pertaining to limited open enrollment for the fall semester of 1969 and the second sheet being the voluntary open enrollment. So I will hand it to the Court at this time, Exhibit HI.

Mr. Greiner: Your Honor, I believe that we have already had marked for identification as an intervenor's exhibit I, the full report on VOE.

Mr. Creighton: That's Exhibit B.

Mr. Brega: I believe it's in evidence.

Mr. Greiner: Which I think is a little more complete.

The Court: Is that 1969-70, too?

Mr. Brega: Yes.

The Court: We will take this in evidence then.

(Whereupon, Defendants' Exhibit HI was received in evidence.)

Mr. Ris: Dr. Armstrong, please.

Direct Examination by Mr. Ris (Continued) [1783]

Q. Dr. Armstrong, when we recessed yesterday I think we discussed that basically during the period of time that we were discussing the changes in the elementary school boundaries that these were made by the Superintendent as an administrative matter and then reported to the Board of Education, is that correct? A. That's correct.

Q. That secondary school boundaries were actually made by formal resolution or action of the Board of Education itself? A. Yes.

Q. May I ask you whether the administration—whether the Superintendent was making the changes at the elementary level or whether the Board was making the changes at the secondary level, were studies invariably done with respect to those changes in advance? A. Yes, they were.

Q. Were the studies basically the same type of studies? A. Yes.

Q. With respect to your planning for construction of a new school building in an area, you previously indicated that you projected future student membership for some years ahead, is that correct? A. Yes.

[1784] Q. And that's one of the elements you considered among various other elements? A. Right.

Q. Now, if you project a figure of future membership, do you always build or customarily recommend building to that figure. A. Not to the peak estimate of eventual enrollment. We have found—and this is generally true I think in other school districts—that the membership in schools in new areas tend to increase up to a peak and then begin to taper off, to fall back to an extent. And the ordinarily accepted figure for this decrease in membership over the eventual life of the school is about 85 percent of the peak enrollment. So rather than build schools to what we think the peak enrollment may be and then when the enrollment drops off have a vacant space available, we feel it is better to build to about 85 percent of what we think the peak enrollment will be.

[1785] Q. Did such a consideration go into the Barrett building? A. Yes, it goes into the consideration of all of the buildings that we construct.

Q. Dr. Armstrong, with respect to the junior high boundary changes in 1962 involving Cole, Morey and Byers, you will recall we have had considerable testimony on that. A. Yes.

Q. Prior to that change, you had made a substantial study of numerous boundaries and numerous schools, had you not, which is represented by Plaintiffs' Exhibit 405? A. Yes, throughout the city.

Q. In that did you make certain projections as to your best estimate of what the future pupil membership would be of the various schools involved in 405? A. Yes.

Q. Was that true also as to Morey? A. Yes.

Q. And if you will look at page 31 of Plaintiffs' Exhibit 405, pertaining to junior high schools, and estimated pupil membership with the proposed changes if adopted, of course, does that give your projections as to Morey, to the best of your ability at that time? A. Yes, it does.

Q. And what was your 1961—first of all, what was your [1786] adjusted building capacity for Morey at that time? A. 1,170.

Q. What was the '61 actual membership as shown? A. 894.

Q. What was your projection for 1962? A. 1,004.

Q. And what was it for 1965? A. It increased to 1,073.

Q. Dr. Armstrong, would you just take your pen on page 31 and underline the word "Morey" and just run your line clear across on your projection for emphasis?

(Witness complied with counsel's request.)

Q. So, subsequently, in the years that followed, if it developed that the Morey population did not go as high as your projection, that would represent hindsight, or, rather, foresight at this point in time? A. Yes, it is impossible to assess all of the variables that go into these projections.

Q. In arriving at the figures in 405, were any racial figures taken into consideration at that time? A. No, they were not. It was strictly on the basis of building capacity and numbers of children.

Q. Did you have at that time any figures available to you giving the racial or ethnic numbers of various schools referred to in Exhibit 405? [1787] A. No, we did not.

Q. Were such figures available to you in your planning in 1948 when you went into the planning end of it until 1964 with the possible exception or with the exception of the new Manual? A. They were not available.

Q. Now, Dr. Armstrong, I would next direct your attention to the situation concerning which you have had some testimony pertaining to Ashland Elementary School, Boulevard and Brown Elementary School. Now, Ashland is on West 29th Avenue, is that correct? A. Yes.

Q. And do you remember the approximate cross street, Bryant or Clay? A. No, I don't remember. It is in that general area.

Q. And Boulevard is on Federal Boulevard in the 2300 block? A. Yes, that's correct.

Q. And Brown is between Julian and Lowell in the 2500 block? A. Yes.

Q. Brown is the newest of the schools among those three? A. Yes.

Q. Now, Boulevard had an old school and a new addition, is that true? [1788] A. Yes, there were two sections.

Q. Two sections, all right. Was the old section one of the oldest schools in the city? A. Yes, it was.

Q. Was there any intent on the part of the District to phase out the old section and close it out? A. Yes, that was one of our proposals.

Q. Did that have anything to do with the 1961 boundary changes? A. Yes, it did, because that part was phased out.

Q. So, with that change, what effect would that have on the pupil membership in Boulevard? A. Well, it would mean the pupil membership would have to be decreased in some way to fit the building capacity.

Q. I hand you what has been marked as Defendants' Exhibit CM and ask you if those are also notes from your personal work book. A. Yes, they are.

Mr. Greiner: We have no objection, Your Honor, to CM.

The Court: All right.

Q. Does this reflect the projections on pupil membership in those three schools among others as between '61 and '62 and on to '66? A. Yes.

[1789] Q. What does that reflect as to Boulevard? A. Well, it shows that the capacity of Boulevard was 375 and the actual membership in 1961 was 503 pupils.

Q. What was projected into '62 and thereafter? A. The projection for Boulevard was that the number of pupils would increase in 1962 to 538; '63, 561; and 577, 589, and up to 601 by 1966.

Q. Did each of those years also reflect taking off 150 pupils? A. Yes.

Q. Is that what is contemplated to be transferred to Brown Elementary School? A. That's correct.

Q. And is the same 150 figure reflected in the Brown projections for 1962? A. Yes, in the next entry, just below this.

Q. If you will wait until I finish my question, otherwise the reporter has us both talking at the same time, Dr. Armstrong. A. Sorry.

Q. At the time of this change between Boulevard and Brown, the maps that have been introduced also show an irregular section transferring or a boundary change from Ashland to Boulevard in the area between the Platte River and the Valley Highway and south of the 14th Street Viaduct. Do you [1790] recall what led to that boundary change or what the principal element was with respect to it? A. Yes, it was a very small area there, and those children were being transported, and since the number was small it had little effect on either the membership of Ashland or of Boulevard.

Q. Did the opening of that section of the Valley Highway have anything to do with this?

Mr. Greiner: I object to the question, Your Honor, because I don't think the record reflects when in fact

the Valley Highway did open. I think it is a leading question.

The Court: It is somewhat leading, but we will let him answer.

The Witness: Would you repeat that?

The Court: Did the Valley Highway have any effect?

A. Oh, yes, it did, because it tended to cut off that section, so to speak, from the rest of the area.

Q. Can you state where the overpass from that section over the Valley Highway was to the west? A. No, I can't remember where it was.

Q. Well, West 23rd Avenue? A. Twenty-third, that's right. I am sorry. I couldn't remember exactly.

Q. Now, did your projection, Defendants' Exhibit CM, show there was any loss at all from Ashland and any gain to [1791] Boulevard from this boundary change? A. No, it was so small we felt it wasn't even essential to enter it here.

Q. Was there any racial or ethnic consideration at all in transferring that particular section to Boulevard? A. No, there was not.

Mr. Ris: I am not sure Exhibit CM was offered or admitted. May we have an order on that?

The Court: Yes.

Mr. Ris: All right.

(Whereupon, Defendants' Exhibit CM was received in evidence.)

Q. Now, I will direct your attention, Dr. Armstrong, to the situation pertaining to Colorado Boulevard as it relates to Teller and Steck Elementary School. Teller is located

where? A. Well, it is west of Colorado Boulevard. I can't —I don't remember the exact address.

The Court: It is on Monroe?

The Witness: About 12th and Monroe, in that general area.

Q. Close to Gove? A. Yes, just south of Gove.

Q. Do you know approximately when that was built? A. No, I don't, offhand.

[1792] Q. Is it an older school? A. It is an older school and has had some additions.

Q. And Steck? A. East of Colorado Boulevard at 4th and Albion or Bellaire, in that general area.

Q. Do you know about when it was built? A. It is a newer school, but I don't remember the construction date.

Q. Were both of those already constructed when you got in the planning department in 1948? A. Yes.

Q. Was Colorado Boulevard at that time a six-lane divided street? A. No, it wasn't.

Q. During your planning period from 1948 on, since then has there been any device created with respect to Gove Junior High or traffic conditions across Colorado Boulevard? A. Yes, two years ago, an overpass was constructed there actually from the school. The school site is divided, one part on each side of Colorado Boulevard, and the overpass goes from one part of the site to the other. It also has landings so that the pedestrians using the public sidewalks can make use of the overpass.

Q. Is Teller so situated that this serves any purpose for Teller? [1793] A. Yes, it does. Some of the children who attend Teller Elementary School need to cross Colorado Boulevard, and this overpass serves as a way for them to get across.

Q. Was this part of the planning for that overpass? A. Yes.

Q. Now, have there been any particular accidents in that area involving school children? A. Before the overpass was constructed, there was an accident where two children were fatally injured.

Q. From either Gove or Teller? A. They were from Gove Junior High School.

Q. Now, with respect to Steck, has that been given consideration as to what might be done with the boundary line and its relationship to Colorado Boulevard? A. Yes, consideration has been given to it and we worked closely with the City Traffic Engineering Department to make such crossings as safe as possible, and there have been installed at Colorado Boulevard and Fourth Avenue traffic control signals which helped the pedestrian traffic there, the school children, to get across Colorado Boulevard.

[1794] Q. Is Fourth Avenue completely— A. Fourth Avenue does not go through. So that actually Fourth Avenue terminates at the east side of Colorado Boulevard.

Q. Was that also made a one-way street some years ago? A. Yes, it was.

Q. Has there been given consideration to attempts to revise the boundary line for Steck, for example, to get rid of that? A. Yes, consideration was given to it but there seemed to be no feasible, practical way that this could be be done and it was felt, with the safety programs and with the traffic control lights, that this was an adequate situation.

Q. In connection with your planning, Dr. Armstrong, could you tell us what has been done with respect to maintenance of the various school buildings in the district and with particular reference to the older buildings as compared

to the new buildings? A. We have a very complete program of maintenance for the older buildings. This consists of keeping them in safe and healthful condition by means of painting, by means of repairs, replacing roofs, and inspection by the Fire Department and by our own engineering staff to be sure [1795] that the structure is adequate and safe. We have developed some programs of lighting classrooms, corridors, and we have installed fire detection systems. We have replaced boilers. Quite an extensive program to keep these buildings in operating condition, so that physically the buildings are, in our opinion, adequate.

Q. With respect to the lighting, what lighting program was it you mentioned? A. Several years ago the school district embarked on a program of replacing all the lights in all the schools of the city as a matter of fact where they were needed, which at that time were new, the fluorescent lights. And so all of the classrooms in all of the schools have been provided with fluorescent lights, bringing the lighting level up to a satisfactory amount, so that there is no problem of lack of illumination.

Q. Has this been accomplished in all the old buildings? A. Yes, in all schools.

Q. Has fire protection or smoke detection systems been installed in all the old schools? A. All the ones built before 1900. We have some thirty-five installations. I'm not just sure of the list but all of the older buildings.

Q. Dr. Armstrong, I would hand you first of all a document which has been marked as Intervenors' Exhibit E—[1796] if the Intervenor has no objection—and ask you what this is? A. This is a pupil membership report dated November 17, 1969.

Q. For all of the Denver Public Schools? A. Yes, all schools in the district.

Q. And what does that reflect? A. It shows the name of the school, the building capacity, the membership in the grades, respective grades, including the special education as well as the regular pupils.

Q. Was this a report that was made in the regular course of conduct of the operation of the district? A. Yes, sir, it's a monthly report.

Mr. Ris: We offer in evidence Intervenors' Exhibit E.

Mr. Greiner: No objection

The Court: It will be received.

(Intervenor Defendants' Exhibit E was received in evidence.)

Q. Now, I will offer you specifically to the report of pupil membership as of November 17, 1969, as compared with membership of November 18, 1968, and with particular reference to the junior high schools. Would you tell us what the 1968 pupil membership was for the junior high [1797] schools? A. Yes, this is for November 18, 1968, the total membership in the junior high—these are the junior high pupils—whether they were housed in junior high schools or whether they were in a six-year school, 21,788.

Q. What is the 1969 membership for all the junior high schools? A. 21,971.

Q. Right at 22,000? A. Yes.

Q. And I would hand you what's previously been admitted into evidence as Plaintiffs' Exhibit 347. And I would direct your attention—I don't know what color it is. I'm color blind. Is that brown or green? A. Green.

Q. Does that actually reflect the 1968 actual membership as shown by Exhibit E—Intervenors' Exhibit E? A. It

appears to me to be low. The number shown here is 21,788, which is nearer 22,000 than this line shows, so it is low here.

Q. Would you put an X approximately where it should be and put your initial on there. And then with respect to the 1969 membership in the 1969 column, would you put an X approximately where it would be? A. Let's see, that would have been nearly—

[1798] Q. And if you would put your initials after that, also, please.

Thank you.

Would you refer to Exhibit 346 that pertains to certain schools, Doctor, and if you will notice the one line, the bottom line, capacity, refers to Hill, Merrill and Jefferson, and then the minority schools above—not so stated on the exhibit—

> Mr. Ris: Correct me if I am wrong, Mr. Greiner, but those are Baker, Cole, Morey and Smiley, I believe; is that correct?
>
> Mr. Greiner: I believe that's correct.

Q. Now, there has been some testimony here pertaining to overcrowding with respect to Hamilton Junior High and Place Junior High. Could you tell us what planning has been which has led to the construction of Hamilton and Place? A. Yes, Hamilton and Place are both located in Southeast Denver where there are large numbers of—eventually of junior high school children to be accommodated.

Thomas Jefferson Junior and Senior High School was on double sessions for a long time and it was our intention when the building was originally planned to accommodate only grades ten through twelve. With the completion of Hamilton, we were able to take the seventh and eighth

grades out of Thomas Jefferson Junior and Senior [1799] High and accommodate them at Hamilton. There wasn't room at Hamilton to take the ninth grade. So the plan then is eventually to take the ninth grade out of Thomas Jefferson, accommodate those children in the schools in Southeast Denver, Merrill, Place and Hamilton, and possibly Hill, and make Hamilton a junior high school, seven through ninth grades, as are the other schools in the district. And to make Thomas Jefferson a senior high, grades ten through twelve. In order to do that—to balance the membership with the capacity, taking into account the potential growth in this area, the Place Junior High School will be necessary. There is one other factor which is an unknown and that is the potential for annexation just east of Place Junior High School. There has been talk and, as a matter of fact, there was before the City Council a request for annexation of some four square miles just east of Place Junior High School.

Q. Dr. Armstrong, has this been a planning that is looking some years ahead and on the basis of the best available figures that you have now, projecting into the future? A. Yes, and our figures for the total number of senior high school pupils in the area is around 2,100 to 2,500, senior high, that is, ten through twelve, and Thomas Jefferson Senior High School has a capacity in that [1800] same area. So we expect that the senior high school pupils can be accommodated there and the junior high school pupils accommodated as I indicated in the junior high schools in the area.

Q. Both in Southeast and Southwest Denver, your building plans over the last ten years have been for building schools right at or very close to the city limits, isn't that correct? A. Yes, that's correct.

Q. And what is the reasoning behind that? A. Well, because of the annexation pattern that has developed over the years, we feel that it's important to look ahead so far as we can or as accurately as we can and locate schools so that they will be within a reasonable distance of the residence of the children they're going to serve. Two examples, I think, show what does happen.

Thomas Jefferson itself was located on the city limits when the land was acquired and the building constructed. Since then it's obvious what's happened. This whole area has been annexed, and numbers of children will be residing there that will need to be accommodated. Somewhat the same situation existed southwest when the John F. Kennedy Junior-Senior High School was constructed. That was just about on the city limits at the time it was constructed. And since then quite an area has been annexed [1801] to the city, both west and south from that building.

Q. George Washington, when it was constructed, was at the city limits? A. George Washington also was then at the city limits.

Q. During the period of time that you have been engaged in planning, could you tell us approximately—and let's restrict this to the last ten years, from 1960 to 1970—in 1960 what was the approximate square mileage of the district? A. About seventy-five square miles.

Q. And what is it now? A. It's about a hundred. Just under one hundred, I believe.

Q. So you picked up about another twenty-five? A. Another twenty-five square miles, yes.

Q. In the past ten years? A. Yes.

* * * * * * *

[1845] * * *

Cross-Examination by Mr. Brega:

Q. I would like to refer, first, to your planning and design and work that went into the preparation of Hamilton and Place. Would you tell us about how long and what the procedure is for you to plan a particular school building in the district? A. It starts out with the appointment of an architect approved by the Board and then the preliminary planning goes on for several months. It varies with different buildings as much as six to eight or nine months for the preparation of preliminary plans. Then, after those have been approved, the staff is authorized to proceed with the preparation of working drawings and specifications. This takes another six to eight or nine months, depending on the project.

Q. Let's stop right there. How many people would you [1846] say are involved in this particular procedure? Is it just a one-man job? How many departments? A. All of the departments in the District are involved. It is important to know that in the Administrative Services, because they are affected from the standpoint of maintenance, operation, transportation, lunchrooms, and so on. Obviously, the Division of Education is important in working with us to develop these plans so that the educational program can be properly accommodated. The Division of Pupil Services is interested in various areas of the building. Counseling, for example, is one, so that all of the divisions are closely involved in these decisions, many people.

[1847] Q. Does any one person or department make the final decision on this? A. The final decision is made by the Board of Education.

Q. And they get all of these composite studies done by all the groups over these months? A. Yes, and they take the form of preliminary plans and they are discussed then with the Board of Education, all of the implications involved, costs, and so on.

Q. Do you know when Place and Hamilton were approved by the board, roughly? A. Now, at what stage? The preliminary plans?

Q. Yes. A. Or the original authorization to proceed?

Q. Well, let's take the preliminary plans. A. No, I don't know the date.

The Court: Well, he wants to know about how long ago it was. Five years ago?

The Witness: Oh, Place was under construction as of this fall, so the preliminary plans were approved some six or eight months before.

Q. And in that study with Place, was there any provision for removing pupils from any of the Northeast schools? A. Yes, as part of a long-range plan involving [1848] Hamilton, Thomas Jefferson, Merrill, Gove and Smiley, there were plans to accommodate some of the children from Smiley in those junior high schools.

Q. Basically, where is Place located? A. It's in the—at East Florida and South Quebec Streets.

Q. That's Southeast Denver? A. Southeast Denver, yes.

Q. How many students were coming out of Smiley under these plans? A. There were two plans set up; one whereby 200 children would be coming out of Smiley to be accommodated at Place and then some also at Hamilton.

Q. Now, taking Place for the moment, that school hasn't

been opened yet, has it? A. No, it's under construction.

Q. And they approved that 200 students should be removed from Smiley? A. Yes.

Q. What is or what was the condition at Smiley at the time that that was approved so far as double sessions extended or— A. Smiley was on double sessions at the time.

Q. And what was the purpose in trying to remove the students? [1849] A. To take Smiley off of the double sessions.

Q. Were you trying to get it down to a pupil number? A. Yes, trying to reduce the numbers there below the capacity of the building.

Q. Did you have a number in mind that you were trying to work with? A. Yes, we were working toward a pupil membership of a little over a thousand at Smiley eventually and that is a long-range program.

Q. And, in regard to Hamilton, were there any plans on pupil tarnsfer from Northeast Denver for that school? A. Yes, some 150, as I recall, were to be transferred from Smiley and also from Gove and Hill to reduce capacity—or to reduce memberships there.

Q. In planning the two schools that we have talked about, was Northeast Denver considered as a possible site? A. Well, the 1962 study suggested that a junior high school be constructed at 32nd and Colorado Boulevard.

Q. But that was scrapped? A. Yes, it was.

Q. Was there any consideration to going back into that area when you planned these two schools? A. No, the consideration of the board was that a new junior high school would need to be constructed further [1850] south and east from that area. And at one time there was a con-

sideration of the acquisition of some land around Lowry Field as a potential, not only for a junior high but for other facilities.

Q. And part of the planning behind it was to try to integrate these new schools, was it not, by—to bring pupils in from a wider, more diverse area? A. Yes.

Q. And this I presume then come out of the 1962 junior high that was planned at 32nd and Colorado Boulevard? A. Well, that was the time when these other studies began to evolve, yes.

Q. Was there a new junior high built in the eastern part of Denver between 1962 and 1968? A. No, there was not.

Q. So there was really—this was really the first planning since the junior high at 32nd and Colorado Boulevard? A. Yes.

* * * * *

[1858] The Court: When was Cole built, Mr. Armstrong?

The Witness: I don't know offhand. It was in the '20s. It was in the 1928 building program. It was in that era.

Mr. Brega: It was built in 1925, Your Honor.

The Court: At the same time West and East were built?

The Witness: Yes, the same building program.

The Court: Do you regard it as an adequate physical facility?

The Witness: I'm sorry, sir?

The Court: An adequate physical facility?

The Witness: Yes, physically it's in good shape, good condition.

By Mr. Ris:

Q. Dr. Armstrong, with regard to planning for Hamilton and Place, was there also a resolution adopted by the Board of Education sometime during the '60s with the reference to no building in the Northeast Denver area? A. Yes.

[1859] Q. Is that policy in effect? A. It has never been rescinded to my knowledge.

The Court: Well, this one on 32nd and Colorado Boulevard, what was its purpose? What area was it intended to take in? Cole adequately took care of everything.

The Witness: Cole at that time was crowded, and so there was a need—and I believe Smiley was also, so there was a need for additional capacity in the area.

The Court: This was done to relieve Cole and Smiley?

The Witness: Cole and Smiley.

Q. Now, with regard to the planning for Hamilton and Place, were there certain recommendations made to the Board of Education at their meetings in 1968? A. Yes, there were.

Q. Did you personally appear at that time? A. Yes, I did.

Q. And did you present some recommendations to the Board with respect to this planning and this construction which would involve the movement of pupils from Smiley? A. Yes.

Q. Can you tell us expressly what those recommendations were? Movement from Smiley to what other schools?

And involving how many pupils? A. Yes. At that April 25th meeting, it was recommended that an addition be placed on Hamilton Junior High School, [1860] which was then under construction, so that children from Smiley and from some of these other schools in the area could be transported to Hamilton to relieve the crowded conditions at Smiley, which was then on double sessions.

Q. And at that time, what was the recommendation of the number of pupils to be transferred from Smiley to Hamilton? A. It was 150.

Q. Now, at the same meeting of the Board, was there consideration also given and recommendations made pertaining to the construction of another junior high school on what we now know as the Place site? A. Yes.

Q. And did that also involve transportation of Smiley students? A. Yes, it did.

Q. Now, how many were contemplated and what recommendation was made to the Board? A. Two hundred from Smiley to be housed at Place Junior High School.

Q. Was this further studied at the May meeting in 1968? A. Yes, it was.

Q. And were some further recommendations made at that time with respect to these two junior highs, or either of them? A. Yes, that the planning proceed for construction of the addition at Hamilton and the construction of the new Place [1861] Junior High School.

Q. And what figures were given to the Board at the May, 1968, meeting concerning the removal of students from Smiley to alleviate its overcrowding and to move them into other areas? A. Well, the pupils be moved from Smiley to the Place Junior High School and that

pupils from some of the other nearby junior high schools be accommodated at Place, also.

Q. Can you give us exactly how many pupils were to be moved from Smiley to Place? A. About 200 was the projected amount.

Q. Now, were some also to be moved from Smiley to Hill and some Hill students to Place? A. Yes.

Q. How many did that involve? A. Originally, there were to be 150 from Hamilton—or from Smiley to Hamilton—and then from Hamilton to—or, yes from Hamilton and TJ to Place were about 600. In other words, the idea was to eventually eliminate the junior high school at Thomas Jefferson and house it in those junior high schools.

Q. Was there also, as part of this overall plan, that some were to go from Smiley to Hill? A. Yes.

Q. Was this so recommended to the Board at the May meeting? [1862] A. Yes.

Q. How many? A. I believe it was a hundred.

Q. Now, also were some to be moved from Smiley to Merrill? A. Yes.

Q. Was there an estimate made then at the same meeting as to the total number of pupils that would be removed from Smiley to these other junior highs as the result of the opening of Hamilton? A. Yes, there was, but I don't remember this number.

Q. Well, see if this refreshes your recollection, Dr. Armstrong. "The effect of the indicated moves to reduce the number of pupils at Smiley from around 1600 to 1,000 and permit a reduction of about 100 pupils from Gove—"

Mr. Greiner: May I ask what counsel is reading from?

Mr. Ris: May 16, 1968 minutes.

Mr. Greiner: Is that an exhibit?

Mr. Ris: Is that? No. Would you like to see it? He is using it to refresh his recollection.

Mr. Greiner: Has it been marked as an exhibit?

Mr. Ris: No, but I would be glad to show it to you, Mr. Greiner.

Q. Was there any discussion at that meeting as to the locations from which the Smiley students should be taken?

[1863] The Witness: No, it was to done on a geographic basis, however, because this was the way that—

The Court: What do you mean geographic?

The Witness: In other words, pupils in a certain area in the Smiley District would be assigned to a particular school. In other words, it wouldn't be on a name-by-name basis. We have ordinarily assigned children to schools on a geographic—

The Court: Which geographic areas were you considering?

The Witness: We hadn't at that time. This was just a proposal, and after the planning had been done and the school was under construction, we would then have made our assignments.

Q. Did you actually get to the point of making such assignments? A. No, we did not.

Q. Why not? A. This was a preliminary proposal and we normally do not make pupil assignments until a school is at least under construction and very nearly ready for occupancy.

Q. What about the assignment of Smiley pupils to Hamilton? A. Well, that school was finished. The original part of the building was finished or very nearly finished and the [1864] addition was under construction.

Q. Well, at some point in time, were some pupils then moved from Smiley subdistrict to Hamilton? A. Yes, they were.

Q. And who did the planning on that? A. Well, this was a combined effort. In other words, Personnel and my department.

Q. All right. Is any part of that transfer now pursuant to the injunction of this court? A. Well, the original assignment of pupils from Smiley to Hamilton was done before the injunction and that still stands. They are still being transported.

Mr. Ris: All right, I am sorry, Mr. Greiner, do you have some other remark?

Mr. Greiner: Yes, Your Honor, rather than depend on the witness' general description of what went on at the board meeting, I would like to have those minutes marked as an exhibit and placed in evidence.

Mr. Ris: Counsel may do so if he likes. I was merely asking it to refresh the witness' recollection, if it were available for that purpose, and that's a proper evidentiary procedure.

The Court: Well, he can mark it and offer it as a plaintiffs' exhibit.

Mr. Ris: Oh, yes, if the plaintiff wishes to do so.

[1865] Q. Getting back to the board minutes, the portion I read to you concerning the reduction of the number of

students from 1600 to 1,000, does that refresh your recollection? A. Yes. The purpose, of course, there was to provide additional space at Smiley for some other programs that were important.

Q. With regard to these monthly reports from principals that you previously mentioned, do those reports come directly to your office? A. No, they do not. They go to the Budgetary Services at that time. It is now Planning, Budgeting and Research.

Q. What is done with those reports, do you know? A. They are studied and compilations are made, analyses are made of the reports, and summaries provided as necessary.

Q. And do the summaries and compilations that are of interest to you come to you or are made available to you? A. They are made available to me.

Q. Is that what you basically rely on, rather than the broad data in the basic reports from the principals? A. Yes.

Q. Now, does planning automatically cease when projected pupil membership levels off? A. No, sir, it is a continuing project.

Q. Does leveling off of pupil membership mean the whole district becomes static and just rolls along? [1866] A. No, one of the factors we mentioned earlier in connection with planning is the mobility of the population within the city, and this occurs continually, among other factors.

Q. Insofar as having compilations or summaries of the ethnic data furnished to you by the department that gets in all the reports and so forth, or from the Community Relations Department, can you tell me specifically when you began to get this information on a regular basis? A. Yes, it was in '64. They began to collect it earlier, but we didn't have it available for our studies before 1964.

Q. There has been dispute as to whether it was '62 or '64. I just wanted to get that in.

With regard to the Ashland-Boulevard-Brown 1961 change in boundary, have you given that any further thought as to any other matters that went into that boundary change? A. Yes, I mentioned the sole reason for changing the assignment of those pupils was membership, but it was actually a matter of access, also, because of the access of the overpass there that led directly to 23rd and made good access to Boulevard as contrasted with the more difficult access to Ashland.

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[1877] • • •

KENNETH OBERHOLTZER, called as a witness by the defendants, being first duly sworn, on his oath testified as follows:

The Court: Please take the witness chair and give us your name and address, please, Doctor.

The Witness: My name is Kenneth Oberholtzer. The address is 3244 South Gregg Court, Denver.

The Court: Thank you.

Direct Examination by Mr. Ris:

Q. Dr. Oberholtzer, I hand you a document that has been marked Defendants' Exhibit HE. Is that a summary of your past educational and professional history? A. Yes, it is.

Mr. Ris: Offer into evidence Exhibit HE.

Mr. Greiner: We have no objection.

The Court: It will be received.

(Whereupon, Defendants' Exhibit HE was received in evidence.)

Q. Dr. Oberholtzer, you were Superintendent of Schools, School District No. 1, City and County of Denver, Colorado, from August 1, 1947, to 1967, correct? [1878] A. Correct.

Q. And the School District having been created by statute, there were various duties and responsibilities imposed upon the District by the Board of Education as a policy-making body? A. Yes, sir.

Q. And as Superintendent of Schools you were the administrative head of the District to carry out the policies of the School District? A. Yes, sir.

Q. And in many instances were your responsibilities of such a nature that you had to make recommendations to the School Board itself? A. Yes, sir. My duties were outlined largely in the bylaws of the Board of Education, which gave me certain broad powers, even policy-making rules not inconsistent with the policy.

Q. All right, sir, in a position such as Superintendent of Schools, could you give us a summary or an outline of various departments in which your administration was divided for administrative purposes and the general nature of the duties of each such department? A. Perhaps the easiest way to do it would be to use the terms for the assistant superintendents.

Q. All right, sir. [1879] A. There was an assistant superintendent for Personnel Services, which meant the matter of recommending personnel, the assignment of personnel, which was both certified and classified, all persons in the District, excluding only a few such as the attorney and others.

Q. And what is meant by certified and classified? A. Certified is defined by law as those certified to teach or to administer or to supervise in a School District. Classified

in effect is all others in the employ of the District, such as persons in the lunchroom, custodians and the like.

[1880] Q. Are certified personnel all entitled to tenure after a probationary period? A. All certified personnel as teachers—they have tenure as teachers. Certain other personnel recently has tenure, yes.

Q. And would you just briefly state for the record what tenure is in this concept? A. Tenure is defined by state law as in general a person who is appointed as a teacher, a certified person, to teach in the district and who serves with satisfaction for a period of three years and is reappointed. Upon that fourth reappointed he becomes a tenure person.

Q. What is meant by probationary in the sense that you use it? A. Probationary is essentially applied to teachers and refers to a person who is serving in their first three years in the District.

Q. Before they have tenure? A. Before they have tenure, yes, they are known as probationary.

Q. Will you continue on with your discussion of the various departments and divisions. A. Yes. I referred first of all to personnel. There is another large division which was known as instruction which included such services as instruction, curriculum and guidance. There is another large division called buildings [1881] and grounds. And this obviously refers to the construction, the maintenance and operation of the school plants, the various buildings of the District.

There was later introduced—that is when I say later, I am describing what was initially true in my tenure of office—later introduced a planning and engineering office which is an offshoot of buildings and grounds. But, in essence there are three major types of functions under the assistant superintendents. There are in addition some other officers

who were not directly responsible to the Superintendent but to the Board of Education, but who worked with the Superintendent, such as the attorney for the District, the legal services.

There were also certain financial and secretarial services, for example. There is, for example, a secretary-treasurer of the School District. They worked in close collaboration with the Superintendent and generally under his direction although not responsible to him.

Q. All right, sir. At the time you arrived who was the attorney for the School District? A. Mr. S. Arthur Henry.

Q. Did he continue to serve as such during your entire 20-year period? A. During my entire period as superintendent.

Q. Sometime subsequent to your arrival was there a [1882] reorganization of the staff itself with some change in responsibilities of various departments? A. Yes.

Q. Is there any necessity to go into any of that? A. I could state it very briefly if it's of pertinence to you.

When I first came to Denver there were three assistant superintendents and the other officers that I have mentioned. One was an assistant superintendent for elementary schools. One for secondary schools. And one for business affairs. That was in 1947.

In 1950 there was a reorganization on a more functional line. We had an assistant superintendent for instructional services. One for personnel services. And one for business services. And that structure held until about 1962, I believe, when we introduced the planning and engineering services office, and that was an offshoot of the business affairs office, otherwise the same.

Q. You split up one part or division into two parts, is

that basically it? A. Right. It was just a division of workload, so to speak.

Q. Upon your arrival in 1947, what did you find with respect to the population and population trend then in existence in Denver? [1883] A. This was one of the things that was talked over in connection with my appointment and which I took a look at when I arrived. There had been preceding 1947 a declining school population for several years. But at the same time there had been a rising birth rate, young people population. So that it was known that when the school year opened in 1947-1948 there would be a substantial increase, and I was asked especially to take a look at this whole situation and to try to make some recommendations soon as to what to do about it.

Q. Asked by whom sir? A. By the Board of Education. In taking a look at it, one of my early decisions was to employ the services of an expert in population prediction to make a survey of the population and to find out how many boys and girls would be expected in different parts of the city as the result of this population explosion. So, we employed the services of Professor Fitzhugh Carmichael of the University of Denver to make a study of the population over a period of years and to assist us in the location of school sites to meet the needs of this growing population, that is, to locate schools.

Q. All right ,sir. Did the school population—the pupil population increase during your 20-year tenure? A. The year before I came, as I recall the population was a little over 45,000 pupils. In 1947, my first fall in [1884] Denver, it jumped by almost 3,000 pupils to about 48,000. It more than doubled during my tenure as Superintendent. The high point was a little over 97,000, as I recall, about 1962 or '63, in that neighborhood.

[1885] Q. Now, also during your tenure, to take care of this expanding pupil population, was there a substantial amount of building that was done? A. There was, a very substantial amount.

Q. Could you give us an idea of how many different projects during that 20-year period? A. As well as I recall, there was a hundred or more projects, building projects, during my tenure as Superintendent, and related thereto were three major bond issues which the citizens of Denver voted. One was in 1948. Another was in 1952. The third was in 1955. I heard this morning testimony, 1956. That's when the bonds were sold, but the bond issue was in '55, so there were three major bond issues totaling 79½ million dollars, and the other funds which were appropriated from current funds in the budget made the total well over a hundred million dollars for buildings.

Q. That's for capital construction? A. For capital construction and the equipping of buildings.

Q. Now, with regard to the source of these funds, you had your operating budget that you computed every year and recommended to the Board? A. Correct.

Q. And once the Board adopted a budget, was it the final body to approve this budget ordinarily, or did it have [1886] to go to City Council or any other agency? A. The Board of Education has the final approval on a budget, but by law if there is an increase of more than a certain amount each year in the operating budget you were obliged to report to the State Taxing Commission for approval or for referral to a vote of the people, and of the twenty years I was there I think I had to go up about eighteen years for approval.

Q. All right, sir, then did you have some portion of the annual budget which was allocated to a reserve for capital

expenditures? A. There were two types of funds that related to the construction of buildings. One was the bond fund, to which I have referred, and that can be achieved only by a vote of the people. The other was known as the capital reserve fund, which is provided by state law, and this initially was limited to a one-mill levy. It later became a possible two-mill levy, to be used entirely for the construction of school building and equipping of school buildings, and this was the fund referred to in the testimony this morning where one could accumulate over a period of years. You could levy, for example, two mills from year to year, and could accumulate funds enough to build a particular school. For example, this was the way in which the Kennedy Junior-Senior High School was built, out of that capital reserve fund. It was not [1887] built out of bond funds.

There is also provision in law for what is called the capital outlay account within the general fund of the budget.

If I may add parenthetically, there are three major funds in a budget, the general fund, the bond fund, and the capital reserve fund. There is also a retirement fund. I mentioned three—four funds. It was three at one time and then four. It was divided.

Q. Now, you mentioned that there was about a total of 100 million including bond funds and also capital reserve funds combined which were available during your tenure for building purposes and equipment? A. Yes, sir.

Q. Was that all used up during your period of time? A. Yes, sir.

Q. When was the last bond passed prior to your tenure, do you know? A. I believe 1938, when Dr. Stoddard was Superintendent.

Q. And there have been none since 1955 that have

passed? A. Well, yes—when you say that it passed, there was one recently that did not pass.

Q. That was in 1967? A. Right, in the fall of 1967.

Q. Yes, sir, you had just left office. [1888] A. That was after my term of office.

Q. All right, sir. Now, by reason of the increased school population and increased amount of school space, did you have major increases in personnel, both certificated and classified? A. There were major increases. For example, the number of classroom teachers when I came to Denver was about 1600, as I recall. When I left office, it was more than 4,000.

Q. Could you give us the approximate amount of your budget the year that you came and the last year that you were in office? A. I can give you approximate amounts. The first budget would have been in the fall of 1947 for the year '47-'48. It was a little over 12 million dollars. The last budget that I recommended, which would have been in the fall of 1968 for the school year '68-'69 was, as I remember, more than 76½-million.

Q. So the District itself is a sizeable operation? A. One of the largest in the City of Denver.

Q. When you arrived, what did you find with respect to community involvement in the affairs of the School District? A. I found some involvement. I would not say it was extensive. There were active Parent-Teacher Associations, a Parent-Teacher Association Council, but I don't recall any other groups directly affiliated with the schools. There [1889] were, in addition, a number of civic groups, of course.

Q. Was community involvement something with which you were interested or concerned? A. Very much.

Q. And why? A. Very much concerned. It seems to me

that it is an important and integral part of school operations. The schools are public schools and finally responsible to the people, of course, and especially in view of the very great building needs at that time, it was obvious to me at the outset that we needed to have the community more involved in trying to solve this problem. And they must have an understanding of it. They should have had one better than they had at that time, because I remember very well some of my early meetings in the community when I made some statement about the needs of schools, there seemed to be an aura of incredibility, "This can't be, we aren't going to grow that way."

So we found it necessary to organize for a study of the school situation in addition to Dr. Carmichael's study of population, organized in other ways.

May I just add parenthetically there was formed a citizens committee, and there were committees formed in all of the schools.

Q. What were they called in the individual schools? A. School advisory committees.

[1890] Q. And did those committees continue to function thereafter? A. They were in being when I left office.

Q. Were there substantial changes in curriculum during your tenure? A. Yes, sir, substantial and continuing changes.

Q. Now, Dr. Oberholtzer, we have already had considerable testimony here concerning the neighborhood school concept, and, again, I don't want to get into a lengthy dissertation on it, but would you again just give us your general definition of what is meant in your mind by the neighborhood school concept? A. The neighborhood school concept has been applied essentially to the idea of constructing a school in a given area of the city called a sub-

district, for the most part within ready walking distance of a group of pupils, and by that, the definitions varied through the years, but in general, within a mile, for example, for the elementary schools, generally within two miles for the junior high schools. The senior high schools were at usually greater distances, and there there was some expectation that there might be transportation, bicycles, automobiles, other ways of getting to school.

Q. Is there any portion of the neighborhood school concept in your definition or in your thinking, Dr. [1891] Oberholtzer, that includes any direct or indirect attempt or being used as a device to segregate by races or ethnic groups? A. There was not, no, sir.

Q. During your twenty years as Superintendent, do you know of any instance where a pupil or pupils were refused attendance at a school within the subdistrict of his or her residence and denied attendance because of race or color? A. Not to my knowledge.

[1892] Q. Now, with respect to this racial and ethnic data, I'd like to know what you did and your motivation there, Dr. Oberholtzer—you came some seven years before Brown against the School District was decided by the Supreme Court. Right? A. Yes.

Q. When you came, what was the policy or practice of the District with respect to racial or ethnic matters and the assignment to schools or the determination of boundaries? What did you learn? A. Early in the fall after August 1 when I came, one of the staff members called my attention to a provision in the Constitution of the State of Colorado which says that there shall be no distinction or classification used in the schools for pupils; that is, no distinction or classification by race or color. This staff member called my attention also to the fact

that there had been previous to my coming some annual reports which did state numbers by—I have forgotten—I think Negro, other classifications. When we both took a look at it we both concluded that this was not in keeping with the Constitution and that we would not pursue that practice, not continue it.

Q. You mean the reporting of figures in that matter? A. The matter of requesting or reporting the figures. We found, for example, that—I think there was on the enrollment cards some designation from which apparently these [1893] statistics were gathered. My attention was called to the annual report, I think, of the superintendent and the secretary where such figures were published. But I directed—when I learned of this—that such not be done.

Q. Did you discuss this with the School District Council before giving such instruction? A. I did discuss this with Mr. Henry and his staff, and he agreed that this was desirable.

Q. And did you then publish such an order to your staff? A. I did so, yes.

Q. This was in 1947? A. That was in the fall, yes, sir.

Q. Thereafter did you continue to get from your staff summaries or statistical analysis or anything comparable thereto by race, color or ethnic origin? A. I did not receive any. My attention was called and I must say on or about—I'm not positive at this late date—but around 1957, that despite my order there were some such statistics being collected. They had never been reported to the staff. And to my surprise were being collected. However, I was not aware of them until this was called to my attention, and when it did come to my attention I again issued an order that they not be collected and, thereafter, to the best of my knowledge, they were not [1894] collected.

Q. During that tenure period when apparently they were coming in to the administration building, were these again from the principal report estimates? A. Apparently they were, yes.

Q. Did you see any of those yourself? A. I did not, no. I don't customarily see those basic reports. I see the summaries. But in this instance I did not see a summary of this report at any time.

Q. And to your knowledge so far as you know were any such summaries or tables or collations or anything of that sort prepared and directed to the other members of the staff? A. I do not know of any, no, sir.

Q. Now, when 1954 came along, the Brown decision was published. Did you take a second look at the situation? A. We certainly did.

Q. What did you do at that time? A. We took a look together, particularly with the attorney, to get his interpretation of the application of the Brown case to Denver. It was his opinion and our opinion that this related to what is now called the de jure segregation, that is, to school systems where by law there was a separation—a separate school facility; separate school systems for the Negro and the Anglo.

Q. Under the old separate but equal doctrine? [1895] A. Under the old separate but equal doctrine, yes, sir.

Q. Was the School District operating under the so-called separate but equal doctrine A. It was not, no, sir.

Q. Dr. Oberholtzer, were there also professional publications which discussed this from time to time at that time? A. There were. There were publications and there were doubts expressed as to the applicability in those publications. In fact, that was generally assumed to be the case.

Q. Did you also attend professional meetings on a national scale in which the same problem was discussed? A. Yes, sir.

Q. And was there any consensus at those meetings as applied to a district such as Denver?

Mr. Greiner: Objection, Your Honor. It would be hearsay, I believe.

The Court: He can describe what he observed as bearing upon his state of mind. Go ahead.

A. Well, the discussions were again in a vein similar to those in the publications which I have just commented on.

Q. Now, Dr. Oberholtzer, there has been some testimony here that—

Mr. Ris: Excuse me just a moment.

Q. There has been some testimony here, Dr. Oberholtzer, that in January, in the months following in 1956, that there [1896] were certain members of the Negro community who appeared before the Board or conferred with you individually concerning some boundary changes, particularly a few blocks on the west side of York Street pertaining to changing the optional Manual-East district to all Manual; an optional Smiley-Cole to mandatory Cole; optional Morey-Cole to mandatory Cole. Do you recall that particular period of time? A. Yes, I do.

Q. And particularly with respect to Mr. Lorenzo Traylor who testified here—I don't believe you heard his testimony. A. No.

Q. I'm just attempting to bring this into some context for you. Do you recall meetings that were held at that

time attended by various members of the Negro community? A. Well, let me see if I can put in context—Are we now talking about the proposals which related to, for example, the opening of Hill Junior High School and the boundaries of the junior high schools and the senior high schools that were interrelated about that time?

Q. Well, Hill Junior High was to open the end of January 1956. Yes, sir. Does that ring a bell with you? A. Yes. Well, that's what I wanted to establish. You're talking about secondary school boundaries now?

Q. Yes, we are. [1897] A. Yes.

Q. Now, do you remember now whether with respect to the opening of Hill that your staff submitted to you various proposals for creation of new boundaries for Hill and changes in the surrounding subdistricts? A. Whenever you open one new junior high school, you inevitably affect certain other contiguous areas. In this case it would have been Smiley; probably Gove or Cole; Morey; that general vicinity.

Q. Now specifically do you recall that you made some recommendations to the Board in January of 1956 with respect to certain boundaries? A. I know I made some recommendations. I can't recall just exactly streets or localities at the moment.

Q. Do you recall whether those recommendations originated with the opening of Hill as the take-off point? A. Yes. This was the reason for the proposals. The basic reasons.

Q. Now, Hill was carved out of basically what other junior high subdistrict? A. It would have been basically Gove and Smiley most directly. To some extent, possibly Morey. But, Gove and Smiley.

Q. So that would result in changes of the boundaries of those schools? [1898] A. Yes. And when you affect those particular schools you can also affect certain other neighboring schools. As I recall, they were affected.

Q. Do you recall that there was some opposition by members of the community to your proposal made in January of 1956? A. I do recall that there were some comments made to the Board, yes.

Q. Dr. Oberholtzer, I hand you what's been marked as Exhibit 332 and ask you if that refreshes your recollection as to the proposals that were made by you at that time. A. This certainly appears to be the proposals, yes, sir.

Q. And that is divided into how many major parts, with Roman numerals? A. There were four major parts.

Q. Were all those the outgrowth of the opening of Hill? A. Yes.

Q. Were all those adopted by the Board in the January meeting of 1956? A. No, they were not. As I recall, we were obliged to consider— Well, we had to have some boundary lines for Hill Junior High School. It was opening shortly. And as I remember we divided the action into two parts, the first part [1899] relating to Hill Junior High School, and the immediate contiguous school —junior high schools, and later the action with respect to—well, to be more specific, there were two parts: The first was the new boundary lines for Gove, Smiley and Hill. And Roman two for Morey, Gove and Hill. Three was between Cole, Morey and Smiley. And four, between Manual and East. As I recall, action was taken on I and II in January and the other two were deferred.

Q. Would there be a tie-in between III and IV? A. Yes.

Q. Why is that? A. Primarily because the so-called feeder junior high schools related to both Manual and East were affected then.

Q. Now, do you remember when III and IV were enacted—or adopted by the Board, I should say? A. Apparently in June. That's my recollection. And, you have the Exhibit No. 333 here.

Q. That's a copy of the Board minutes at that time? A. And this is a copy of the Board minutes of June 20, in which action was taken on the changes in boundary lines between Cole, Morey and Smiley and between Manual and East High Schools.

Q. At the time that these changes were made then, as indicated in the Exhibits 332 and 333, did you have any racial statistics as to pupil membership in the various schools involved or in the neighborhood from which the [1900] pupils came? A. We did not.

Mr. Greiner: Pardon me. Could we have "you" identified? Is it the personal "you" or is it the School District?

The Court: I believe he could only testify concerning his own knowledge.

Q. Let me ask you first—did you have any personally? A. Personally, no.

Q. To your knowledge did any member of your staff? A. No, and I'll have to supplement that, because I know of no discussion or presentation of any such data.

Q. Were any such given to—

[1901] The Court: You are talking about actual numbers?

Mr. Ris: Yes, sir.

The Court: This doesn't say they didn't have any knowledge?

Mr. Ris: No, sir, I am asking about statistics, was my question.

The Witness: Correct.

The Court: Well, that doesn't really mean very much. I suppose what we are really concerned with is were you aware of the conditions?

Mr. Ris: I will come to that in a moment, yes, sir.

The Court: In other words, at this stage I don't suppose that you could fail to know that all the population is increasing, particularly the Negro population, or expanding.

Mr. Ris: Well, this is—

The Court: You are going to bring that out?

Mr. Ris: I will pursue this along that line, yes, sir. May I proceed?

The Court: Surely.

Q. Were any statistics or figures presented to the Board? A. No. No, sir.

Q. Now, there have been some figures in the new Manual publications, have there not, Dr. Oberholtzer? A. This is so, yes. There was a study of the new [1902] Manual High School, in which I think there was one table of statistics. That's the only exception that I know of.

Q. Do you know the source of those figures? A. No, I don't.

Q. You say it was a special study. Do you know how that special study was carried out? A. Well, the special study

was carried out under the direction of an assistant superintendent and the principal of the high school.

Q. All right. When Manual was opened in 1953 was there any boundary change for the new Manual as compared to the old Manual? A. I don't recall that there was any particular change, no, sir.

Q. Now, at this same period of time and to develop along the line that the Court just asked about, with respect to the change proposed between Cole-Smiley, Cole-Morey, East and Manual, the particular area being immediately west of York Street, what personal knowledge did you have as to the racial composition of that area, generally, specifically, whatever it may have been? A. I had no statistical knowledge. As has been inferred here, I had some general knowledge, obviously, but no specific or statistical knowledge.

Q. Tell the Court as specifically as you can what your [1903] general knowledge was. A. Well, an obvious awareness that there was a presence of a large number of Negro pupils, for example, in Manual and in Cole and in that vicinity.

Q. To what extent did your knowledge as to the minority population in that area and the pupil membership coming from that area enter into your consideration at that time in the boundary changes that were being proposed? A. At that time it was not a consideration.

Q. Why not? A. Because, again, we were, as we understood it, under the mandate of the Constitution not to make distinction or classification by race or color, and this was not to be taken into account in the schools.

Q. Now, there were people who appeared before you at meetings, either in the community or before the Board,

who told you that this should be taken into consideration, were there not? A. There were some.

Q. And what was your reaction to that and why? A. Well, again, our reply, as I recall, or our comments were that we were endeavoring to build schools where they were needed to accommodate the pupils who were in those particular areas of the city, and by that I am not referring to any particular line but a neighborhood, if you want to call [1904] it that, a particular area of the city.

Q. Was there any one person or any one group who appeared to you, Dr. Oberholtzer, to speak for the entire community there?

Mr. Greiner: Object, Your Honor. I don't believe that would be relevant.

The Court: I don't see the purpose of this, Mr. Ris.

Mr. Ris: Well, again, it goes to the matter of intent, motivation, causation, so forth, which is one of the plaintiffs' theories in this case.

The Court: That the Board or the Administration was primarily charged with following the community demands?

Mr. Ris: No, sir, but I think it enters into what he did and why he did it.

The Court: Well, the fact that there were splinters of opinion, I don't think is of much consequence. There probably always are.

Mr. Ris: My point is this, Your Honor, to hear Mr. Traylor talk he appeared before the Board and he stated his piece and gave his reasons and so forth, and from his testimony he was speaking for every-

body, and there was no splinter. All I am attempting to establish is that there was.

The Court: All right.

[1905] Mr. Ris: Many different viewpoints.

The Court: Go ahead.

Q. All right, Dr. Oberholtzer, I will restate this. At these various meetings, were there different opinions expressed by different people? A. May I ask the reference? At these meetings, what do you mean?

Q. These meetings—

The Court: Having to do with these boundaries.

Q. 1956. A. Yes, at the Board meetings there were. The reason I asked, I think if I may amplify a little bit, because of the presentation at the Board meetings I invited into my office and into the Administration Building a large number of people from time to time in small groups to discuss this situation, both from the Negro and Anglo communities, as to what their views were, and this is why I was asking you. I didn't know what meetings you were referring to. These were conferences with citizens of the area.

The Court: Well, I think there were some meetings described at Manual High, for example.

The Witness: Well, that's another type of meeting, Judge. That's why I am asking what he is referring to.

Q. I was just referring to any meetings, whether they were at the Administration Building, at Manual, or at Glenarm [1906] YM, during this period. I didn't want to

take the time to go meeting by meeting, but try to cut it a little short here, on the discussions held during this period involving this particular boundary change. A. Right.

Q. Now, then, getting back away from this specific boundary change, Dr. Oberholtzer, and to the consideration by you individually, by you as the Superintendent, and by the Board, at what point in time did there come a change with respect to consideration of racial and ethnic groups? A. I would say in perhaps 1962 would be as good a point as any because at the time, in 1962, there was a proposal for a building program, including as one of the proposals a junior high school to be located at 32nd and Colorado Boulevard. That probably, as nearly as you can take any one point, would be a turning point of consideration. Now, there were some subsequent related matters there.

Q. But that was the major thing that— A. I think as a date, yes.

Q. Did this ultimately lead to the appointment of a special study committee which we have been referring to here as the Voorhees Committee? A. I have not heard all the testimony here. I presume that's what you are talking about, yes sir.

Q. There was a special study committee appointed in [1907] 1962? A. There was a special study committee on equality of educational opportunity. I presume this is the one you are calling the Voorhees Committee.

Q. Of which Jim Voorhees, James Voorhees, was the chairman? A. Yes, sir.

Q. Who authorized this committee to be formed, Dr. Oberholtzer? A. The Board of Education.

Q. Who appointed the committee? A. The Board of Education.

Q. Were there numerous citizens recommended for it? A. As I recall, there was a general invitation to the public to nominate persons to be members of this committee, and a large number of names were submitted to the Board of Education, and the Board of Education made the selection of the persons to be on the committee.

Q. Now, in connection with the study of that committee, were Mr. S. Arthur Henry and his staff requested to research the cases that have been decided in recent years following the Brown decision? A. He was asked to review and to present a written opinion or series of opinions.

Q. And was that done before the committee? [1908] A. It was done.

Q. Also in 1962, in this same connection, did you and anyone else take a trip to visit other schools districts than Denver, being faced with like problems? A. Dr. Henderman and I did in May or June of 1962, yes, sir.

Q. And what was Dr. Henderman's position at that time? A. Dr. Henderman then was Deputy Superintendent and also Assistant Superintendent for Instruction Services.

Q. Where did you go on this trip, Dr. Oberholtzer? A. We went to Philadelphia, New York, Detroit and Chicago.

Q. Upon your return did you report to the Board? A. I did make an oral report to the Board of Education, yes, sir.

Q. I hand you what has been marked as Exhibit HM and ask you if you know what that is. A. This is a transcript of notes taken on my oral report, taken by the secretary of the Board.

Q. Have you had occasion to look at that recently? A. Yes, I have.

Q. And is that a fair transcript of your remarks to the Board at that time? A. Yes, it is.

Mr. Ris: We offer into evidence Exhibit HM.

[1909] Mr. Greiner: Your Honor, we have never seen it before. Might we take a minute to read it?

The Court: Yes.

Mr. Greiner: It is several pages long.

(Document was handed to counsel.)

Mr. Greiner: Well, Your Honor, I have no doubt that this is an authentic transcript. We do object to it on the basis if it is offered for trying to establish the truth of the facts asserted in the report regarding what was going on in these various cities, I believe it is a hearsay statement, and we would object to it on that grounds.

The Court: I think it is only offered for the purpose of showing inferentially the attitude and state of mind of the Superintendent. For that purpose, we will receive it.

(Whereupon, Defendants' Exhibit HM was received in evidence.)

Q. Dr. Oberholtzer, I don't want you to attempt to read that report at all, but can you just very briefly summarize what you had done on this trip and what you found as reported to the Board? A. Yes, I can, and the purpose was, as the Judge has stated. I recommended this trip to ascertain more accurately what was going on in other large cities, particularly these four, with respect to consideration of racial and ethnic factors in the matter of building schools, programs of [1910] education and such, and when I returned I made this oral report that was made here simply with the idea of advising the Board generally as to what was taking place. No two of the cities were acting alike, but

they were all concerned with such matters as teacher assignment, community relationships, school boundary lines, and the like.

Detroit had a study going under a citizens advisory committee on school needs which was chaired then by Mr. Romney and out of which grew a special committee to study the quality of educational opportunity.

At the conclusion of my remarks, I did say that there were two major ways of conducting a study which I felt was necessary in Denver at that time. One would be for the Board of Education to appoint a committee or commission involving citizens individually, citizens as representatives of organizations, and also some of our professional staff. Another way would be to have a professional staff study involving consultants and hearings so that the community could express itself.

I expressed to the Board a preference for the first alternative, which was later—and I recommended at a later date the Board adopt it, the idea of a committee composed of citizens and professional persons, and I would like to add here again my concern for that approach because I felt very much the need of a much better community understanding of the [1911] issues and the questions which were at stake. I did not feel that there was such understanding at that time.

Q. Then the Voorhees Committee was appointed, went to work, and did you get an interim report from that committee? A. There were some interim reports, yes, sir.

Q. And then the final report came out March of '64, and you have a copy there before you as Exhibit 20? A. I do.

Q. All right, after this report was published, did you have occasion to study it, Dr. Oberholtzer? A. I most certainly did.

Q. What did you do about it? A. I studied it intensively, and one of the first things I did was to make a compilation of all the recommendations separately and to assign each of the recommendations to a major staff person for study in his office. I also made a summary of all the recommendations and provided copies for every person in the public schools staff so that they were aware of the recommendations of the study committee.

Q. You have before you a document marked as Defendants' Exhibit HN. What is that? A. It is entitled, "Recommendations of the Special Study Committee," and it is what I just referred to, my assignment to various members of the staff. For example, it has a number column in which we numbered all the recommendations of [1912] that special study committee so that we could refer to them readily. There were 155 recommendations.

Mr. Bis: We offer into evidence Exhibit HN.

Mr. Greiner: Does it bear a date, Dr. Oberholtzer?

The Witness: I don't see a particular date on this copy.

Mr. Greiner: Could we have a foundation, Your Honor, at least as to when it was prepared? Otherwise, we would have no objection.

Q. When was this prepared? A. This was prepared immediately after the presentation of the report. It would have been on or about April of 1964.

Q. And was there a follow-through on this, Dr. Oberholtzer? A. There was a follow-through, and in many ways—may I mention in addition to the staff study, I invited every faculty, school faculty, to make a study of the recommendations and to respond to those recommendations.

Q. Was that done? A. That was done. As a part of the consideration, the special duty committee itself held public hearings throughout the city. Through the cooperation of the Parent-Teacher Association, meetings were held in various parts of the city to discuss the recommendations. I personally made [1913] reports to the Board of Education on the progress that we were making, our response to the recommendations, and what the schools were doing about them. Now, there were several types of responses. One of them was a report to the Board of the staff studies, but I think perhaps of more pertinence would be the summaries which I reported to the Board of Education.

[1914] Q. What was accomplished? A. What was accomplished? With respect to each of the recommendations?

Mr. Greiner: Your Honor, we have no objection to the introduction of HP and HQ which are being marked now.

The Court: All right, they will be received.

(Whereupon, Defendants' Exhibits HP and HQ were received in evidence.)

The Court: We have already taken HN, I guess. Were you satisfied then with the data on HN? You objected to it on that ground.

Mr. Greiner: Yes, Your Honor, I was.

Well, Your Honor, HQ—we would again object to it if it's going to be offered for the truth of the matters stated in it. It is a somewhat self-serving document. It's a report of Dr. Oberholtzer to the Board.

Mr. Ris: I had better lay a foundation as to what it is.

Q. Dr. Oberholtzer, I hand you three exhibits, HO, HP and HQ. Will you take them one by one and state what they are, please? A. HO is entitled, "A Progress Report to the Board of Education by the Superintendent and Staff of the Denver Public Schools on the Recommendations of the Special Study Committee on Equality of Educational Op. portunity, May 6, 1964, to May 6, [1915] 1965."

HP is entitled, "Two Years After a Progress Report to the Board of Education by the Superintendent and Staff of the Denver Public Schools on the recommendations of the Special Study Committee on Equality of Educational Opportunity, May 1964 to May 1966."

The third document, HQ, is a secretary's report of my oral comment to the Board of Education and its meeting on June 29, 1967. There is no other heading. But, this relates primarily to the advisory council on the equality of educational opportunity—the so-called Berge committee report.

Q. Have you had occasion to review the transcript shown, HQ? A. I have.

Q. It is a correct transcript of your oral remarks? A. To the best of my recollection, it is, yes.

Mr. Ris: We offer in evidence—

The Court: We will receive them all.

(Whereupon, Defendants' Exhibit HO was received in evidence.)

Mr. Ris: Was HN also received?

The Court: HN has been received. HQ will be received over the objection for the limited purpose of reflecting the thinking at the time and the knowledge that was communicated to the Board members.

[1916] Q. Dr. Oberholtzer, I am going to leave these exhibits for a moment and we will return to them shortly. Now, Dr. Oberholtzer, we have already had considerable testimony, but I'm not sure it's entirely clear so I want you to explain it to us the best you can—what difference, if any, there be between what's known as a rated capacity of a school building and the actual utilization of a school building; what the relationship may be. And whether merely reflecting pupil membership to rated capacity is always a fair comparison; whether the actual utilization of that building must be taken into that consideration. A. I had heard some of the testimony with respect to this and I can understand why there might be some difficulty in understanding the matter.

We are obliged to have what amounts to certain base figures from which to consider capacity of a building or utilization of a building. And this has been—it was during my twenty years—different terms were used and there were some differing practices as was pointed out this morning in how you calculated capacity. We found it difficult to explain to citizens through the years, and I find it here. But, it is a necessary part of our consideration.

The tendency of most lay citizens is to take capacity as an ironbound—you go above or below a certain figure. That was not the purpose of this matter at all. It was to give [1917] an indication on the basis of a formula from which you derived the utilization. And just to repeat, usually building capacity was calculated on the basis roughly of 30 pupils per classroom with certain variations. But, that was the basic—there were variations, as was pointed out this morning with respect to major things.

For example, whether you included libraries or not. Whether you included the gymnasium or not. So it made

some difference from year to year as to what a capacity was. But, this was simply the starting point of consideration of utilization.

And when we took a look at the—at a given pupil population in the school in terms of suitable programs, you always had a variation as to utilization. The confusing part is that we still find citizens referring to under-utilization and over-utilization based on this 30 pupil. This is really of no meaning, if you consider the program. I have to say it that way. And yet, we were obliged to publish a capacity figure, and this is why we got ourselves into arguments with people about what it meant, and I have heard some of them here.

For example, if there were—if we had testing results, achievements, and I'm referring to standardized achievement results. If there was generally let's say lower achievement than another school, there would be a different [1918] picture as to its utilization.

Let me generalize I hope in a meaningful way. Using the middle line of achievement as the median, if the major achievement was well above the median, it was possible to have larger class sizes, a larger number of pupils in a given building and still maintain a very good educational program. This is largely because in those areas or neighborhoods where there was a generally high achieving group of pupils, that group is more capable of self-direction in its own study activities and did not need lesser number of pupils.

If there was lower achievement in certain areas, it was necessary to have a larger number of teachers per pupil per group of pupils. That is, the number.

This is where you get into teacher-pupil ratio.

And generally speaking, one of the adaptations that we

made through the years for those schools where achievement was not as high as I have just referred to, there would be lower pupil-teacher ratios. Every room would be occupied and the building would be utilized from our standpoint fully for that program.

Now, if you just take a 30-pupil average and calculate it, then that building was not utilized, and I have heard that term used here, underutilized. That in our estimation is not the case. The building was fully utilized and that's why I want to make it clear at this point because I can if advisable [1919] point to particular schools and that may be useful to do so.

But, this is in general the case. So, we instituted the other kinds of adaptations to endeavor to raise the achievement levels, but one of the basic adaptations was to lower the pupil-teacher ratio. In other words, if you want to translate this into pupil capacity and utilization, instead of let's say using 30 pupils as a normal capacity in those schools, you in fact ought to use closer to 25 as a rated capacity.

Q. Now, we had considered this at one time as a way in which to relate to this and we tried it. But, we found people constantly getting confused as between the two applications. This is in fact what has happened.

Q. And some of the comments that I heard this morning relate specifically to what I have just said.

Q. Can you relate this specifically to either Manual or Cole from the testimony you heard this morning? A. Yes, sir. It would apply both to Manual and Cole. The achievement level at Manual and at Cole was not in this higher bracket that I am talking about generally, and please keep in mind that one of the basic facts of

education is the individual differences, and I'm talking now only in general, not individual.

There was a need in both instances of a much lower pupil-teacher ratio and this was requested year after year by the principals in those schools. And we did accede in [1920] their request for lower-pupil teacher ratios as one of the means of endeavoring to raise the achievement levels.

Q. Dr. Oberholtzer, there has also been a problem with respect to this exhibit, which is 390 and 390-B. And there was particular reference to certain elementary schools which are represented by blue circles, Columbine, Whittier, Gilpin, Crofton, Ebert, Elmwood, Fairview, Westwood and Elyria.

Q. Can you relate what you have just been discussing with respect to utilization compared to rated capacity as to these particular schools?

Mr. Greiner: Your Honor, I object. That exhibit speaks as of September 1968; at a time when the Superintendent was no longer Superintendent.

The Court: Well, he can give us whatever information he has on this subject. It may not be in date particularly.

A. If it would be useful, I will comment, as I knew the schools.

Q. That's all we're asking. Anything you have of your own knowledge; what you know from your own experience. A. From what I know of those schools—they were generally in what would be termed low economic—socio-economic neighborhoods and this is based upon the average income of the family, and they would be generally

in the portals that I was talking about, not of the high achieving schools, but of the lower achieving schools. Yes.

[1921] Q. Dr. Oberholtzer, you say that you had various adaptations that were used in those low achieving schools. Why were you using adaptations there? What was your objective? A. Our endeavor was to try to raise the achievement levels of the children in those schools. It has come to be known in these later terms as providing equality of educational opportunity. What we were trying to do was to provide the conditions whereby these boys and girls might achieve more nearly in keeping with their abilities.

Q. Directly tied in then to making available equality of educational opportunity? A. It was directly related to it, yes, sir.

Q. Now along the same line, but deviating a bit, there has been some evidence introduced at this trial concerning the achievement results by schools and particularly with respect to the triennial testing that was done and the fact that although there were publications made of the test results, that here were no publications to the general public or even to the Board itself at its meetings of analysis, school by school, so that schools were compared. Is that the fact? A. That was a fact during my administration.

Q. Why did you do that, Dr. Oberholtzer? A. May I comment then, because I recommended the institution of the triennial surveys of testing of achievements [1922] which began in 1950 and were continued at three-year intervals thereafter. At the same time an opinion survey which accompanied it, which is pertinent to this, I hope, later. We did consider many times in staff the desirability of reporting comparative results and decided not

to do it, essentially for the same reasons that we did not publish comparative results of individual boys and girls. We felt that it would not be desirable. There are individual differences among boys and girls, many differences. There are many differences among schools. And it was in our judgment an unfair practice to do this.

Now, this is a very short answer to a difficult and complicated question, but I would add immediately that the results for every school were made public in the neighborhood. Where that school was located we did compare their results with the city wide results and it was an obligation of the principal and the faculty to discuss with the citizens of that community the results and at least one meeting was held in the schools to do this on each occasion.

The Board was furnished the overall results. The community at large was furnished the overall results. A special edition of the review, for example, was published.

Q. And the review is what? A. The review is an official publication of the Denver Public Schools issued at first once a year and then I think [1923] three times a year, which was an attempt to make a public report to the citizens of some important things going on in the schools.

Q. To whom is the review circulated? A. A copy was given to every boy and girl in the schools to take home, for one thing, so that there was a public statement of the results. We also mailed copies to organizations and to a large number of individuals who expressed an interest and wanted copies. The members of the Board were provided copies. All members of the staff, certified and classified, were provided with copies.

Q. Did the staff itself compare school by school? Did they have that material available? A. That material was available, and there, however, were no discussions with

faculties or with schools comparing them with other schools. We did every year—when I say "we," the deputy superintendent of instruction made a personal visit to every school at least once a year, all schools in the district, for the purpose of discussing these results with the principal and the faculty committee, usually the so-called instructions committee of the faculty, raising questions as to what they were doing to improve the situation.

[1924] Q. In each school, was there a standing instruction of the faculty? A. There was, for a long number of years. This is an old custom in Denver. It was here when I came and continued.

Q. Dr. Oberholtzer, as the years went by and we had overcrowded situations, you had various expedients to solve the problems, either temporarily or permanently, correct? A. We did.

Q. When you first came, was consideration given to the use of mobile units? A. There was some consideration at that early date.

Q. Were they being used at all in the Denver system? A. No mobile units. There were some so-called temporary buildings that had been there since World War I.

Q. At Gove primarily? A. There was, I think, one or more, perhaps one or two, at Gove, but there was another junior high school that had one or two.

Q. Was that the extent of the temporary buildings? A. That was the extent of the temporary buildings at that time. We called them temporary buildings. They were not temporary.

Q. Were mobile units being used in other districts in the metropolitan area? [1925] A. I don't recall any mobile units. There were some called, again, temporary buildings. For example, our neighboring Jefferson County embarked

on, I think they called them cottage schools. They were homes, in fact, converted to schools temporarily, but I don't recall any so-called mobile units at that time.

Q. In the '60s, there was some use made of mobile units in Denver, were there not? A. There was a very late development, after we had considered other ways in which to meet the increasing population.

Q. What other ways were used? A. Well, basically, we made a decision early not to build temporary buildings in connection with the first bond issue, so we constructed no temporary buildings for elementary or secondary schools for a long period of time. I have to qualify that, because in the late 1960s, there was a change. Instead, we did utilize several sessions of schools and so there were at times as high as 200 rooms on double sessions in the district, mainly in the elementary schools, although there were at times some secondary schools, rather than building temporary or mobile units. Now, this was in lieu of permanent construction, until we could get it.

Now, our ideal was to provide permanent [1926] construction wherever possible. We had the usual problems of insufficient funds to do all the things that we wanted to, to meet the needs. A great many of the needs were met through the three bond issues and the other program that I referred to, but a lot of them were not met.

Q. Would you just define what is meant by double sessions? A. A double session—let me use the term in the elementary schools first—for example, it meant that a given classroom in a given grade would have two sessions in a day. There would be one teacher in the morning and one teacher in the afternoon, and, generally speaking, that, as I recall, went from 8:30 to 12:30 and 12:30 to 4:30 in the

afternoon, with some overlap of teachers, so that there were in fact two teachers in a given room at a time.

Q. Two different groups of pupils? A. No, one group of pupils, but there were two teachers for that group in the overlap period of time at the noon hour.

Q. No, I'm speaking about the morning session and the afternoon session. A. There were two sessions of pupils but no overlap of pupils. The overlap was in the teachers who were working with the pupils. That was mainly in the—

[1927] Q. Just a minute, let's back up.

The Court: I thought double sessions involved full utilization of the buildings by starting at seven in the morning with one shift and commencing at twelve with the second.

The Witness: Now, Judge, we are coming to that in a moment. That's the secondary school, not the elementary school.

Q. Well, in the elementary school, do you have one group going in the morning and a second group going in the afternoon? A. In the secondary school, but they started—

Q. I am talking about the elementary. A. Two groups in one room.

The Court: When do they start?

The Witness: 8:30 in the morning to 12:30 and 12:30 to 4:30. What he is talking about is a secondary school. That's another matter. I will come to that.

Q. I don't think it is clear that you had separate teachers, morning and afternoon. A. That's what I stated.

Q. Two groups of pupils, morning and afternoon? A. Yes, sir.

Q. And the teachers overlapped over the noon hour? A. That's right.

[1928] Q. So the teachers overlapped? A. They had the same day as any regular teachers.

Q. All right. How about the secondary school? A. It was as the Judge indicated. We began there much earlier, and our endeavor was to provide, as nearly as we could, the full time element for them. We began about seven, went to twelve, and twelve to five. That's the secondary school, that's true. Here again, there were two groups of pupils and two faculties. There was not a continuation of teachers. Now, this was widely used in both elementary and secondary schools as a temporary measure to meet overcrowding. There was another means of doing this used in the secondary schools only.

Now, I have to refer to stages of overcrowding, if I may here. At the first stage, there would be extended days, and by that I mean they were taking normal school days, which began around 8:30 or so, and extended to about 3:30. They would add a period on in the morning and in the afternoon, or one or the other or sometimes both. This enabled them to accommodate another group of young people in the schools. When that did not meet the need, then we had to go to a double session, and that's the second stage.

Q. Was the extended day technically used only at the secondary level? [1929] A. In the secondary schools, yes.

Q. That had to be tied in to a so-called tutorial system where they went from class to class. A. This was adaptable in the secondary schools because you have a quite dif-

ferent organization. You do it subject by subject. Certain subjects would be offered in the morning and certain in the afternoon.

Q. So, a normal day, say, at a high school, was seven periods and on an extended day you would extend it to nine periods? A. That would be typical.

Q. The pupils would still take the normal course? A. They would be involved for seven periods, for the most part.

Q. You could accommodate more pupils in the nine periods? A. Right.

The Court: I think we will take our afternoon break at this time, Mr. Ris.

(Whereupon, at 2:27 o'clock p.m., the Court recessed.)

[1930] (Following a recess, the trial resumed at 3:48 p.m.)

Q. Dr. Oberholtzer, we were discussing various—

The Court: Double sessions.

Mr. Ris: I think we were through with double sessions, unless the Court had some—

The Court: That was the last thing.

Mr. Ris: I'm through with it.

The Court: I'm pretty well checked out on that now.

Q. Now, what other options are there that have been used from time to time for a solution of overcrowding in the schools that we have not discussed so far? A. Well, a limited—to a limited extent, some transportation. But,

transportation was used more often to accommodate pupils in areas where there were no schools and you transported them. The other was the mobile units to which you referred. But, that did not come into the picture until late 1960's, as I recall, around 1965-1966, somewhere in that time. Those were the principal ways.

Q. Did you on occasion or as a matter of practice have to determine what the wishes of the parents of the children or the students were as to some of these various options? A. Yes, there were discussions. Sometimes extended discussions; sometimes very brief discussions, depending particularly on the differences between elementary and secondary schools. There was usually some discussion. Very often in [1931] the case of the elementary schools it would be the principal and the faculty with the citizens. Sometimes, the central staff would be involved. Rather frequently in the case of the secondary schools where board action was necessary and much larger numbers of pupils involved, there were hearings and sometimes in the schools there were meetings, representations were made at the board meetings.

So it varied greatly from school to school. But, there usually was some consideration of the citizen interest.

Q. Do you remember a circumstance pertaining to the Smith Elementary School and questionnaire to parents as to various alternates—or to various options, I should say? A. I do have some recollection of it, yes. But at the same time that Smith was being considered, Stedman was also being considered. And Dr. Hendryman attended the series of meetings at Smith School and I attended a series of meetings at Stedman School. So I am familiar generally with what went on at Smith, but I did not attend the meeting.

Q. You were not personally present that evening? A. I was not.

Q. Did Mr. Olander attend the one at Smith, if you know? A. He might have. But, Dr. Hendryman was the man primarily responsible, my deputy superintendent.

Q. At that meeting—at Smith, you were aware that [1932] the meeting was being held? A. Oh, yes. And he was assigned to go there.

Q. And at that time and prior to that meeting was it known busing was to be had out of Smith to what schools the children would be bused? A. I don't recall that particular—there was a discussion of possible busing and of possible mobile units, as I recall. These were the—or double sessions; such arrangements. But, the primary issues resolved between mobile units and busing.

Q. Boundary changes also a solution to overcrowding? A. I don't recall any extended—at least any extended discussion of any changes in boundaries at that time. There were perhaps some, but it is primarily ways of making a significant difference in the overcrowding.

Q. Dr. Oberholtzer—

The Court: Well, were the solutions—the discussions and solutions the same at Smith and Stedman?

The Witness: No, sir. The solutions were not the same.

The Court: Were you going to ask him about his experience at Stedman?

Mr. Ris: No, but I'll be glad to.

The Court: He said he attended Stedman.

Q. Would you tell us about your experience at Stedman. [1933] A. I'm glad to have the opportunity. I did discuss

with Dr. Hendryman his experience so I had some general knowledge of what occurred.

Mr. Greiner: Pardon me. I thought the question pertained to Stedman, Your Honor.

The Court: Well, that was my object.

A. All right. I will discuss Stedman then.

The Court: Very good.

Q. That was the question. A. In the case of Stedman I was present at the meetings where there were citizens interested in solutions to the overcrowding of that school. The discussions resulted in the citizens recommending that we relieve the overcrowding by busing out some children from the school.

[1934] Q. What type of meeting was this, Dr. Oberholtzer? A. A public meeting.

Q. Was it a PTA meeting or a special meeting called for this purpose? A. It was a special meeting called for this purpose, at which I understand a general invitation was extended to citizens of the community.

Q. Do you remember when this meeting was held? A. In the afternoon.

Q. What month or year? A. I can't recall precisely. It was, I think in the spring of the year.

Q. January, 1966? A. I was thinking of later. It might have been.

Q. There has been some evidence as to certain overcrowding in Columbine and Harrington in the early '50, specifically 1951 and 1952. Do you recall what the situation was at Columbine and Harrington in particular at that time? A. '51-52?

Q. Right. A. There was an increasing population of students in that area, and as I recall, rather serious overcrowding of those schools.

Q. Do you recall what the situation was with [1935] increase in number of Negro students in either of those subdistricts at that time? A. Well, again, we had no statistics and I have no distinct recollection of the racial composition, no. I do know there was some general changing and moving of population beginning about that time, but not a large group.

Q. All right, do you recall making any changes or establishing of any optional zones in that area where the race, directly or indirectly, went into your consideration or decision? A. That was not a part of our consideration.

Q. Directly or indirectly? A. Directly or indirectly.

Q. Now, with respect to the 1956 boundary change, when those changes were made between Cole and Smiley and Cole and Morey and East and Manual, do you recall what was done with respect to the pupils that were already enrolled in any of those optional schools, as to whether they could continue or had to complete their junior high experience or the senior high experience at the new school? A. The general policy at that time, and I presume it was followed then, was to permit a boy or girl to continue in the school of attendance. For example, if you were in a junior high school, to continue his attendance [1936] there. In the senior high school, to continue there.

Q. I would direct your attention again to Plaintiffs' Exhibit 333, June 20, 1956, and Paragraph C. Does it so indicate that all the present seventh, eighth and ninth-grade pupils may continue at either Smiley or Morey or

Cole, where they were presently attending? A. Correct. Paragraph C.

Q. With respect to Manual and East, referring to Paragraph B, what is provided? A. All present tenth, eleventh, and twelfth-grade pupils living in this area may continue at East and Manual High Schools under the present option.

Q. And when did it become mandatory then as to the future students? A. Well, all pupils entering the senior high school from the area in the future, beginning September, 1957, would attend Manual High School.

Q. Now, Dr. Oberholtzer, I would like to take a look, if we may, at Barrett. First, Barrett construction and, first, to the Barrett site selection. Can you tell us in what year the property was acquired by the school district, roughly, Jackson, Colorado Boulevard, East 29th Avenue to East 32nd Avenue? A. It, as I recall, was acquired in 1949.

Q. Were various school sites selected during your [1937] tenure in office? A. A great many sites and one of the first of my jobs was to participate in this selection, resulting—and this is an instance, the 32nd and Colorado site—resulting from the Carmichael study. This was one of the early sites acquired, and we acquired sites throughout the city where there was some projected increase and where we did not have, or where there was potential increase, and we did not have sites, and in this case it was a potential that we were looking to. 32nd and Colorado was a junior high school site, as I recall, because of its size, but we did acquire a goodly number of both elementary and secondary school sites in a period from roughly 1948 to 1950, and then thereafter periodically, as expansion, annexations occurred, so on.

Q. Again, attempting to obtain a time sequence, you assumed your responsibilities on August 1, 1947? A. Right.

Q. Do you remember when Dr. Carmichael began his study and survey? A. Well—

Q. Or do you remember when you got his report? That's the important thing. A. Well, it came in 1948, as I recall, before the close of school or about the close of school. Dr. Carmichael [1938] was employed sometime before December of 1947, as I recall, to begin his studies, and he begin promptly to make these studies of pupil populations and projections of populations and assisted us also generally in commenting on the location of sites, but we had in addition a committee of realtors who did the actual negotiation for sites at our direction. That is, the general locality. You can't always buy a site where you would like to have it, because the neighborhood perhaps was already built up. Rarely did we have the opportunity to go into an undeveloped territory and select a site where we would like to have it.

Q. All right, in your years of connection with the Denver Public Schools, have school site locations ever been selected for the purpose of containing minority pupils, that is, Negroes and Hispanos, in schools separate from Anglo students? A. No.

Q. Now, with regard to the Barrett construction, what was the problem that led to that construction, Dr. Oberholtzer? A. Well, again, as in other cases, a rising and in this instance a very rapidly rising school population and an overcrowding of schools in the immediate neighborhood. In this instance, the most contiguous schools would have been, I believe, Columbine and Harrington, but rapid [1939] rise there led us to recommend the construction of a school at 29th and Jacbson. We had an available site.

It was at the east end of the territory involved, where the children were. We would have much rather had a school farther to the west, but there was no site for it. This was the available site.

At the same time, there were other needs very closely related and similar to the Barrett situation. For example, the Denison Elementary School. I mention this because the plans of Barrett and Denison were identical. That is, they were prototype schools, and the situations very similar, rapidly rising population.

Q. Again, in connection with the decision to build on this site, were parents of the children in the community consulted? A. There were discussions, as I recall, about the construction of the school, yes.

Q. Do you remember when the authorization was given by the board for the schools? A. As I recall, I recommend that we construct the school late in 1958, somewhere in that neighborhood.

Q. Had planning been considered prior to that for any period of time? A. In this instance, as in others, yes, over a period of months, some consideration had been given.

[1940] Q. I hand you what has been marked as Defendants' Exhibit GC, which purports to be Pages 9 and 10 from certain minutes. Do you recognize what that is? A. These appear to be copies of minutes of the Board of Education.

Q. Relating to Barrett School? A. Yes.

Q. Have you reviewed these recently? A. I have had an opportunity to read them, yes.

Q. What is the date of the meeting? A. The date of the communication is April 8, 1959.

Mr. Ris: We offer into evidence Defendants' Exhibit GC.

Mr. Greiner: No objection, Your Honor.

The Court: It will be received.

(Whereupon, Defendants' Exhibit GC was received in evidence.)

[1941] Q. Now at the same time do you recall what the situation was with respect to Columbine? I think you mentioned Harrington. A. I think I did mention Columbine and Harrington.

Q. I'm sorry. I missed that if you did. A. There was an increase in population at both Columbine and Harrington, yes.

Q. Was there any difference in the population movement between 1958 when Barrett was first being discussed and 1960 when it was completed and occupied? A. It's my recollection that about that period there was a considerable change in the population, increase, yes.

Q. Now, had you anticipated the amount of increase and the amount of population movement in that area during the planning stages? A. Well, we had anticipated some increase obviously, or we would not have constructed a school. But, as I look back on it now, there was more really than we had anticipated.

Q. Now, do you normally build for a hundred percent of your maximum estimated membership? A. That was not our customary practice. We usually tried to make an estimate of the peak population for a given area and then we would construct a school for about 85 percent of that peak.

Q. Do you recall any of the children in what turned out [1942] or what ultimately became the Barrett subdistrict

for being bussed to any other school for that before Barrett opened? A. I believe there was some transportation at that time to Park Hill Elementary School.

Q. Do you recall whether or not there were double sessions at either Columbine or Harrington before Barrett was constructed? A. I can't recall precisely but I wouldn't be surprised if there were. There was a rather substantial increase. There probably were.

Q. With respect to the establishment of the eastern line of the Barrett Subdistrict to Colorado Boulevard, will you state the matters considered in coming to that conclusion? A. Well, here, again, we were concerned with meeting the needs of a group of young people, boys and girls, in that immediate area. The school site was at the eastern edge of the area under consideration, next to Colorado Boulevard. We were concerned about the traffic on Colorado Boulevard, and I must say if you examine the map as we looked up and down Colorado Boulevard we tried where we had the responsibility of building schools not to set the boundary lines over. Elementary schools now I am talking about.

And so, we did set the eastern boundary with that—that was one of the factors; but not all of them.

Q. Even though the boundary line—even though the [1943] school site was on the eastern boundary line of the subdisrtict, was the size of the subdistrict such that it was within the one mile walking distance for elementary students? A. Yes. We had, if I may add, a situation quite similar developing in the western part of the city, and I referred earlier to the two plans that were used, one at Barrett and one at Denison. Originally, keep in mind, this site was not intended to be an elementary school site, but as we found development in the city and in this

instance a much larger population development over a relatively short period of time than we had expected, we were under the necessity of building an elementary school. The same thing happened at Denison School, which is very comparable. The school site is right up against Sheridan Boulevard on the west side of that subdistrict. These are two instances, coincidental, that happened right about the same time, but similar circumstances of unusual increase, rapid increase.

Q. At the time of planning for the Barrett School in 1958, did the district own another site further east, in the Hallett area? Somewhere in there? A. Elementary school site now you're talking about?

Q. Yes, sir. A. I don't recall any within any relatively close distance, no.

[1944] Q. Senator George Brown testified he understood or thought there was another available site further east. A. There might have been, but nothing close that I recall. Quite a distance.

Q. Was there any racial or ethnic basis for establishing the site of Barrett where it was built? A. That was not a factor in building the Barrett School.

Q. During the years of your association with the Denver Public Schools, have attendance and boundary line changes been drawn for the purpose of segregating minority students, that is, Hispanos and Negroes, so as to keep them separate from Anglo students? A. No, sir.

Q. Now apparently prior to the Voorhees report there was no detailed written policy as to boundary selection criteria or factors of boundary changes. Is that a correct statement? A. Yes, sir. There were such. I noticed—

Q. Will you tell us what they were? A. I noticed this and again as I reread the report, there were available

criteria. I was looking through, for example, the reviews, copies of the school review, and you will find for example in 1960 a special edition dealing with school boundaries and the criteria, so I am a little surprised [1945] that the report said that there was no previous publication. We did have a policy manual that related to boundaries and such, but I referred specifically to the review as one instance. And there were others, but I can't recall specifically.

Q. Was this policy book that you referred to limited solely to boundary matters? A. No, this was a compilation of a large number of policies by the Board of Education, rules by the Superintendent which had the effect of policy by sanction of the Board authority. It was a combination of such and a rather thick document—if I may show you with my fingers—about so thick. (Indicating.)

Q. Now, were optional zones in use throughout the district when you arrived in 1947? A. There were optional zones in various parts of the city, both for secondary and elementary schools when I arrived in Denver.

Q. Were they in use in both predominantly Anglo areas as well as predominantly Negro areas? A. Yes.

Q. And these continued until 1964, as I understand it? A. Yes, rescinded in 1964 in part as a result of one of the recommendations of the study committee.

[1946] Q. To your knowledge during the period they were in use, were they used for racial segregation purposes? A. They were not so used.

Q. Dr. Oberholtzer, do you have any specific recollection to the 1961 boundary changes involving Boulevard, Brown and Ashland? Can you add any light to those changes? A. I have heard the testimony and I am sorry, I can't add any specific light to that situation.

Q. Can you tell me if during the period at about 1961 or '62 there were any discussions in staff with respect to the phasing out of the old portion of Boulevard or even of Ashland itself? A. Yes, I remember those discussions. I heard the testimony this morning. The Boulevard School was made up really of two parts; one distinctly older than the other. And there was sort of a passageway between the two buildings.

Q. Was the new part contained so far as heating and— A. It was not a new building. Let's call it a more recent part. It was also an older building. It was not a new building. In other words, construction—I don't remember the precise date, but long before I came to Denver. The other part of the building was one of the very old buildings in the city and the nature of it was such that we deemed it inadvisable to continue to have school in the building. And so we razed the building.

[1947] Q. And that was following the 1961 lowering of the capacity at Boulevard? A. That did result in the lowering of capacity. Now I do remember that aspect of it. But, as to the other discussions, I don't recall.

Q. Now, with respect to the 1961-1962 boundary change study, which among other elementary schools involved Stedman and Hallett, do you recall that particular study that was made, Exhibit 52? Are you familiar with that? A. Do you have anything that would help me recall it? I remember the general situation.

Q. Will you look at Exhibit 52, please, Dr. Oberhholtzer. Do you recall this particular document at all? A. This is one of the many such documents where we were considering in staff possible school boundary changes. It was not the sort of document which would have been presented to a board meeting or to the board in regular meeting. It's possible that some board member or staff member—I am

sure the staff members had copies. But, this is not a report. It was for study only, and among many proposals that I made over a period of years.

Q. And this related only to elementary schools? A. It apparently does, yes.

Q. The title on the first page I believe refers— A. Yes, it does.

[1948] Q. At that time who made the determination with respect to boundary changes at the elementary school level? A. By the bylaws of the Board, that was the responsibility of the Superintendent and his staff, with the additional responsibility of informing the Board from time to time. This was done by letter and by various means. But, they were informed.

Q. Dr. Oberholtzer, at about this time do you recall a situation existing at Smith, the pupil membership at Smith where it had a temporary but rather drastic drop that was developing? A. There was a period in—now I am trying to relate it to the particular years. Let me describe it in general; when we built Smith School, we tried our best as usual to predict what the peak enrollment would be. But, it increased more than we had expected and there was an addition necessary. Then there was the construction in that vicinity of a parochial school, as I recall, which resulted in a decided drop in the membership of the Smith School for a short while. But that I mean a period of possibly a year or two.

Then there was another rapid increase in pupil population, and this is typical of some areas. You get varying population trends, down and up. And in the case of Smith School I suppose we have one of the most drastic instances of rapid change, both ways, down and up.

[1949] Q. Was this drastic change predictable before it

happened? A. As we looked forward, we could not see it. If you used 20-20 hindsight, I suppose it is predictable, but we did our best to ascertain what was going to happen and things happened that we didn't expect.

Q. With respect to Exhibit 52, would you please look at pages 16 and 17? A. 16 and 17.

Q. Yes, sir. On page 16, you will notice two references for proposed boundary changes on Stedman, the first three items referring to Maps Nos. 10, 11 and 12. A. Yes.

Q. And the last column there, "Effective Date, 1962." Would you then refer to page 17 and refer to Stedman, showing actual membership in 1961, and then estimated membership for subsequent years. Do you now recall the reason for the variance between the 1962 shown on page 16 and the fact that there is no drop in estimated membership for Stedman on page 17 until 1964? A. I am sorry, I am trying my best to remember what specifically happened there. I don't recall at the moment.

Q. Do you recall whether you made no changes in 1962 with respect to Stedman boundaries by reason of any racial or ethnic factors in the area, in the subdistrict? [1950] A. There would not have been any changes at that date with respect to racial or ethnic factors. As I recall, the initiation of that factor in our consideration began in 1964, not in 1962.

Q. Well, was there any inaction in 1962 with respect to Stedman boundary lines related to racial or ethnic factors? A. Well, the obverse would be so, too.

Q. With respect to the busing out from Stedman in 1966, do you recall how the pupils were chosen who were to be bused out at that time? Was it optional? Was it mandatory? A. I am trying to reflect on your question. There were several considerations. Yes, with respect to options,

yes, it was optional with the parents concerned. That is, with the parents I am talking about now. There were considerations as to what grades, as I recall, should be in the picture for relieving the overcrowding, and once those were decided upon then the option was with, as I recall, the parents.

Q. Was there any selection by achievement level of the individual students? A. I do not recall any selection on that basis, no, sir.

Q. Do you know whether all children whose parents elected to have them bused out were accommodated? A. I think so. The best I can recollect, they were.

Q. Did you have occasion to establish a new department [1951] in connection with community relations in the 1960's? A. Yes, I did. In connection with the trip that I referred to, to Philadelphia, New York, Detroit, and Chicago. One of the matters of interest to me was the staff resources available to the Superintendent and the Board especially, to make studies of the situations, particularly with respect to racial-ethnic matters, and as I recall in each instance there was a special staff member appointed, sometimes an assistant superintendent, sometimes some other title, whose responsibility was to work, usually directly with the Superintendent on such matters, and one of my recommendations after I returned was the establishment of the Office of School-Community Relations. This came in connection with also my recommendation that there be a special study committee established for equality of opportunity.

Wes felt it highly desirable to have a qualified staff member who would be available to the study committee for its studies, and this was one of the reasons for the establishment of that office, not the only reason.

Q. And who was the first one to be appointed as director of that department? A. Miss Mildred Biddick was the first director.

Q. And how long did she hold that position, do you know? A. Well, let's see, it must have been about four years. [1952] I judge from '62 to about '65 or '66.

Q. Then who took over? A. Mr. Gilbert Kruder succeeded her as the director.

Q. Now, with regard to teacher recruitment, employment, assignment and transfer, we have evidence that early in the game and during your tenure, why, there weren't too many minority teachers and they were limited to a relatively small number of schools. Can you give us what the situation was when you arrived and what happened chronologically after that? A. Well, this is substantially correct, what I have heard in the testimony, minorities here I suppose referring to Negro-Hispano-Asian.

At the time that I arrived, most of the minority teachers were in the central part of the city in the schools, the central part of the city.

Q. Was there any educational theory at that time, generally accepted in the profession, with respect to assignment of minority teachers to predominantly minority schools? A. Yes, there was. The thought was that the minority teachers, as you have called them, in this instance mainly Negro teachers, could best be assigned to those schools where there were some concentrations of Negro pupils and where in a sense there would be an immediate empathy, understanding, role-model playing. This was currently acceptable [1953] theory at that time.

Q. What is meant by role-model? A. Well, as I would say it, it is an adult of in this instance the same race to whom the children could look up to as a model. They have

attained status and achievement in their profession or their occupation and as a person.

Q. Did this have some relationship to the motivation of the child? A. A very intimate relationship, yes, sir.

Q. Now, with respect to the identity of applicants by race or ethnic origin, what was the practice and why during the early years before '64, particularly? A. I am not sure that I understand. Each applicant was—a teacher applicant, now, we are talking about?

Q. Yes, sir. A. We had different procedures for different employees. The teacher applicants, usually by letter, sometimes otherwise, made inquiry and for an application blank. The first process would be to file that, and the accompanying materials, which included a transcript and a college record, references and such. When that was completed, the usual procedure was for the person to come in for an interview with one of our staff and then an appraisal was made by the particular staff person whether this person was qualified and should be recommended for appointment. This is in general the procedure.

[1954] Q. Well, with respect to any designation of race or ethnic background, was that asked on the application? A. That was not on the application, no, sir.

Q. Was a photograph required? A. There was a photograph required at that time.

Q. And was that continued during your tenure? A. That was continued up until a certain time when we were asked to discontinue it.

Q. By whom? A. And this was done by Mr. Reynolds, who is the director of the Colorado Anti-Discrimination Commission, the state commission.

Q. State agency? A. A state agency. He came over to look—I don't recall how it came about, but he was appar-

ently aware or had looked at our application blanks, and in his judgment this was a discriminatory practice, and in light of his judgment we discontinued it.

Q. At what period did actual recruiting begin to attempt to get more minority teachers, Negroes or Hispano? A. Well, there were efforts all throughout my tenure to hire the best qualified persons that we could for teachers, and there were applicants from among Negroes as well as Anglos, Hispanos—as between Negroes and Hispanos, relatively few Hispanos, more Negro applicants. We did make some [1955] appointments. I don't think there was any great increase for quite a period of time there. In fact, there weren't large numbers of applicants. We did make intensive efforts to increase the numbers, especially with the advent of the special studies committee and thereafter, its report.

Q. As of 1964? A. As of 1964.

Q. Now, before 1964, was race or color either a positive factor or a negative factor? A. Now, here again, we were not operating on a basis of trying to make a distinction as to racial or ethnic factors. We were endeavoring to hire the best qualified persons that we could find for the schools.

Q. Regardless of race or color? A. Regardless of race or ethnic factors.

Q. Then the Voorhees report made some affirmative recommendations pertaining to both recruiting and the distribution of minority teachers? A. This was one of the aspects of that report to which we gave careful attention, yes.

Q. Did you take action according to that direction? A. We did take action, affirmative action, to endeavor to increase the numbers.

Q. Now, respect to the assignment of teachers or transfers, was there anything else you could add to the [1956]

testimony you heard here in the last couple of days? I don't want to just repeat it, but anything— A. No, sir, not in substance. Let me just make one comment. Some emphasis was made several times on the seniority rights, and as was pointed out, the administration did have the power to appoint—I mean, to transfer—initial appointment, too, placement, and if in our judgment there was a serious deficiency, then we did make some transfers, and we did. We would talk to teachers.

Now, I didn't hear this in the course of the testimony that I have heard, because I personally did some of this talking with some of the teachers. There were different conditions under which we were operating. Let me give I hope just a brief description of this, because one of the first things that occurred when I came to Denver in 1947, there was a disagreement among the certified employees as to how they were to be represented in their views with the superintendent and the Board.

I will simply state that after a long period of consideration, beginning in 1947, shortly after I came, in 1948, there was established what was known as the Employees Council of the Denver Public Schools. This was an organization of both certified and classified employees on a proportional basis to the number of employees in a classification. This was the group that recommended policies to the superintendent [1957] and the board in a variety of ways, among the personnel, and so there were policies in the policy book to which I refer that held for quite a while, and there was more discretion on the part of the superintendent and staff at that time as to transfers than there is at present, apparently.

In 1962, we entered into the first formal agreement with, for example, the Denver Classroom Teachers, and there-

after there have been subsequent agreements with changes, and I think there is more emphasis now than there used to be on the matter of seniority and tenure.

Q. Were these agreements beginning in 1962 the result of what's commonly called collective bargaining between the administration and the organization representatives? A. These collective bargaining, professional associations, that sort of terminology, yes, and the process.

Q. Mr. Lorenzo Taylor testified that in the years 1952 to 1956—approximately four years—he said there were 150 applicants to the school district seeking appointment and somewhere between 30 and 40 were so employed. A. What period?

Q. 1952 to 1956. A. '52—

Q. To '56. Now, 30 or 40 employees employed out of 150 applicants, how would that compare with the number of teachers who were employed during the comparable period, [1958] compared with the total number of applicants in that period? Could you give us an estimate? A. Well, my estimate would be that that would be a higher proportion than we hired among the Anglo applicants, because we were hiring at that period—it must have been ranging all the way from 300 to 600 new teachers each year. It varied. We had some years where there were 2500 increase in school population. I remember one year where we had about 5500 increase, so it varied, but there would be each year anywhere from 3,000 to 5,000 applicants total, most of whom would be Anglo applicants. So I would say that if this figure is correct—I am taking his figure, I don't remember it—but if that is the figure, it would be a relatively high proportion of the group.

[1959] Q. All right, now, another witness, Dr. Oberholtzer, was Ethel Rollins, social worker, who testified

that she was informed that shortly after she was employed, assigned, that it was the policy of the school district to have white certificated personnel within a school vote as to whether to accept a Negro teacher or other certificated personnel who was assigned to that school. Was there any such policy? A. There was no such policy.

Q. Was there any such practice? A. I'm not aware of any such practice.

Q. Dr. Oberholtzer, you made several references in your testimony concerning pupils in reference to their achievement and in some reference to their socioeconomic environment. Do you have an opinion from your experience, your education and your experience both before you came to Denver and in Denver as to what factors go into an individual's achievement, whether they achieve highly or whether they achieve poorly?

Mr. Greiner: Your Honor, I would object on the basis the witness isn't qualified. I don't think there has been any foundation laid to show that he has studied this question.

The Court: You might ask him some preliminary questions on it.

[1960] Mr. Ris: Well, I think his entire background is shown in the exhibit.

The Court: I'm inclined to agree.

Mr. Ris: It gives his educational and professional experience plus—

The Witness: If I may just add, my graduate studies were related directly to some of these questions, if he wants to look into it.

Q. Go ahead and tell us some of what your background is in this field in this regard. A. Well, from my Master's

degree—through my Master's degree through my doctorate, there was work in psychology, in education, in sociology, in statistics and in measurement, all of which are related, I think, to the subject at hand. I hesitate to say in this highly-controversial field that anybody is an expert, that knows all of the answers. Certainly I do not. This is an extremely difficult field. Witness the current controversy as to the importance of native intelligence and what it is. But I think most psychologists would agree as most persons with a degree that there are differences among people as to their native capacity. I'm talking about individuals now.

So, there are such things as—let's call it native ability, to do school work, for example. And this [1961] was the original definition related to the intelligence quotient. It was an attempt to try to assess the capacity frankly to do school work. Now,through the years, ideas about this have changed. But there is a native capacity I think without doubt. It's very difficult to measure precisely and to take into account. But there are differences. This is the most important factor.

Secondly, related to it, is the whole—if I may use the term—environment, in which this child was reared, grows up, becomes a person. There are, within this environment, the home, the community, the school. And I don't want to be pedantic in recital, but these are all important, very important factors. There is also, importantly, the determination and the motivation of the pupil himself. After all, he is the one that learns. Nobody else but he can learn for himself. We have to be reminded of this. There are indicators within the environment.

Now, I want to get back to the specific question as I

remember your question; some factors in the community, was it?

Q. What factors that create differences in achievements. A. In achievement, yes.

Q. Right. [1962] A. I mentioned the individual. And the individual is all-important. But there are things that affect the individual, situations, people, and these have a bearing on every boy and girl.

I think perhaps—and I'm giving you my opinion— realize there are studies of this and, over a long period of time, I have concluded that probably the most important factor affecting the individual himself, aside from his native intelligence, is his home environment; his mother and dad; his sisters and brothers; the neighborhood in which he grows up and becomes a person. These are all very important as they affect his achievement.

Q. Can you be more specific as to what differences there are in the home that has made a substantial difference to the child? A. Well, for example, the educational level of the parent has much to do with it. With his own understanding of what a school is; of what a school can do; his own experience in school affects his relationship to the child. If that relationship has not been satisfactory, the tendency, for example, would be to reflect that in the child; not always. But when you come to studies—and there have been studies in professional literature of the influence of achievement insofar as the home is concerned, the educational level of the parent is one thing. The [1963] occupation of the father and the income level.

Now, these are all indicators which have been objectively studied in various instances and this is usually what is referred to generally as socioeconomic factors. These three indicators.

And where those three indicators, if I may put on a continuum, are relatively low, the chances are the achievement of the pupils will be relatively low. Now, there are individual exceptions to this. No doubt about it. But study after study will show you this relationship. These are the principal factors. There are other factors. Now I'm referring here not only to the community. Let me talk about the individual pupil.

There are two major factors that we see in schools and one is his attendance at school. If he does not attend school, the chances are he is not going to learn what is offered at the school in the way of opportunities. I am talking about most individuals. If this child is obliged to move from school to school as many as three, four, five times within a given school year, his work is affected.

Q. Is this a situation that is common? A. This is a situation in Denver and in most large cities. It unfortunately is a factor that is not a atypical in low-income families that do move from time to [1964] time from one place to another. We have schools of very high mobility. This is the term we use; pupil mobility.

Q. By that you mean turnover in the school population? A. Where they move. A child moves from one school to another, or where there is an in-and-out at schools.

Q. Can you give use an illustration of a specific school in Denver in percentages? A. Yes. Two schools come to mind. Downtown Emerson Elementary School, why, there is—

Q. Where is it located? A. There is one of the highest. And Morey School is located—

The Court: He asked where Emerson is located.

The Witness: Oh, it's on 14th and—

The Court: And Emerson?

The Witness: No, it's not Emerson, Judge. That's Ralph Waldo Emerson was the origin of the school name. It's about Ogden somewhere, I believe, in that neighborhood.

The Court: Also the origin of the street name, I think.

The Witness: Was it? Yes. But I don't think the school was located there.

The Court: I've been here longer than you.

The Witness: Okay, Judge. You're probably right.

[1965] The Court: But not that long either.

A. But the Emerson School and the Morey Junior High School, are within a short distance of each other. Those two school probably—I know they are among the highest in terms of mobility. I do recall—and I can't name the years—but in talking with principals of Emerson School, the mobility or turnover of the Emerson School was more than 100 percent in a given—

Q. A single school year? A. In a school year. That means you had a complete changeover of the student body within a year. Now, there—this is not typical, but it is not atypical altogether either. There are other school of high mobility.

The Court: Well, through the years that was—well, I would say it was above average economics—

The Witness: It was until recently.

The Court: Until, I suppose, the late '50s.

The Witness: That's right.

The Court: Fairly solid economically fixed area,

I would say, at that time.

Mr. Ris: Originally, yes.

Q. When was the changeover in that school from a static school population to high mobility? A. The Judge has indicated, as he recalled, it was in the '50s. And, as I recall, most markedly in the '60s.

[1966] Q. What other substantial factors are there which you relate to achievement in your opinion, Dr. Oberholtzer? How about language? A. Well, I can give you variations of the home environment. Where there is a home environment with a low income, there are usually fewer books, magazines, reading materials in the home, which has an effect on a child.

The matter of language—that is, the use of oral language one of the best indicators of whether a child can do the usual work. And if one were seeking a single factor as an indicator of capability of doing school work, you could just ask for the vocabulary, the range of vocabulary, the oral vocabulary.

Now, these are not exact. These are general indicators. But, the language of the child has much to do with his capabilities and it is especially important what happens to that child in his early years before he gets to school.

The largest education program that Denver has had—it was here when I came and I think it continues—is a speech correction program. And this results from difficulties that children have with the language when they come to school. And when a child comes with a limited oral language, he has difficulty in learning to read. Reading is based on an oral language base.

[1967] The Court: Of course, his exposure is probably the most important element in changing

this, isn't it? Exposure to persons who have vocabulary; who enunciate?

The Witness: I would agree.

The Court: We will call a halt now until 9:15 tomorrow morning.

(Whereupon, the trial recessed at 4:59 p.m.)

[1970] * * *

Direct Examination by Mr. Ris (Cont'd):

Q. Dr. Oberholtzer, when we recessed last night I believe we were still on the general subject of achievement with particular reference to low achievers and some of the basic background reasons therefor. One of the last things we were discussing was the background of some of the youngsters, the low achievers, with particular reference to their home environment and so forth. Now, I think one of your last statements concerned the matter of communications; communication in the home, parents, depending on their extent—the extent of their educational level. And, the occupation and income of the family.

Now, I would like to pursue this one step further [1971] if we may, please. And this pertains to the age at which you believe these children become disadvantaged culturally, so to speak. When it begins, and when the most important years are that they create this gap between an underprivileged child and a child coming from an average middle-class home in a socio-economic level. Would you pursue that, please? Tell us your opinion. A. Well, there are no differences as between low income or high income with respect to the timing of influence. Life is a continuing stream, and a person is influenced throughout, of course. But, what are known currently as cognitive psychologists

contend generally, and I believe with them, that there are very important influences at early ages that affect what a child is capable of doing in school.

Q. Specifically what ages are you referring to? A. I am referring— Again, life is in continuing stream. I don't think there is any one mark to stage. But, most of the psychologists will say at least beginning at age 3, 4 and 5, some say earlier. As a matter of fact it begins with the first verbal oral attempts at language, and from there on, to a marked degree. The language capability of a child, his potential, when he comes to school affects markedly what is done about reading and his capability of learning to read. So, where there is, let's say, a relatively low degree of capability or of communication as you have expressed it in [1972] language, that child has a marked handicap when he comes to school. He comes with that to school.

And, if I may add, if I had the power as a person to allocate the dollars for education as I would like to do them, I would put proportionately a larger—much larger proportion for those early years that are sometimes called early childhood education years, probably three and four and five years old. The five-year-old now is kindergarten.

Q. Is that the age level of what we know now as the Head Start program? A. Head Starts programs vary. Most of them I think are four or five-year-olds, rarely three-year-olds. But, this is the early childhood area which has come into prominence in recent years and largely because of the findings of the cognitive psychologist.

Q. Now, Dr. Oberholtzer, in your discussion of the various factors and differences in background which reflect

on a child's achievement level, you have made no reference to race or color as an element? A. I have not.

Q. Is that a factor in your opinion? A. I do not think that race as such is as I think the factors that I have mentioned are.

Q. Dr. Oberholtzer, there has been some question raised at this trial concerning the facilities and equipment between [1973] the various schools. Could you tell us during the period of your administration, twenty years that you were Superintendent, what was done and what was accomplished with respect to any attempt at making the physical facilities and equipment as equal as possible? A. Well, throughout the twenty years there were substantial amounts of funds allocated to the maintenance of buildings. I well remember my first experience when I came in August in visiting buildings.

Q. August, 1947? A. 1947. To my amazement I found in many of the clasrooms, one single drop cord light in the middle of the room. That was the lighting. They were already under way with a program to change that situation. Mention was made in the testimony that I earlier heard of the fluorescent lighting program, which was true, and we were able to step up that program so that every classroom in the district had good lighting. That took a period, as I recall, of two or three years to complete. In other ways we changed the situation from fixed seating that was in some of the rooms to tables and chairs. We generally supplied equipment comparable to the new schools. In other words, tables and chairs and such.

We made an endeavor, for example, to include central libraries, lunchrooms, and in other ways to make the buildings equal insofar as types of facilities were concerned.

So, [1974] there was a continning and a very large program of maintenance throughout the twenty years.

Q. Was the maintenance budget increased substantially during that period? A. I can't remember specific figures at the moment, but there were increases, yes. It varied some from year to year but as between the beginning and closing, yes, there were increases, dependent on the kind of program.

Q. Now, with respect to the educational organization in the various schools, both at elementary and at the secondary level, would you inform the Court as to whether there were equal offerings on the basic three R's, for example, various classical subjects, reading, writing arithmetic, or were there differences in curriculum offerings at any of the various schools? A. There were the same basic offerings. For example, reading was taught in all schools, arithmetic and such. The subjects, the basic subjects, the so-called three R's, were taught in all of the schools. There were differences in the curriculum within specific subject areas, to be sure, depending upon the needs of the pupils, their interests, and such.

Q. What was the reason for that? A. As I indicated, differences based on needs, on interests, on their background, and such.

Q. Did that have any relationship to attempts to offer [1975] everything on an equal educational opportunity? A. This was related directly to that in an attempt to provide equality of opportunity.

One of the things, if I may add another word, related directly to this, is the matter of pupil-teacher ratio that was referred to yesterday in testimony. One of the typical arrangements or changes made where there were no achieving pupils was to provide a lower pupil-teacher

ratio; in other words, to make possible teacher-pupil contacts more frequently individually than might otherwise be the case.

Another type of arrangement, which we instituted and practiced in many of the lower achieving schools, especially, was team teaching. In this instance, instead of perhaps two teachers there would be three teachers working with groups, sometimes a group of thirty or sixty different pupils, but they were divided up into smaller groups, and where you had, for example, three teachers with sixty children, you would have a pupil-teacher ratio, of teacher to pupil, 1 to 20. The normal in many schools was 1 to 30. So this was one of the typical changes made.

Q. Were there also varying assignments with respect to non-teacher personnel, social workers, so forth? A. There were changes made with respect to that. We instituted the employment of teacher aides, for example. These were frequently people who assisted with the clerical [1976] tasks of the teacher so that more attention could be given to the professional aspects by the teacher herself or himself.

Q. There has been some evidence here concerning compensatory educational programs. Were those also initiated during your regime? A. What I have indicated were some aspects of compensatory programs. There were introduced some newer types of curriculum materials, for example. In some instances there were, for example, more community trips to enable children to see first hand some of the community environment that they had not seen before, and that was used as a basis of discussion and of reading and of writing. There perhaps were more materials developed by the teacher herself in addition to the standard materials of textbooks and such. These are illustrations.

There were also provided special teachers of reading where there were marked deficiencies, and this came in before the federal program, but also it was enhanced or expanded after the federal programs were introduced. As a matter of fact, in the so-called target areas, as they were designated, which were under the criteria of the federal government, certain so-called low income areas, there were mobile units moved in on school grounds, and teachers would take groups of pupils to help them with reading.

Q. When these federal programs were offered on a [1977] national scale, did the Denver School District take advantage of those programs, apply for them? A. We did apply for funds, for approval, and we did participate in the programs, yes.

Q. In substantial amounts? A. In substantial amounts, yes.

Q. Now, specifically with regard to the Head Start program, can you tell us what was done under the federal programs in that regard? A. The Head Start program in Denver was made up of a number of different agencies participating, one of them being the Denver Public Schools, and in our instance we made a beginning, I am trying to recall, one summer. Then we had programs in the regular school year and in the summers, both, that is, it was a continuing program. These programs were offered in housing centers. We leased space in the housing centers. These were low income centers, and we provided the opportunities basically in those centers. As I recall, there were some twenty centers.

Q. Dr. Oberholtzer, it was during the sixties that the open enrollment program was first initiated, is that correct? A. An open enrollment program was initiated fol-

lowing the report of the special study committee on equality of opportunity. The recommendations were made, I believe, in May, 1964, and this was instituted in the fall of 1964.

[1978] Q. On your trip east, Philadelphia, New York, Detroit, Chicago, did you investigate their plans of open enrollment in 1962? A. We did, and we found them utilizing such programs.

Q. When the limited open enrollment was established in Denver, was that based primarily upon the experience of these other districts that you investigated? A. We did base it pretty largely upon their experience, not precisely the same, but very similar.

Q. Was there any one district to which it was more closely related than other cities? A. Our plan was patterned more especially after New York and Detroit.

Q. What was the objective of the open enrollment plan? A. The objective of the open enrollment plan was to make it possible for boys and girls who might be attending a given school to attend some other school outside of their subdistrict where they were supposed to attend and where, in their judgment, they might get perhaps a different educational opportunity if they wanted it.

[1979] Q. Dr. Oberholtzer, in 1964 is when the optional areas were abandoned throughout the entire District, is that correct? A. They were rescinded or abandoned again as the result of the recommendations of this study committee report in 1964.

Q. Now, do you remember what month in 1964 the boundary changes were considered by the Board of Education at a formal meeting? A. I believe it was May.

Q. Was it at that same meeting that you announced the changes that you were making in the elementary school

boundaries? A. Well, that was a pretty long meeting as I recall, and I think that was one of the features, yes. There were actions by the Board on my recommendations for a number of policies. One of the major policies was with respect to school boundaries, subdistricts. For the first time we took into account racial and ethnic factors as a policy of the Board of Education. And that was in May 1964.

Q. Was it at that meeting that he made the recommendation which led to the adoption at that meeting of policy 5100? A. That was one of about three or four different policies, as I recall. That was one. There was one on boundaries, one on pupil transfers, one on pupil transportation. That's four. There might have been another one.

The Court: I'd like to ask a question here. I may [1980] forget it if I don't right now. You indicated yesterday that you were reticent or hesitant about taking any positive action involving classifications based upon race. Was it your view that the Colorado Constitution prohibited you from taking any action that would have a tendency to desegregate prior to 1964?

The Witness: Judge, it was our view— In substance, yes. To express it differently and use the language of the Constitution, it said you shall not make a distinction or classification based on race or color. And it was the interpretation of our attorney and our interpretation that this would in a sense prohibit what you have said, yes.

The Court: Thus, then you avoided any possible policies that would have a tendency to relieve the concentrations of Negroes at Negro schools, for example?

The Witness: As I have indicated, yes, Judge.

The Court: Okay. Well, I gathered that impression from what you said, and I wanted to clarify it.

The Witness: I tried to indicate throughout that our boundary lines and our actions were based without distinction as to race and color. That was our effort.

Q. Either in a positive manner or a negative manner? A. —or a negative manner.

Mr. Ris: May I pursue this one since you brought it up?

[1981] The Court: Well, I would encourage you to do so.

Q. In 1962 was there a request made to Mr. S. Arthur Henry to make a thorough study of the decisions, the court decisions that had come down since the Brown decision in 1954? A. There was such a request made for written opinions, and it was made by me. It was also made by the special study committee on equality of opportunity.

The Court: That was in 1954 when Brown No. 1 was decided, is that right? 1954? Is that what you asked?

Mr. Ris: Yes, Volume I, Exhibit 4.

And then this request was made in 1962, however, Your Honor.

The Witness: Let me remind us that we did make requests of the attorney as to the meaning of the Brown decision. I did. Oral opinions were given me that it applied to de jure segregation, where they had equal and separate school systems.

Q. A dual system? A. Dual systems.

Q. But in 1962 it was when you asked Mr. Henry to review the matter at that point in time and to prepare a written opinion for you and for the Voorhees Committee? A. I am not sure whether it was in 1962 or 1963. It seems to me it might have been 1963. It was during the course of the deliberations of the special study committee that that [1982] was requested. I requested it and they requested it, a written opinion. And, he did render a summary of opinions.

Q. And was that furnished to the special study committee? A. It was.

Q. Was that reflected in the study committee's report. A. I believe it was, yes.

Q. Also, let me ask you this, Dr. Oberholtzer, along the same line. When the 1964 Civil Rights Act was passed were you concerned with it? A. Yes, we were. The Civil Rights Act occurred—of 1964 you're referring to?

Q. Yes. A. And the special study committee report came out in the spring of 1964, as I recall it. We were much concerned with the provisions of these Civil Rights Acts and apparently here again there was not to be an assignment—I can't recall the precise language, but the import of it was that there would be no assignment of pupils on the basis of color or race. That was as I recall the wording.

Q. Well, in any event whatever the wording was, that act was studied by you and attempted to be worked into the overall planning of the District? A. That's right.

Q. Now, after the Voorhees report came in then and the action that was proposed at the May 1964 meeting, after [1983] that time did you report to the Board then, with

respect to various elementary school boundary changes and particularly with reference to northeast Denver? A. I did.

Q. And I would direct your attention to Exhibit 70 and an overlay, Exhibit 71, which purport to show the specific changes with reference to Stedman, Hallett, Philips, Ashley, Montclair and I presume Park Hill down in here. Yes, Park Hill here. Could you tell us the basic background and reasons for these specific changes and with particular reference to whether they had any objective of segregatory intent or objectives? A. I can answer the latter. There was no such objective. The objectives were primarily again changes of boundaries resulting from the rapid moving of population in this area and changes in population. I don't recall any. Now, I have to say that because it was at this juncture, one way or the other where we were officially and actively considering the matter of racial and ethnic factors. I do recall that in the case of the secondary school boundaries we did. May I add that the boundaries in this instance as in many instances in the elementary schools involve such a relatively few numbers of pupils, however, in terms of the total school population, that conceivably any one change could have not made a significant change in the racial or ethnic composition of [1984] the student body.

Q. Was that true with respect to these immediate changes in the northeast Denver area? A. I would think it would be so. I have no recollection of any changes—any specific numbers with regard to race or ethnic factors.

Q. Now, at this same meeting I believe you recommended changes at the junior high and high school levels, did you not, which were adopted? A. Yes, the elementary schools were by way of information for the Board in case there were questions about it. In the case of the secondary schools it was my obligation to recommend changes, yes.

Q. Now, I am referring to Exhibit AM which purports to be junior high, 1964, showing old boundaries, the dotted lines—dotted black lines, and the new boundaries with the orange lines. You recognize that exhibit? This being Gove? And this Smiley? A. Lots of arrows and lines there.

Q. Yes. A. Do you have an earlier junior high?

Q. Yes, I do.

1963 or 1964? Either one. A. This one is good.

Q. Okay. That's Exhibit AL. [1985] A. I'm asking for this, because with the opening of the new senior high schools, George Washington and others, in this instance George Washington.

Q. And that was in 1960? A. In 1960 we had determined certain boundary lines, and at the same time, as I recall, we had certain related boundaries in the junior high schools which this refers to. This is—although this is 1963, it reflects the changes that were made about—oh, in '59 or '60, with the opening of the new high schools. I call your attention particularly in this instance, Gove Junior High School boundary, which goes east out along Colfax—quite a long boundary. It's an unusual boundary. Based largely upon available transportation, moving east and west to the school. And also on the fact that you had Hill Junior High School located down here not very far. To the west is Morey. To the immediate north of Gove and a little east is Smiley. Over here is—the big circle and then Gove farther to the west. At this time you will note that there were still optional areas.

"A" here, largely, as I recall, between Cole and Smiley. And "B" as between Gove, I believe Gove and Morey. That was the situation in 1960 and up until 1964, as I recall.

Now, if you will look at 1964.

Q. All right.

(Referring to Exhibit AM.) [1986] A. The new boundaries established here were established with an application of the racial and ethnic factors in mind. No specific pupils in mind, but areas of the city, of the School District. For example, and—in an effort to achieve a higher degree of integration the area north of City Park, that area which was previously, I believe, in an optional zone as between Cole and Smiley, became in a sense a mandatory zone to Gove.

Q. Was this area north of City Park predominantly black? A. I believe it was, largely so. Again, an area from—

Q. And that's basically a major portion of the Barrett subdistrict, is it not? A. Yes, sir.

Q. Then the area just immediately north of Barrett I believe that's Harrington— A. Yes, that's Harrington. The Harrington School which was formerly again in, I believe, within the optional zone largely became a part of the Smiley District. The optional zones, if you will notice, are done away with in this instance, and we have established boundaries. But, for the first time in the case of the junior high schools we endeavored here in 1964 to take into account the racial-ethnic factors.

The Court: The Harrington optional zone was abolished?

The Witness: Yes, sir, the whole junior high school [1987] optional zone was abolished and this became mandatory to Smiley in this instance.

Q. And was this adopted by the Board, also, at the May 1964 meeting? A. Yes.

Q. Which is the same meeting that you announced these changes? A. The elementary school boundary changes, yes.

Q. Now, at the same meeting, then, in '64, was there also a high school boundary change recommended and adopted? A. May we have again the two maps?

Q. All right, we have a '62 senior high map, which I will show you first. A. In this case, again I would refer you to the presence of optional zones, and this represents the boundaries following the establishment of the new senior high schools, in this instance the George Washington High School, which affected markedly the boundaries, particularly of East High School which is contiguous to it.

Q. What other high schools were open at the same time, Lincoln? A. Abraham Lincoln—I am trying to think—and Thomas Jefferson, the senior high schools. There were in this instance three major ABC optional areas relating to East, C relating only to East and to George Washington.

[1988] Now, if we may see the '64 boundary map.

Again, at the meeting of the Board in May of 1964 the optional zones were rescinded or abandoned, and this had its effect upon the boundaries of the high schools, so that for one effect there were no longer any optional zones and substituted therefor were the more or less mandatory zones.

If I may call your attention here especially to the action of the Board, I think it would be useful to start with what was formerly Optional Zone A just north of City Park. Do you want me to point that out?

Q. Yes, would you please. A. This is the former optional zone, Optional Zone A, which was optional as between East High School and Manual High School. As the result of the Board action, if you will notice the red outline, this part of the area which was the largest part of the area, was assigned to the East High School. This part

of the area which was contiguous or closest to the Manual High School was assigned to the Manual High School. There was formerly a small optional area here which had been optional between East and Manual; this was assigned to East High School.

In the case of George Washington High School and East High School, this dotted line area was the former optional zone. As the result of the Board action, this was no longer optional, but in addition they took this territory [1989] in the red line and assigned the whole area to George Washington High School, and this was because of our studies showing some moving of Negro pupils generally eastward, and to some extent southward, and this was in anticipation, also, of some possible further moves in an effort to change, again, the racial-ethnic composition.

Q. Dr. Oberholtzer, there has been some evidence there were not too many black students living in this area at the northern part of this new change at the time. May I ask you to expand just a little bit, were you projecting ahead that there would be a further movement of Negroes into this area? A. It seemed to us logical. There had been moves generally in this direction, and it seemed to us this would be a logical future change, yes, and then you go either way and you have to take into account some reasonableness as to the distance. This is quite a distance from this point to George Washington High School. It is also quite a distance from up in here to East High School. But those factors were taken into account, and we held hearings. I remember one hearing at East High School that was attended by a large number of people with respect to the boundaries. And we would generally hold hearings or people would attend Board meetings and express their views as to what should be done. In this instance there was considerable interest.

Q. Then this was done with an intention of change? [1990] A. This was done with an intention of changing the racial-ethnic factors to the extent feasible there.

Q. Thank you. Dr. Oberholtzer, in the May 1964 meeting of the Board where these various boundary changes were made and optional zones abolished, you mentioned it was at that meeting that Policy 5100 was adopted? A. Yes, sir.

Q. Was it at that meeting that the limited open enrollment policy was also adopted? A. Yes, sir.

Q. And you also mentioned that a major policy change was made with respect to transportation. What was it? A. That included a provision making it possible to—I can't recall the precise wording of it, I don't have it before me, but it made it possible to transport children where there was overcrowding, to relieve them, the schools, so affected, and to move them, the children, into other schools where there might be an improvement in the educational program for the children, in other words, because there would be less crowding, and so on.

Q. Again, such transportation away from the child's own neighborhood school, that is contrary to the neighborhood school concept in its purest form, is it not? A. Yes, it is to some extent, yes.

Q. This overcrowding situation that you referred to, [1991] and busing to relieve it, was that intended as a permanent thing? A. No, it was again intended to be somewhat temporary until perhaps more permanent arrangements could be made to relieve the overcrowding.

Q. And what were the permanent arrangements dependent upon? A. Primarily money funds to construct.

Q. Now, yesterday you referred to Exhibit HN which was a worksheet entitled "Recommendations of the Special Study Committee." A. Correct.

Q. Which summarized the 155 recommendations made by the special study committee, is that correct? A. Correct.

Q. Now, was continuing action taken then thereafter with respect to those recommendations? A. The document to which you refer was simply a listing—I don't happen to have it before me.

(Document handed to the witness.)

A. This is a matter which I developed. It states all of the recommendations, the 155 recommendations, of the special study committee in order from 1 to 155, refers to the pages in the document, the report itself, and indicates my assignment for study to the various staff members. This [1992] was one of the initial steps that we took.

We developed a statement of all of the recommendations which were printed and distributed to all school employees of the District, to every faculty, for study, with the suggestion that they make a study of it and report their views and findings with respect to this.

I also assigned it to various other groups, one of them being the Central Committee on Instruction, which made quite an extended report. This is typical of the beginning aspects of attention to the study.

Q. Was that done? I mean, did these people get these reports back to you? A. They did. They rendered reports to me and many of them—most of them were rendered directly to the Board of Education as well.

Q. And was action taken? A. Action was taken on a large number of these recommendations.

Q. We will get back to the action in just a moment. Subsequent to the receipt of the Voorhees report in 1964, there was then appointed a second committee called the Advisory Council on Equality of Educational Opportunity? A. Yes, sir.

Q. What was the objective of this—

The Court: When was that?

[1993] Mr. Ris: I beg your pardon?

The Court: When was the appointment of that committee?

Mr. Ris: Do you remember?

The Witness: I believe in January 1966.

The Court: Go ahead, Mr. Ris.

Q. What was the objective of this council as compared to the former study committee? A. The precise wording—I have the report, just a minute.

This was a continuation, to some extent, of the earlier report, but the advisory council was given a specific charge that I think is of pertinence to our interests here. May I read some of this? I think I can answer your question more quickly.

Q. All right, sir. A. The Advisory Council on Equality of Educational Opportunity in the Denver Public Schools—I was in error—was appointed on March 17, 1966.

The advisory council was given, on March 21, 1966, the following charge:

"Against this background (of increasing school population leading to concentrations of minority group children in certain areas, as alleviated by certain procedures instituted by the Board of Education in conformity with recommendations [1994] of the special study committee in 1964), the Board of Education requests your study and advice on the following matters, with your report to be submitted at the earliest possible date. Your recommendations will be most helpful if they can be reasonably specific

and can meet the tests of educational validity and financial feasibility.

"A. Should the present policies and procedures of the Denver Public Schools, particularly Policy No. 1222C be applied to the location of new schools or additions to schools in northeast Denver?

"B. If not, what changes should be made in present policies and procedures? What new policies and procedures, if any, should be adopted?"

That was the specific charge to the council.

Q. All right, sir. So there were two basic things they were to answer. And then they submit their report in February 1967, Exhibit 21. A. I was reading from your Exhibit 21, yes, the plaintiffs' exhibit.

Q. Would you refer to page 84 of that exhibit, sir, and what was their answer to the charge with respect to continuation of Policy 1222C as to new schools in northeast Denver? A. "The present policies of the Denver Public Schools, in particular, Paragraph 1(b)(6) of Policy No. 1222C and Paragraph 4 of Policy No. 5100 answer Question A of the charge [1995] and therefore no schools should be built in northeast Denver until plans are developed to implement Paragraph 1(b)(6) of Policy 1222C and Paragraph 4 of Policy No. 5100."

Thereafter they recite the particular paragraphs.

Q. All right, sir. Now, did you, first as to the Voorhees report, have occasion to report to the Board of Education approximately one year after the report and approximately two years after the report as to the progress that had been made with respect to the recommendations? A. I did.

Q. Did your two-year report summarize the entire two years so that it included the one-year period as well? A. Yes, sir, it did.

Q. Yesterday you already identified Exhibits HO and HP as being your written reports, first for the one-year period, then secondly for the two-year period, correct? A. Yes, sir.

Q. With respect to the two-year report, Dr. Oberholtzer, would you hit the highlights for us as to what—not the studies that were made but what actual progress had been made with respect to the recommendations? A. I will endeavor to do it, because this was a summary in itself, and I will have to cite some—

Q. Hit the highlights for us. A. I will try to. First of all, it includes the [1996] General Policy Statement 5100. With respect—

Q. Dr. Oberholtzer, 5100 was really the first policy statement by the Board which added racial heteogeneity to boundary considerations? A. It was.

Q. Go ahead. A. In May of 1964, as to what was done, the recommendations of the special study committee were divided into several categories, one of them being on administration and organization, and I'd like to cite just a few things that happened.

As I have already indicated, the optional areas were discontinued as of September 1964, referred to in these charts.

Secondly, to the usual criteria for setting boundaries, there was added the factor of ethnic and racial characteristics of the school population, making, to the extent possible a heterogeneous school community and the mobility and levels of educational attainments of the pupils.

They also adopted the limited open enrollment for the school year 1964-65, and that was continued in 1965-66. There were quite a few recommendations relating to build-

ings, equipment, libraries and supplies, and I will cite just a few of many changes that were made.

An addition under construction at McMeen Elementary School, it says "to provide for pupils who have had to be bused to other schools."

[1997] An addition to the Hallett Elementary School was authorized to provide permanent classroom space. Under special assistance from the School Lunch Division of the Colorado Department of Education, experimental lunch programs were set up in areas of low income using increased amounts of surplus commodities to enable pupils to buy lunches at 15 cents.

An addition was made to Smiley High School in the form of an industrial arts facility, recommendations on curriculum, guidance and instructions, to cite a few things.

For example, a revision of the social studies program was in process, including certain specific objectives, and I will cite only two to illustrate.

Grade 1, to help pupils appreciate and understand cultural backgrounds of other families.

In grade 11, understanding that all persons should be considered as individuals and judged on their merits, their differences should be respected and their rights safeguarded.

The subcommittee of the K-12—that is kindergarten through 12—human relations committee initiated and is conducting a 10-week seminar for teachers for the purpose of exploring ways of supplementing the social studies guide with specific suggestions for dealing with human relations concepts and learnings related to the various grade levels.

[1998] Library services were given special attention, selection of books dealing with human and intergroup relations for the purchase of professional library and for

examination and contribution to school libraries at each level.

Title Two of the ESEA, which is the education—the Federal Education Act—made possible the ordering of $171,000 worth of library books approximately 60,000 volumes to be owned by the Denver Public Schools but to be available for use in public and private schools in Denver. During the summer of 1965 Head Start programs under the Office of Economic Opportunity were conducted for eight weeks in ten centers. Head Start programs were funded under the same Office of Opportunity, varying from six to ten weeks in twenty centers located in the housing projects that I referred to. Team teaching programs of improving language and reading skills, recommended strongly by special study committee, has been expanded to include arithmetic and has been extended into Grades 1, 2 and 3, especially in the eighteen elementary schools in the target area of the greatest need. Under Title One of the ESEA a project has been funded to help educationally disadvantaged pupils progress through a planned reading improvement program for one-half day for eight weeks for pupils of 4, 5 and 6.

The Metropolitan Youth Education Center set up jointly with Jefferson County has provided counseling, basic [1999] education training, and assistance in securing employment for 450 out of school and unemployed youth from the two districts. In each instance we have cited and I have not taken the time to read the specific recommendations referred— For example, there are eight related recommendations on this one act of ours. The second center for the Metropolitan Youth Education Center is being added in Denver with assistance of the Title One funds. Well, there are many others. Under personnel,

pupils, orientation rooms have been provided in eleven elementary schools for pupils who change school frequently and are lacking in skills needed for progress in the larger group class. Neighborhood aids are provided through OEO funds to assist the teacher and help make contacts with the home.

In the secondary schools of the target area the counseling load of teachers has been reduced and time for counseling has been doubled to permit counselors to have time to give to those students as individuals and to give them special attention.

Also, under ESEA opportunities for substitute tutoring in areas of special academic needs by teachers is provided and an after school library program to give access to reference materials and to encourage reading. A program under ESEA will bring counselors in target area high schools back to work in August to do intensive counseling with dropouts and potential dropouts; to encourage them to return to [2000] school and to plan a program to meet their needs. As to the personnel of the District, recruitment visits were made during the year 1964-65 to forty-three college and universities located in fourteen states.

In addition recruiting materials were sent to eighty-five other colleges and universities. An analysis shows that 403 new teachers were hired for the 1965 calendar year. The number of Negro applicants has enabled the Division of Personnel Services to increase the number of well-qualified Negro teachers. Recruitment visits in 1965-66 have included more intensive and extensive visits to Arizona and New Mexico institutions of higher learning as the number of qualified Spanish-named applicants to the Denver Public Schools is limited.

As of October 15, 1965, all junior and senior high schools and 67 of the 89 elementary schools had at least one teacher with a minority background. The high percentage of minority teachers in schools with the concentration of minority pupils has been reduced somewhat so that no faculty now includes more than 50 percent minority teachers. Letters were written to 55 teacher training institutions throughout the country, emphasizing the importance of preparing teachers to teach all children. Those of different racial and ethnic backgrounds, and those disadvantaged in educational terms. Replies were received from 31 of the institutions. A report [2001] on the improvement of human relations was presented to the Board of Education on November 18, 1965, and to all committees on instruction later. Included was a report of the work of the K-12 committee on human relations and a review of the participation of the Denver Public Schools personnel, a variety of human relations activities during the summer of 1965. A five-day institute designed to develop an understanding of the unique culture of the Spanish-named Americans of the Denver area has been funded with ESEA. The emphasis will be on classroom practices which will build upon the pride of the heritage and the—and improve the motivation and skills needed for the educational achievements.

Approximately 247 teacher aids, non-certified persons, usually from the area near the school, have been hired to relieve teachers of some lunchroom and playground duties. Then there is a section relating to school community relations. I will cite just a few of the many actions taken.

Carefully planned tours of the community with commentary by persons most able to interpret the development and interrelationships of the agencies and opportu-

nities to meet parents and businessmen of the area have proved valuable for new and experienced teachers. A three-day tour is planned for those schools in the target areas before the opening of school.

In northeast Denver the lack of recreational programs [3002] for the growing youth population led to the planning of a coordinated program for recreation involving the city recreation department, the public schools, a number of churches, and concerned individuals. A community study hall association has been providing volunteer staff for 20 study halls located in the community centers, churches, or school buildings. The encouragement and the assistance with learning has proved important to pupils and volunteers. In many cases added enrichment programs have opened new experiences to the young people. Under OEO a coordinator has been paid to help coordinate and help expand the program. A project of youth motivation was funded to assist high school young people, particularly Spanish-named, in four high schools, to have an opportunity to work at a club with adults who can help and see that they can succeed in school and can plan for a satisfying vocation.

A part-time coordinator and neighborhood aids have been appointed to expand and improve the program initiated four years ago under voluntary leadership. This spring the Latin American student clubs held a very successful all-day workshop with the support of interested Spanish-named adults.

Just two more to conclude—

The Court: Just a second. There is no need for putting this verbatim in the record, is there?

Mr. Ris: I just wanted him to highlight—

[2003] The Court: I mean, you wish to have the reporter transcribe all this?

Mr. Ris: He's not reading the entire report.

The Court: Well, if that's what you wish, that's the way we'll do it. In other words, I believe we could refer to the exhibit and the pages. But, if you say you wish to have it done that way, why—

If you think it would be better to have it all in the transcript, that's fine.

Mr. Ris: Actually, he hasn't been reading. He has been skipping through, and hitting the highlights.

The Court: I realize that.

Mr. Ris: I think we have to have it in our record, yes, sir.

The Court: Okay.

A. Through the cooperation of Opportunity School with neighborhood organizations and the Denver Housing Authority staff, a number of basic education classes enrolling 180 adults has been set up in the neighborhoods where the people live. The purpose is to enable mothers and fathers uprate their own skills and to help their children make better use of school opportunities. The Denver Public Schools is again providing work experience for 200 high school youths, age 16 to 21, in clerical, maintenance and custodial programs under a neighborhood youth corps project. In addition to supervision [2004] work experience there will be educational occupation and personal counseling and a physical examination. I was simply trying to give you a few of the many highlights in this report.

Q. Thank you. Now, after the Berge committee reported and submitted their recommendations which are reflected in Exhibit 21, what was done with respect to considering

and implementing any of the recommendations in that report? A. I did make an oral report to the Board of Education about it, and we did proceed to implement various aspects of that report as well.

Q. That report came out in February of 1967? A. Yes.

Q. And you left your position in August of 1967? A. Right.

Q. Before you left then did you give an oral report to the Board which you previously identified as Exhibit HQ? Correct? A. Yes, sir.

Q. I don't want to cut you off, Dr. Oberholtzer, but I also want to cut down the volume. Can you highlight and summarize that even more succinctly than the last one? A. I'll try to do it more succinctly.

Q. If you will, please. A. In this instance the advisory council came up with four aspects of equality that are somewhat different from the [2005] aspects that I have referred to here in my comments. And in light of our discussions yesterday of school capacity, I think this is especially pertinent, because the first of their recommendations—major recommendations related to the term school capacity, and they wanted us to make a special study highlighting some of the various conditions that would affect the capacity and in essence highlighting what I suggested yesterday, that you had to take into account mobility, attendance, achievement and a variety of factors, and we did institute a study, as I recall, in two elementary schools while I was still in office. And one was Stedman and the other, I believe, was Greenlee. I will not take time to indicate that. There is in this report when you read it considerable discussion of that.

A second and most interesting report—or recommendation—related to what was variously called the cultural arts

center, cultural arts program, or the academy of arts for children. In essence what they recommended was a means of enabling children of different cultures, and this related to elementary schools, to become acquainted with those cultures more directly than they ever had before, and to become acquainted with not only children but particularly with adults of the community of different ethnic groups.

And so we set up a center in the Gilpin School. And for example children were transported for part of the school [2006] day from Moore to Gilpin and they participated in classes together with those children, and they also participated in unique and special cultural programs. One of them I remember was by a lady of Japanese ancestry playing a rather unique musical instrument and explaining it to the children. There were dances. There were art programs, various aspects of native culture for the children.

Q. It wasn't limited to learning how to play the auto harp, was it, Dr. Oberholtzer? A. It was not essentially an attempt to teach a skill. But rather to become acquainted with various cultural aspects of different ethnic groups. Again in the general realm of what is called a human relations program.

A third aspect of the program was entitled the Superior School Program. And this was related especially—it was an attempt, I suppose you would call it now in some aspects, a compensatory program. It was an endeavor to suggest ways—ways unusual, unique where superior programs might be instituted in the schools where there were some concentrations of minority groups. For example, in the Negro or in the Spanish—and I remember, for example, that we as a result instituted some Spanish programs at Baker Junior High School.

Q. Was this basically for low achievers or high achievers? A. This was basically for low-achieving pupils.

[2007] The fourth aspect of the advisory council report was related to what they called educational centers in elementary and secondary schools. And this was one where I know there was considerable investigation of the possibility of what was then called educational parks, centers, and some effort was made, to acquire sites and some federal land near Lowry as I recall it.

We made an extensive study of centers, but there was no other specific action taken at that time. However, there were applications of this idea subsequent to my time, and I simply refer to it in the bond issue—that was offered in the fall of 1967, I believe it was, after I had retired.

Q. The basic planning for that bond issue having been done by you and your staff? A. The basic planning having been done, but we did try to incorporate some of their ideas in the center in that bond issue proposal.

Q. Dr. Oberholtzer, just two small matters. Now, going back—I want to clarify something.

The May 6th, 1964 board meeting was a meeting where the various major policy decisions were made and referred to, and 5100 adopted; the boundary changes made at the secondary level and so forth. Was action of the Board on those various policy changes and boundary changes—was it a unanimous decision of the Board in each instance?

[2008] A. My recollection is it was a unanimous vote.

Q. With regard to guidance—vocational guidance I am referring to specifically—there has been considerable testimony here concerning vocational matters at Cole and Manual. Were similar—were vocational guidance offerings made at all other secondary schools as well? A. There were offerings at all high schools. There were vari-

ations among the high schools. Since you have referred to the vocational guidance I heard some comments yesterday in testimony. I would like to amplify a little bit. There was some concern expressed because of—I believe certain unique offerings—now, pre-law, was it? Pre-med and so on in the twelfth grade. And I think you could easily infer that this was all that was offered or it was deferred until the twelfth grade. As a matter of fact, for many years we have had in the Denver high schools a course in vocations which is required of pupils. And this is an attempt to give them an idea of the fields of endeavor or improvement, descriptions of them, and as I recall given at about the tenth grade.

Furthermore, we had at least for many years when I was Superintendent, with the cooperation of the State Employment Service, vocational aptitude—or preference tests. Interest tests, rather. Not aptitude. Interest tests which were provided in all of the junior high schools with the [2009] purpose of calling to their attention again various fields of endeavor for which they might prepare for and which they might be interested.

So I will give—I will cite only these two other instances to show that we have been concerned for many years in the matter of vocational preparation and of attempting to give young people some view of this.

I'd like to mention one other thing, that is, and that is referred to only casually in this report, in vocational education, we institnted before I left office in the high schools certain other experimental courses in vocations that I think are continuing. For example, our concern in the high schools, in vocational education, is to find the kind of preparation—to offer the kind of preparation that young people can use to get jobs.

So many times vocational educational is given, and then there is a gap between the education and the actual time of entering upon a job. That kind of vocational education is virtually useless. We tried to avoid that mistake, and so we offered, for example, in the electrical trade—we had courses in preparation for entry occupations in the electrical trades. We had another type in the basic metals trade. We had another in the business occupations. These are still operating in the high schools. But they have been limited because again we had to provide special facilities for them [2010] and we were not able to expand them in all instances.

Mr. Ris: Thank you. You may examine.

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[2011] * * *

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Cross-Examination by Mr. Greiner:

Q. Dr. Oberholtzer, when you arrived in Denver as Superintendent of Schools in 1947, I believe you mentioned that there were fifteen schools that had Negro teachers, is that correct? A. I don't recall I mentioned that particular number, but there was a small number.

Q. Can you identify some of those schools for us? A. Some of them—most of them would have been in the central part of the city, such as Whittier.

Q. And you can think of more than just Whittier, can't you? Was Greenlee one? A. I don't recall that Greenlee was at that time, it might have been. Whittier, Wyatt, Wyman.

Q. How about Wyatt? A. Wyatt I did mention, I believe.

Q. How about Crofton? A. Probably Crofton, yes.

Q. How about Gilpin? A. Yes.

Q. How about Mitchell? A. Probably, yes.

[2012] Q. Garden Place? A. It might have been, yes.

Q. Bryant-Webster? A. I am not so certain about Bryant-Webster.

Q. Elmwood? A. Elmwood, probably, yes.

Q. Emerson? A. Doubtful at that time.

Q. Was Emerson predominantly Anglo in '47? A. I think it probably was.

Q. So I take it, then, you found—first of all, do you recall how many Negro teachers there were in 1947? A. It was a relatively small number, I think probably less than fifty.

Q. Less than how many? A. Fifty.

Q. And do you recall when the first Negro teacher was placed outside of the core city schools in a predominantly Anglo school? A. I don't recall precisely, no.

Q. It was about 1955 or 1956, was it not? A. It probably was in the 50's somewhere.

Q. Didn't that happen at Mrs. Biddick's school at that time where she was principal? A. I don't happen to recall that instance.

[2013] Q. You don't recall the circumstances? A. I do not.

Q. I take it that you don't deny, do you, Doctor, that when you came to Denver you found that minority teachers had consciously been assigned to minority schools on the basis of their race? A. They had been assigned to minority schools.

Q. Because they were minority? A. In large part because they were minority teachers, yes.

Q. And when would you say that changed, that policy? A. Well, you have already indicated one change.

Q. 1955? A. From there on.

Q. All right. Now, one of the reasons that you felt there was some validity, as I understand it, in this racial assignment of minority teachers, was because they were to act as role models in the minority schools, is that correct? A. This is one function, yes.

Q. Now, did you have an opinion at the time, Doctor, as to what proportion of teachers in a minority school had to be minority teachers in order for this Negro role modeling function to be fulfilled? A. There was no specific number, no.

Q. Might one black teacher have done the job? [2014] A. Not necessarily, no.

Q. Would eight black teachers have done the job? A. I have no specific number.

Q. You said there was literature at the time, as I understand it, that in effect said that this was a good thing to do? A. "This" being what?

Q. The placement of minority teachers in minority schools. A. Yes.

Q. That literature also said, did it not, that Anglo students might benefit from Negro role models? A. Possibly, yes.

Q. Possibly? A. Yes.

Q. You believe that to be the case, don't you? A. I do believe it, yes.

Q. And yet some seven years passed before a Negro teacher was placed in an Anglo school? A. That's correct.

Q. Now, I take it there must have been some resistance, then, Doctor, in the white community concerning the placement of black teachers in white schools, is that right? A. I don't know of any specific resistance.

Q. You recall the findings of the 1964 Voorhees [2015]

Committee, do you not? A. Some of them, yes, in general.

Q. One of those findings was, was it not, that black teachers have not been assigned to white schools because there was a resistance in the Anglo community? A. At a later date, yes. I don't know that it referred to any specific date.

Q. Well, the report spoke as of 1964, did it not? A. Yes.

Q. Then the report found that there were still the concentrations of minority teachers in the minority schools, did it not? A. I believe it was referring to the current time in that statement.

Q. And I believe the report also referred to the resistance of the principals of the Anglo schools about placement of Negro teachers, do you recall that? A. I recall the reference, yes.

Q. Now, what was done during this time period between 1947 and 1955 or 1956 regarding the placement, for example, of minority principals, where were they placed, Doctor? A. As I recall, the first Negro was appointed, I believe, at Whittier School.

Q. And that was a predominantly minority school? A. Minority school, yes.

[2016] Q. What year was that, do you recall? A. I can't recall the specific year. It was in the 50's.

Q. Can you tell us, Doctor, when the first Negro principal was assigned to a primarily Anglo school? A. In the 1960's.

Q. Do you recall the incident? A. What?

Q. Do you recall the particular appointment? A. As I remember, I think you are referring to the University Park Elementary School—no, not University Park, Washington Park.

Q. Washington Park? A. Washington Park.

Q. What was the situation with regard to the assignment of assistant principals, do you recall when the first minority assistant principal was placed in the School District? A. I am sorry, I don't.

Q. Do you agree that he was placed in a minority school? A. I would agree that would have been the case.

Q. And do you recall the first instance of when a minority assistant principal was assigned to an Anglo school? A. No, I do not.

Q. Would it also have been sometime in the 1960's? A. Yes, it might have been in—it would have probably [2017] been in the 60's.

Q. Now, as I understand it, shortly after you arrived on the scene you said that a staff member had pointed out to you a provision in the Colorado Constitution. A. Yes.

Q. Do you recall that? A. Yes, I do.

Q. Who was that staff member? A. Mr. Guy Fox.

Q. Mr. Guy Fox? A. Guy Fox, F-o-x.

Q. Was he a lawyer? A. No, sir.

Q. What was his position? A. He was director, as I recall, then, of Pupil Personnel Services.

Q. Now, as I understand it—correct me if I am wrong—from the early 1920's the School District had until your arrival conducted an annual racial census of the schools, had it not? A. I found that to be the case after my attention was called to this, yes.

Q. And the racial census was published in the Superintendent's Circular for each teacher, was it not? A. Yes, there was an annual Superintendent's and [2018] Secretary's report. I think that was a public report.

Q. Now, do you know what use was being made of that racial report during that time period? A. I do not.

Q. Do you know why it was being compiled? A. I do not.

Q. Now, as I understand it, you gave some orders in 1947 that that census stop, is that right? A. I did.

Q. And yet it took nine years to eradicate it, is that right? A. It was going on without my knowledge, that is, some reporting, but it never came to my attention, as there are many reports that do not come directly to my attention or to the staff.

Q. But do you know whether or not there was any difference of the routing of these reports between 1947 and 1956 when you finally got them cut off and the routing that had previously occurred? A. There must have been some difference, and I have been thinking in my own mind to find what happened. I do not know. And there was before I came a department of research, and I was told that there were some reports from that department. Now, that department did not exist after my coming for more than one or two years, but there was a Department of Budgetary Services, and the normal routing of such material [2019] would probably be to that office, but that office never, in the time that I was in office, made a report to me of such statistics.

Q. Now, I recall that you said that you had a conference, then, with Mr. Henry, who was then counsel for the School District? A. I did.

Q. What was the subject of that conference, can you tell us? A. The subject was the one that I have indicated, what are the indications of the constitutional provisions, and especially with respect to the collecting and the publishing of such data.

Q. And did Mr. Henry's firm render a written opinion? A. He did not render a written opinion. He rendered an oral opinion.

The Court: Just a moment. I don't think we have fixed the time of this conference with Mr. Henry.

The Witness: It was in the fall, Judge, of 1947, and I can't name a specific date, shortly after I came.

The Court: And then you had another conference following the decision of the Supreme Court in the Brown case?

The Witness: We did, yes, and there were many other conferences, but these were—

The Court: I mean one relevant.

[2020] The Witness: Relevant to this.

Q. Calling your attention, then, to the fall of 1947, Doctor, do you recall how long it took for this opinion to be rendered, did this consideration carry over some period of time? A. I don't remember the length of time, but there was within a reasonable time a response.

Q. You said yesterday in your testimony that Mr. Henry said that he felt it would be desirable to stop the racial census. Did he say it would be necessary, or did he say it would be desirable? A. I can't recall the specific word, but the intent of his reply was that we should not continue.

Q. Now, at this time you were aware of the District's policy, were you not, of assigning teachers on the basis of race? A. They were assigned to minority areas for reasons I have indicated before.

Q. Did you inquire of Mr. Henry whether or not the Colorado Constitution might apply to that kind of assignment policy? A. No, I did not.

Q. Did you have occasion to discuss that relationship? A. That particular relationship, no.

Q. Now, seven years later the United States Supreme [2021] Court decided Brown against Board of Education. Have you read that opinion? A. I have read it.

Q. And you discussed that opinion with Mr. Henry? A. I did.

Q. Was there a written opinion rendered on that occasion? A. At that time, no. There was an oral opinion.

Q. And you were aware at the time that Brown was decided, were you not, Doctor, that there were then existing in School District No. 1 schools at all levels of education that were predominantly in minority in racial composition? A. I was aware of their general composition, yes, in that there were so-called minority schools.

Q. Do you recall offhand, Doctor, how many such minority schools there were in Denver in 1954? A. Not a specific number, no. I made no particular count on such basis.

Q. Well, in considering the possible impact of the Brown decision, didn't you consider what it might then take, if Brown required desegregation in Denver, wasn't that one of the things you considered? A. No, the opinion given was that the Brown decision did not apply to us.

Q. So you never got that far in the process of trying [2022] to determine what it might have taken at that time, is that right? A. We were not then concerned because of that opinion.

Q. Now, you were familiar, were you not, Doctor, with the findings in Brown of the educational and psychological damage caused minority children by their concentration in minority schools? A. I was aware—

Mr. Brega: Just a minute, if I may. I object to that question. The decision in Brown was rendered upon a dual system, and that opinion states that by legally segregating those people it does create those problems, but this is not the situation as it existed in Denver, nor has it ever existed by law in Denver. Since 1893 we have had an open school policy.

The Court: I think the question was whether he read the language in Brown and was aware of it, that's all, and I think it is a permissible question. Isn't that the thrust of your inquiry?

Mr. Greiner: That is correct, Your Honor.

I am not sure the question has been answered.

The Witness: Will you repeat the question? I did not think that was the trust of your question, the last one.

[2023] Q. Now, did you read the Brown decision A. I did.

Q. And you were familiar with the findings in that case? A. I was.

Q. And one of those findings was of the psychological and the educational damage done to children in those southern systems, is that right? A. Wherever they had separate school systems, yes.

Q. And was the basis of that decision or did you consider whether or not the basis of that decision at the time was the concentrations of these minority students in all minority schools? A. Not in that light, no, sir.

Q. Well, now, you have testified as an expert. You have a background of psychology, is that right? A. To some extent, yes.

Q. Did you see any basis for distinguishing the type of damage found in Brown and the type of damage which might occur in a northern so-called de facto setting? A. There are possible bases, yes.

Q. What are they? A. So far as I know, there is not in evidence—to the best of my knowledge, evidence to show that in all instances, including the Coleman report, that there is [2024] necessarily damage.

Q. But—well, the Supreme Court found damage. That's

a constitutional fact in the South, is it not? A. Again, let me refer to the fact that they were talking about the separate school systems where there were concentrations.

The Court: I think his answer is that he didn't feel it was pertinent in relationship to the system in Denver; that he didn't regard the isolation per se as the important factor. Isolation as a matter of law he says, is the thing he felt might be damaging.

Q. Is that the purport of your answer? A. That was the purport of my answer, yes.

Q. Now, there was a great deal of discussion, I assume, among educators when the Brown decision was made, is that right? A. There was.

Q. And I believe you said yesterday that the consensus was that Brown would only be applied in the South, is that right? A. At that time, yes.

Q. Were there any differing views expressed at that time? A. Yes. Never unanimous, on subjects.

Q. Some people thought that Brown might apply in the [2025] North as well? A. I think so, yes.

Q. Even to the so-called de facto situations? A. Some people did, yes.

Q. Was that one of the questions that Mr. Henry rendered an opinion on? A. Well, may I say again, as I have said before, his opinion was that this applied to the de jure segregation; separate schools.

Q. Now, did you become aware at a point in time, Doctor, and I take it that during the late '40s, throughout the '50s until perhaps the dispute in 1962 about the building of the proposed junior high school—throughout that time period, if I could capsulize your policy, it was to

build schools where the children were, isn't that right? A. In essence, yes.

Q. Did there come a time, Doctor, when you realized that this policy was leading to more and more predominantly minority schools? A. It was apparent in the late '50s that there was a movement of population into areas, for example, where we had already built schools.

Q. Well, now, for example, since 1950—between the period 1950 and 1962, it is also true, is it not, Doctor, that many schools received additions to their [2026] facilities? A. That's correct.

Q. And many of the schools which received those additions were at the time they received them minority schools, were they not? A. Some of them were.

Q. Now, I'd like to draw your attention next, Doctor, to the controversy that surrounded the 1956 boundary changes.

The Court: Well, as a matter of fact, when they reach a certain percentage of concentration, Doctor, why, they just—I think your experience probably shows that they just—if you let nature take its course, they just go Negro. That's all. Pretty soon they are predominantly Negro. Do you think that that is a justifiable conclusion? When they get over, say, 40 percent Negro, why—and whether it's from neighborhood movement or what—it's only a matter of time?

I mean, it's very definitely predictable that they will be predominantly Negro?

The Witness: No, I don't think that is definitely predictable, Judge.

The Court: They don't stabilize, do they?

The Witness: Some do. Some don't. What you have said frequently happens, but I don't think it happens [2027] in every case.

The Court: Not invariably?

The Witness: It happens frequently, yes.

The Court: You think that East High, for example, is predictably going to become a predominantly Negro school in a very short time?

The Witness: Do I think so? No, I do not think so.

The Court: If it's permitted to go just the way it is—

The Witness: No, sir, not necessarily.

By Mr. Greiner:

Q. It's true, is it not, that East is getting more Negro each year? A. I think there is some increase, yes.

Q. And the Anglo enrollment this year is just barely 50 percent Anglo? A. I'm not acquainted with that figure.

Q. Now, first of all, with respect to the building of new Manual, it's true, is it not, Doctor, that Manual High School today is the smallest high school in the district? A. It is the smallest senior high school, yes.

Q. And it was at the time it was built, also, was it not? A. I believe it was, yes.

[2028] Why was Manual built so small, Doctor? A. Are you talking about new Manual or old? A. New Manual. A. The new Manual was built in the same general location as the old Manual and substantially the same attendance area. That was the reason.

Q. It was built to serve a particular community? A. The community in that area, yes.

Q. What was the composition of that community, Doctor? A. Negro and Anglo, largely; some Hispano.

Q. Well, you recall, do you not, Doctor, that as early as, I believe it's 1950—1951, that Manual was already a predominantly minority school, do you not, about 40 percent black, 35 percent Hispano, 25 percent Anglo? A. Somewhere in that neighborhood.

Q. And I assume that that neighborhood that new Manual was to serve wasn't getting any whiter between, say, 1951 and '53 when new Manual was opened? A. No.

Q. It was becoming blacker, was it not? A. There was some tendency, yes, to that.

Q. Well, it's true, isn't it, that when new Manual opened, Doctor, it only had 77 Anglos in it?

Mr. Brega: Your Honor, I object to this line of testimony. In 1953—that was prior to Brown and at [2029] that time the law in the country was separate but equal. That was all right. If that were the case in Denver, that would not have been unconstitutional at that time. I think it's moot and not relevant to the issues.

The Court: Well, I think that we have been permitting inquiry into the history of this for various purposes. So we will not draw the line at this point.

The Witness: Would you repeat the question, please?

Mr. Greiner: Would the reporter read it, please?

(Question read by the reporter.)

A. I do not recall that figure.

Q. Do you recall what its Anglo composition was when it opened? A. No, I do not.

Q. Was there any doubt in your mind that, when new Manual opened, Doctor, it would be predominantly minority in its composition? A. It appeared to be so at that time, yes.

Q. So you knew that as a fact, did you not? A. I have answered your question. I said it appeared to be so.

Q. Now, did you consider what might happen to the racial composition of new Manual in the event you had built it larger, for example, during the planning stages for new [2030] Manual? A. Racial factors and ethnic factors were not a part of our consideration in the construction or location of schools.

Q. And I take it your answer is the same with regard to a possible change in the boundary between what has been that for old Manual and that for new Manual? A. I would give you the same answer.

Q. Well, you're not telling me, are you, Doctor, that you were in fact, when you built Manual, building a separate but equal school, are you? A. I don't know the import of this question.

The Court: What he's asking you is, just so I think you will be aware, is whether this was built to be a Negro school and planned as such, although you were determined, undoubtedly, to give it equal facilities. That's the essence of what he's asking you.

Mr. Greiner: That's correct.

A. We were again building a school to house the children of that particular area, and there was, as you have said, a high percentage of Negro pupils in that area, yes.

Q. Well, for example, the whole curriculum at Manual was tailored, was it not, for these minority students? A.

It was tailored to the students who were attending [2031] that school, yes.

Q. And those were minority students. You don't deny that, do you? A. No, I'm not denying it.

Q. Now, at the time that Manual was being planned—and I'm still talking about new Manual—East was considerably older capacity, was it not? A. It was—I don't recall specifically. I think it might have been some overcapacity.

Q. And was a projection— A. In the sense you have determined capacity, I want to come back to that and amplify the answer.

Q. Well, can you give me a number, Doctor, at which the enrollment at East would have had to reach at which point you would agree with me that it was overcapacity? A. I cannot give you a specific number. As I indicated to you yesterday, there was no specific number. The programs were different at East and at Manual and the achievement levels of the pupils were different and we had a lower pupil-teacher ratio at Manual than we did at East.

Q. My question goes to East and not to Manual. A. I'm talking about East. It has a higher level pupil-teacher ratio because the achievement level was higher and consequently it was able to house a larger number of [2032] pupils. That's the basic reason.

Q. And I take it the gist of your testimony yesterday, Doctor, was that in an Anglo school such as East, its rated capacity comes very close to its utilization figure, does it not? A. It may or it may exceed it. Not all Anglo schools. I'm sorry. You generalized. Not all. Some.

Q. Well, let's talk about East. A. All right.

Q. Are you telling me then that East could afford to

house more than its rated capacity? A. It could at that time.

Q. And that would require a pupil-teacher ratio of about thirty, is that right? A. I didn't say that. That does not go with the utilization above 100 percent.

Q. Well, rated capacity is based on thirty pupils per room, is it not? A. That's class size. And pupil-teacher ratio is a different matter from class size.

Q. Well, did you have team teaching at East in 1953? A. Not necessarily. We had a lesser number of teachers for the number of pupils, proportionately.

Q. In other words, you disagree that in 1953 East [2033] was being overutilized? A. I didn't say that. I said it was capable of rendering or offering a suitable achievement educational program and the pupils could achieve well with a higher pupil-teacher ratio and they were. I didn't comment on the utilization.

Q. Well, I'm not trying to argue with you, Doctor; I'm trying to find out whether—I mean, the school district does use the terms overcapacity and undercapacity, does it not, in describing enrollments at schools? A. It does on occasion, yes. And I indicated my reservations yesterday about that and tried to explain.

Q. Well, is there some term that you would prefer that I use to describe those two phenomena? A. No, I don't think you could use any other term.

Q. Well, do you have a term that you would prefer? A. When we were talking with people about capacity of buildings, we tried to go into the programs, as I explained yesterday, and this was a matter that we usually had to discuss with respect to a particular school. And you cannot use a formula such as that and apply it to a program.

This was a figure from which you worked. That's all it was.

Q. Now, I take it, then, that in 1953 you had some [2034] projections in existence, did you not, as to what the projected enrollment at East would be in the future; what the projected enrollment at Manual would be in the future? A. Are you referring to a specific year, Mr. Greiner? 1953, did you say?

Q. Yes. A. It would have been normal to have projections. We had annual projections for the following year and at stated periods we did have projections for as much as five or more years.

Q. And you recall, do you not, Doctor, that those projections showed, one, that East would continue to expand its enrollment year after year after year? A. This was because— Yes, let me qualify it, also. —because Denver was expanding to the east and southeast. And the East High School was housing those pupils.

Q. Then you also projected that Manual would stay at the very same pupil population, is that right? A. Somewhere in that, I think, relatively level population.

Q. Would you agree with me, Doctor, that with respect to those projections at East, that at some point those projected figures reached a number where you might agree that East would have been overcapacity? A. Yes. We had to make judgments of that sort. But [2035] there was no specific number at which that occurred.

Q. So there were no standards, is that right? A. I did not say that.

Q. No precise standards? A. I said there was no specific number at which you made that decision, and it varied with schools. And it did—in other words, there was no cutoff point. You're trying to imply that there

was a specific cutoff point with each school and there was none.

Q. But there was in fact a cutoff point for each school? A. A decision was made in that case as it is in each individual school. But there is no point that can be applied to all schools as I'm trying to say.

Q. Now, new Manual when it opened had a capacity of what? About 1,600 students? A. As I recall, fifteen to sixteen hundred; in that neighborhood.

Q. 1,525 or— A. Something of that sort.

Q. And its enrollment when it opened was about 1,200 students? A. Here again, you're getting into the question of time of program and the application of the thirty pupils per room. And using that application, the capacity was [2036] 1,525.

Q. Yes. And the enrollment was about 1,200. A. The enrollment actually was, I think, lower.

Q. And it was clear, was it not, from your projection that it was East that was going to be under the most pressure in terms of continued increases in enrollment? A. Yes, because of the area from which the children were coming, the pupils.

Q. But you made no attempt at all, I believe you will agree with me, to relieve East by using Manual, isn't that right? A. We did not.

Q. The Court asked the question as to what I would refer to as a tipping point in a school, Dr. Oberholtzer, a point at which the minority population gets at a certain point and then just continues on until it is a predominantly minority school. Now, are you aware of any instance in Denver, for example, where a school had reached, say, 40 or 50 percent minority and then had a reverse, so that the Anglo population increased from that point on?

A. It was my impression that the Park Hill area—that there were concerted efforts to create what was called an integrated community, and I believe that there was a change in that instance. I can't recall specific figures but that is my general impression.

[2037] Q. That was the result of some affirmative action by the community? A. By the citizens of the community, yes.

Q. And without that affirmative action, do you think that same result would have obtained? A. It would be doubtful, yes.

Q. Because there is no other experience in our current recent history in Denver, is there? A. I know what you have said is the general trend, but I know of no specific turning point that you have referred to. I really don't.

Q. Now, when you were planning new Manual, there was a great deal of consultation with the school's community, is that right? A. There was a study made and consultation with the community, yes.

Q. And in that community I believe you will agree it was black and Hispano, was it not? A. A large part of it.

Q. Now, were you aware—and I take it that there were a few Anglos, were there not, in new Manual when it opened? A. I have made some reference to it previously. I know there was some there. I can't recall how many.

Q. Do you know where they lived? [2038] A. No, I do not.

Q. Did you have any idea in 1950, '51, '52, and '53 where the edge of the Negro population was at that time? You did, didn't you? A. I was aware of certain general moves of the population, but as to a specific street, no, I cannot indicate that.

Q. You did not know whether or not there were few,

if any, Negroes living east of York or even east of Williams at that time? A. What time?

Q. 1953. A. I don't recall any specifics of that sort of that date. No, I do not.

Q. Now, did you have a consultation with the principal of new Manual concerning the establishment of boundaries for new Manual? A. There must have been such a conference. I cannot now say definitely when. Yes, we did have that in practically all instances.

Q. Was the subject of the eastward movement of the new Manual boundary discussed at that conference? A. In general, the boundaries would have been discussed, in all directions. I don't recall specifically eastward. All boundaries would have been discussed.

[2039] Q. Do you recall whether the principal pointed out to you at the time that the Anglo enrollment of Manual could be increased by moving the boundary eastward? A. I do not.

Q. You don't know whether that was—A. I do not recall any such comment.

Q. Now, the boundary for new Manual was placed—the eastern boundary was placed what? About a half a block from the school, mandatory to the attendance area? A. There were two types of boundaries; one mandatory, one optional.

Q. Was there any other senior high school in the district at that time, Doctor, that had its building right up against its boundary line that way? A. That's a relative term, right up against. But, I don't recall any as close as that.

Q. Now, turning your attention to the 1956 boundary changes, you mentioned that there were meetings that you attended in the black community; for example, at a meet-

ing at Manual High School. Do you recall that meeting? A. I think I did attend a meeting, yes.

Q. And there were also appearances before the school board in its public meetings, is that correct? A. Right.

Q. And the school board and you personally were made [2040] aware at that time, were you not, Dr. Oberholtzer, of the racial considerations, the racial results of the boundary changes which you were then proposing? A. There were some statements made about that, yes.

Q. Did you disagree with those statements? A. I didn't express either agreement or disagreement. My response then was, I think, as well as I recall, that we were not then taking into account the racial or ethnic factors in establishing the boundaries of the schools.

[2041] Q. It was clearly pointed out to you, was it not, what the effect of those boundaries would be, the racial effect would be? A. There were some statements to that effect, yes.

Q. Could you verify those statements as to whether or not they were accurate? A. We did not have any counts at that time of racial or ethnic population, and we did not attempt to verify or to comment on them.

Q. Did you have any doubt of their veracity? A. I simply received their statements for consideration.

Q. Is it my understanding, Dr. Oberholtzer, that you felt that your hands were tied, that you simply couldn't consider that kind of information? A. The policy of the District at that time was not to take into account the matter of racial and ethnic factors.

Q. Did you get an opinion from counsel in 1956 concerning that? A. That specific issue, no, I did not, that I recall.

Q. Were you aware at that time of any of the desegre-

gation moves that were made in the South in the Brown decision? A. I was aware in general of some moves.

Q. You were aware of the fact that in order to desegregate you had to take into consideration the race of the pupils involved? [2042] A. Yes.

Q. But again you didn't think that that would apply in Denver? A. That was not the policy of the District at that time.

Q. Well, I take it that the policy of the District was mandated in your view by the Colorado Constitution, is that right? A. This was certainly one aspect of it, yes. My duties, as chief executive, were to administer the policy of the District.

Q. Was another reason, Dr. Oberholtzer, the fact that in order to integrate or desegregate Denver Public Schools at that time you would in essence have had to abandon the neighborhood school policy? A. We were not then considering, may I say again, any policy of what you call desegregation or integration, because the policy of the District was not to take into account racial or ethnic factors.

Q. I take it that during this period of time, at least, you felt that there was no educational premise to desegregation or integration, is that right? A. This was not then a factor in the determination of our policies or in the application of our policies.

Q. Now, as I understand it, the factors that were used [2043] with respect to boundary changes were such factors as capacity utilization, distance, safety, convenience of pupils. Do you think of any others offhand? A. Natural features.

Q. Natural hazards? A. Hazards and such, and the type of program in the building.

Kenneth Oberholtzer—for Defendants—Cross

Q. Now, when you were present at those meetings in 1956, didn't you find that you were being presented with proposals which talked about alternatives to the boundary changes which you had proposed, in terms of your own criteria that you have just mentioned to me? A. There were some, a few proposals, yes.

Q. For example, you recall the fact, don't you with respect to distance, I believe the whole area east of Colorado Boulevard, north of 28th, was in fact closer to Manual than to East, is that right? A. I am sorry, would you repeat that again?

Q. East of Colorado Boulevard, the entire area north of 28th Avenue or Street, whichever it is. A. North of 28th I think it would be.

Q. Would be closer to Manual? A. Probably closer, yes.

Q.And it was pointed out to you that the transportation from that area of the city was basically east-west; in [2044] other words, that the public transportation available to such schools as Manual and Cole was better than it was to East and Smiley, is that right? A. These were some factors, but not all factors taken into consideration, yes.

Q. Now, was there a natural hazard that made you hesitant about expanding Manual's boundary to the east? A. I don't recall any, no.

Q. All right.

Is there any other facet of pupil convenience other than distance that you can think of? A. Principally that.

Q. Pardon? A. Principally that.

Q. Distance and accessibility of public transportation? A. Right.

Q. Well, then, what was it, Doctor, in the terms of the criteria which you have described for me? A. A program of the school and the utilization of that school, its capacity, that was the main reason. We felt there was not the capacity at that school for additional pupils.

Q. Now, you knew at that time, did you not, that eventually you would either have to add on to East or build a new high school, is that right? A. That was one thing in prospect, because the growth [2045] of the area was to the east and to the south, nearest to East High School.

Q. You just told me, though, Doctor, that north of 28th it wasn't closest to East High School.

The Court: He said that in another context. He said the reason he knew he had to build a new high school was that the largest growth was nearest to East High School, to the east and south. He wasn't quibbling with you on that point.

A. I don't intend to quibble on that point. I know that, yes.

Q. So the basic question, then, is the question of capacity utilization, is that right A. You had a high school which was then offering a program to the pupils and the capacity and utilization of that school appropriate to the achievement level and the pupils in the school, yes, that was the basic and it usually is the most important consideration.

Q. Because the School District, I take it, throughout this whole period was strapped for money, was it not? A. Generally to construct buildings.

Q. So your natural inclination would have been to use all the available capacity that there was at East?

The Court: He said it was a good school. It had a national reputation, did it not?

[2046] The Witness: They did have a national reputation. But again, refer to the achievement levels of the school—

The Court: You said you wanted to make full utilization of that facility. Wouldn't that have been a factor?

The Witness: This was not the primary factor. It was because this school had a high achievement level relatively, and they could accommodate, without affecting that achievement level, more pupils. This was the basic consideration. And this, in the reverse, was the case in Manual.

The Court: Its averages were higher than any other school, I would imagine. I expect you wanted to use it as a show place, too, didn't you?

The Witness: There was no particular intent on our part to use it at that time as a show place.

The Court: Well, to set a standard.

The Witness: It was one of the best high schools.

The Court: It was a yardstick school?

The Witness: Well, again, our policy then, as I have indicated, I think, I am not sure, we were not trying to compare high schools and to indicate necessarily one better than another.

The Court: This was a fact, though, wasn't it?

The Witness: It was a fact that the achievement level at East High School was high and a good school, yes.

By Mr. Greiner:

Q. I take it, then, with respect to [2047] the children in Manual that you felt it would be better to keep those children in Manual where they could get the benefit of this lower pupil-teacher ratio? A. The policy of the District was to offer a school to children living in different areas and to make adjustments and to endeavor to offer the best program we could for those children. There are great variations in children all over the District.

Q. Now, for example, when you send a black child into a predominantly white school, Doctor, you generally send them from an environment in the sending school that had a low pupil-teacher ratio into an environment where its class size is going to be larger and the pupil-teacher ratio is going to be greater, do you not? A. When we send?

Q. Yes. A. That would be a fairly typical situation but not always the case.

Q. Well, for example, the busing out at Stedman that finally took place in 1966, that was the occasion there, wasn't it, that's what happened? A. This was at the request of the parents and at their option.

Q. Are you saying that those parents were making a bad educational decision? [2048] A. I am saying that they made the decision in response to the question that you have asked me. I did not make that decision. It is a matter of individuals, and I cannot give you a general class or group answer, and by and large, the children who I think opted, I would expect them, although I can't recall, to be the ones who were achieving better than others. This would be the natural inclination for them.

Q. Why do you say that? A. I say this is the natural inclination for them to do it, because I know at that

time I heard some parents express doubt as to the wisdom of doing this, they were apprehensive about what their children would achieve in the new schools. I heard this expressed at the Stedman School. Not all parents were favorable to the idea. Some of them did want to do it. I don't think you can generalize, as you have indicated.

Q. Well, for example, the busing out at Stedman in 1966, there were approximately how many children bused out of Stedman? A. In 1966? My recollection is about a hundred or so.

Q. Not all of those children were black, is that right? A. I frankly don't know the composition, but probably a majority were.

Q. But also some Anglos were bussed out of Stedman? A. Let me remind you again there was no requirement of black or Anglo to be transported.

[2049] Q. So both blacks and whites left Stedman in that busing program? A. The option was with the parent without regard to race.

Q. Were there many whites left in Stedman after that busing program was instituted? A. I do not recall the composition of the school.

Q. Now, with regard to the Negroes, then, who were bused out of Stedman into predominantly Anglo receiving schools, that was a fact, was it not? A. They were, yes, that was the request.

Q. Now, did you make an effort, Doctor, in the receiving schools to lower the pupil-teacher ratio into classes which were to receive those black children? A. No, there was no effort to lower the pupil-teacher ratio generally, as I recall, but there was an effort made to receive them well in the school and to try to offer them the best educational

program. I don't recall any general lowering of pupil-teacher ratio, no.

Q. Now, you also mentioned with respect to the boundary proposals in 1956 in East, Manual, Smiley, Cole proposals, that you had private meetings where you called in representatives of the community, is that right? A. I did.

Q. About how many such meetings were there, Doctor? [2050] Let me remind you this was under consideration for about six months. A. Yes, over a period of several months, and there must have been at least ten different meetings.

Q. Now, were these meetings—first of all, were there any of these meetings that were attended by both blacks and Anglos at the same time? A. As I recall, in each instance.

Q. In each instance? A. Yes. I am talking now about the meetings in the Board room where I met with people.

Q. Right. Now, during the course of those meetings were there expressions from Negroes? A. There were.

Q. Were there Negroes who didn't want Anglos to go to Manual? A. I don't recall that specific question or answer.

Q. Were there Negroes who didn't want their children to be forced to go to East? A. I don't recall in that context of being forced. I do know that there were many who said they were pleased and wanted to remain at Manual and didn't want any changes.

Q. Now, were there Anglos who didn't want their children to be forced to go to Manual? A. I don't recall any such instances.

[2051] Q. Then I take it there was no community sentiment on this boundary proposal? A. There was commu-

nity sentiment, a divided sentiment, some wanting changes, some not wanting changes.

Q. Well, did I miss some alternatives, Doctor? Whites being forced to go to black schools, blacks being forced to stay in the black schools, blacks being forced to go to the white schools, the whites being forced to stay in the white school? A. Perhaps I am confused by your emphasis upon forced. There was no discussion of force.

Q. I am sorry. A. The question was basically your comments about the boundary lines and should they be changed. There was no question of forcing people, that I recall, that ever came up in those discussions.

Q. Well, now, did some of the people that you talked to live in the area north of City Park? A. There was a random selection of people, as far as I recall, over the general area affected.

Q. Between York and Colorado Boulevard, is that right? A. There were some from that area.

Q. Did you find many black representatives from that area, Doctor? A. I don't recall the specific locations of people, [2052] Negro or whites, but they were from the general area.

Q. Do you recall that the people in that area, the racial composition in that area—it was still predominantly Anglo, was it not, in 1956 between York and Colorado Boulevard? A. As well as I recall it, it would have been, yes.

Q. So that if you had moved the boundary of Manual to the east, say, to Colorado Boulevard, you would have picked up a lot of Anglo children, is that right? A. If we had done that, probably we would have, but there were other factors; we were not considering racial factors at that time.

Q. Weren't there Anglo parents in that area who were concerned about the fact that if you made such a change

their children would have to go to Manual? A. There were some expressions by Anglo and black, concerned both ways, yes.

Q. Now, that area between York and Colorado Boulevard after 1956 remained optional, did it not, between Manual and East? A. A part of it did, as I recall.

Q. Now at that time there were still a great many optional zones scattered throughout the city at all levels of education, is that right? A. There were several, yes.

Q. Now, as I understand it, every once in awhile you [2053] would make a change or a revision in an optional zone, for example, the 1956 boundary proposal was just such a change, was it not? A. This was one, yes.

Q. Do you recall, Doctor, the fact that you would every once in awhile make an analysis of who was going where out of optional zones? A. An analysis not on racial or ethnic factors but simply numbers of pupils.

Q. Yes. And you could locate those pupils geographically, could you not? I mean the principals, for example, of the two schools that might be the subject of an optional zone, they would know what students were— A. There would be generally what we called a spot map made by the principal showing the location of the pupils affected.

Q. I take it that when an area which had previously been optional, when you find that the experience was that no one was exercising the option, then you would stop the optional zones? A. This was a general practice, and this was the principal reason for moving a boundary, yes, from optional to mandatory. This would be the principal reason, yes.

Q. Because the primary rationale of these optional zones was to accommodate parent sentiment, was it not? [2054] A. It was basically to do that. In the case of high schools and junior high schools primarily.

Q. To give them a choice? A. Give them a choice, because we found whenever we tried to set school boundaries you usually found people on either side of that boundary in disagreement as to which way it should be, and one way of determining a decision was to make option areas, then they could make their choice between the two schools.

Q. Now, in 1962—well, let's look at Barrett, I guess, next. Planning for Barrett began when, in April of 1958, is that right? A. It was about 1958, as I recall.

Q. Do you recall at what point in time the School District became irrevocably committed to the building of Barrett? What is that event? A. I am sorry.

Q. What is the event that makes you irrevocably committed to a school building? A. That would be—the awarding of a contract to the construction would be the last time, but we have several steps preceding that which commits you to a school.

Q. Do you recall when the contract on Barrett was let? A. I am sorry, I do not. I think I recall that I made a recommendation to the Board in December of '58 with regard [2055] to Barrett School. That would be where I entered into the situation.

Q. All right. Do you recall when you first began getting expressions of concern from the local community about the location of Barrett? A. About the location of Barrett?

Q. Yes, sir. A. I can't recall a specific date. It would have been probably somewhere in that general area, '58, '59.

Q. In other words, at the time that you were receiving these expressions of concern it wasn't too late to stop the building of Barrett? A. There were some expressions, but not many expressions of concern.

Q. Well, it was pointed out to you, was it not, Doctor, that when Barrett opened it would be predominantly

minority? A. There were some people who did so, yes, not very many.

Q. You didn't have any doubt but what that was true? A. There was a trend, a movement of population into that area, yes.

Q. There was a movement of black population, was there not? A. To a large degree.

Q. For example, you knew that Columbine was predominantly black by that time, didn't you? [2056] A. It must have been, yes.

Q. And that Harrington was predominantly black? A. Would have been changing rapidly. Harrington and Columbine were contiguous north and west, I believe, at that time.

Q. Yes. And you knew that there were a great many black children being bused out of the Harrington area down to Park Hill Elementary School? A. There were some, yes.

Q. There were about 200 of them, were there not? A. I think that was the number, yes.

Q. Now, who did you consult with with respect, first to the size of Barrett? A. Well, here again we were dealing with a specific area of land, so to speak, of the city. We consulted—are you talking now about personnel, persons we consulted with? The staff would have made studies of the area and of overcrowding, the population particularly of the contiguous school areas.

Q. Now, is it true that the planning of Barrett contemplated that children would be diverted from Harrington to Barrett, A. As I recall, this school was built primarily because of overcrowding occurring at Columbine and Harrington.

Q. Was it then contemplated that some Harrington children would be sent to Barrett? [2057] A. Yes.

Q. And it was also contemplated that some Columbine children would be sent to Barrett? A. This was the main reason for building the school.

Q. And it was also contemplated that the optional zone between Harrington and Park Hill would be terminated, was it not? A. I believe that was part of the consideration.

Q. So the busing from that area into Park Hill of these 200 children was to stop? A. We were endeavoring, yes, to eliminate that and to find a more permanent home for the children.

Q. Were you aware of the eastern edge of the Negro population movement in 1958? A. I could not define any edge, no, we had no racial counts at that time, or ethnic.

Q. Do you have a general idea? A. A general idea of where people were located, but no specifics.

Q. You knew, didn't you, that there were very few blacks living east of Colorado Boulevard at that time? A. In 1956?

Q. '58. A. '58. I would judge there would be relatively few.

Q. And the same condition obtained in 1959? [2058] A. I'm not sure about that because there were some rapid changes occurring in the late 50's and I can't pinpoint where or when.

Q. What was the school immediately east of Colorado Boulevard? A. There were lots of schools immediately east of Colorado Boulevard. If you are talking about where Barrett is located, yes, Stedman.

Q. Stedman didn't have many blacks in it, did it, in 1959? A. You are asking me about figures in specific schools. I cannot recall, I don't know, but I am just going to assume that there would not be very many.

Q. The condition at Stedman didn't change very radically

in 1960, did it? A. Well, here again you are asking me about a specific school. I was aware of some rapid changes approximately from 1958 on, and whether it affected Stedman I don't recall at the moment.

Q. So with regard to the building of Barrett you were told that when it opened it would be predominantly minority, is that right? A. As I recall, it was predominantly minority.

Q. Do you recall that very shortly after it opened it was practically 99 percent black? [2059] A. I am sorry, I can only give you the general impression. I did not have a count.

Q. So with that knowledge you went ahead and built Barrett, the knowledge of what the results would be? A. We did not know what the final results would be. We were aware of conditions and changing conditions.

[2060] Q. Now, by 1962 Barrett was on a very large site, was it not? A. It was on a site intended originally as a junior high school site.

Q. And Barrett only took up a very small portion of that site? A. A small part of it at the southwest part, I believe.

Q. So in 1962 you made a proposal to build a junior high school at 32nd? A. That's right.

Q. On what? At the area just north of where Barrett was located? A. It would have been located at the northern edge of that site, yes.

Q. And do you recall when that proposal was first made? A. For the junior high school?

Q. Yes, sir. A. That was in 1962.

Q. Was it in January? Or was it midyear or late year? Would it help you to put it in relationship to the—

A. There was a report issued at that time, a building

[2061] report. I think you have it in your records somewhere.

Q. Is that Exhibit 405? A. Would you mind my seeing that?

Q. That's dated February 1962. A. It would have been a part of that report.

Q. A part of this report? A. Yes.

Q. That's Exhibit 405? A. I couldn't recall whether it was January or February. But February.

Q. Now, I take it that with respect to the building of the junior high school that you were told eventually the same things about it that you had been told about Barrett, is that true? A. We were told, yes. That was several years later.

Q. Two years later? A. After the opening of Barrett. But not after we planned Barrett.

Q. What had happened, Doctor? A. Well, as I told you—

Q. What had happened in the interim that made your response to the community reaction to the junior high school differently than what your response had been to the building of Barrett? A. Well, there was a genuine community response in [2062] this instance. A concern that there would be segregation if a junior high school were built in that area. I must say when we were considering Barrett there was not such a community response. There were some individuals, but there was certainly a divided opinion in the community at that time about Barrett.

Q. Well, in other words, in 1962, because of a larger community response, you felt that it was constitutionally acceptable to take race into consideration? A. I felt that

it was advisable to give heed to their views and to reconsider the matter at that time.

Q. Did you get a further opinion from Mr. Henry at that time? A. It was at about that time or a little later when— This occurred at about the time a special study committee was set up, too.

Q. Not quite, I believe. That was set up in June. A. It was a little later. But the study committee was set up partly as a result of differing views that were expressed.

Q. I believe I asked you if you got a legal opinion from Mr. Henry at that time. Would you answer that question? A. I don't recall a specific legal opinion at that particular juncture, no.

Q. Now, when was the field trip reflected in [2063] Exhibit HM taken? Do you recall that? Do you have that exhibit in front of you, Doctor? A. Let's see. I must have it. HM.

Q. Yes. That's the transcript of notes taken. A. I don't seem to have the exhibit.

Q. Here we go. I'm handing you Exhibit HM, Doctor. Does that refresh your recollection as to when the trip was taken? A. Yes.

Q. How long was that trip? A. As I recall, we were away about two weeks.

Q. Where did you go first? A. Philadelphia.

Q. What was the situation in Philadelphia with respect to the racial composition of the school district there? A. I don't recall a special composition. But they were much concerned because there were apparently—there were large numbers in Philadelphia, and large numbers of Negro pupils.

Q. Was it predominantly black by that time? A. I don't recall. By that you mean majority or more?

Q. Yes. A. I don't recall the specific compositions of any of those cities but I know there was enough to be of great [2064] concern and they were making studies.

Q. Now, had there been any previous studies of the problems of Philadelphia in this respect? A. By then?

Q. Yes. A. Well, they had in Philadelphia what was called a fellowship commission that is referred to in this report that had been apparently studying this matter over a period of years. I don't know how long. But for some years.

Q. Did you talk with some representatives of that commission? A. Yes. There were some in attendance I met at meetings in the superintendent's office where there were a variety of people present. I don't recall specifically who all was there.

Q. Had that commission issued any kind of an interim report? A. There were some reports at that time. I don't recall whether they were annual reports or what.

Q. Were you given copies of those reports? A. We did look at some, yes.

Q. Did you bring some back to Denver with you? A. No, I did not, not that I recall now.

Q. Do you recall—what was the subject of that report? [2065] A. The subject of the reports were primarily in the general field of human relations; what to do with respect to a better understanding particularly among the different ethnic groups of the city.

Q. This was to try to break down the attitudes of discrimination or prejudice? A. I think primarily so.

Q. Would you say that that was its primary emphasis rather than improving educational opportunity in Phila-

delphia? A. Well, it was related to that. It was an attempt to improve the school community relationships, frankly, with respect to racial and ethnic matters.

Q. Now, in 1962, Doctor, was Philadelphia assigning black teachers in white schools? A. I do not recall the answer to that specific question.

Q. Do you recall asking that question at the time? A. I don't remember now specific questions that were asked. We were in extended periods of discussion. I'm sure personnel was one of the matters, yes.

Q. Did you also discuss the assignment of administrative personnel who were in minority and white schools? A. We generally discussed the areas of personnel, curriculum, buildings, human relations, a variety of subjects.

Q. All right. Anything else you recall, Doctor, about [2066] what you learned in Philadelphia? A. Not at this moment, no.

Q. Then where did you go? A. To New York City.

Q. Now, New York had been the subject—its school district in Manhattan and boroughs—those school districts have been the subject of many reports, have they not? And studies? A. Yes.

Q. Had you, before going to New York, reviewed any of those reports which were already in existence? A. I had been aware of some reports and New York probably had issued more reports than any other school system up to that time. But I can't recall the title of a specific report. They did have a commission on integration that did some publications. I'm sure I must have read or more of their reports before I went but I don't have a specific recollection at this moment.

Q. I take it from the resume contained in Exhibit HM

that the scope or the direction of the New York program was broader than just community relations, is that right? A. It was much broader than in Philadelphia.

Q. It was broader than the Philadelphia program? A. Yes.

Q. And it included concern with educational opportunity [2067] in these minority schools? A. Yes. There were a variety of subjects and the basic interest was an equality of educational opportunity.

Q. And they also were considering the problem of assignment of minority teachers in white schools, were they not? A. That's right.

Q. And also the assignment of minority administrative personnel in white schools, is that right? A. They were giving much more active consideration than Philadelphia at that time.

Q. Well, were they giving it more active consideration than Denver was at that time? A. Consideration of the assignment now of people?

Q. Yes. A. Yes.

Q. Now, did you get any current reports from the New York commission to study? A. My recollection is that we did have some reports. But again, I can't at this stage remember the title.

Q. Do you know whether or not one of the subjects of those reports of the commission on integration in New York was whether or not there was a relationship between concentrations of minority students and equality of educational opportunity? [2068] A. I do not recall a specific on that, no.

Q. You do recall that that was under consideration? A. It was one of the considerations, but I do not recall anything specific on that.

Q. And you don't recall that they had reached any conclusions in New York? A. At that time?

Q. Yes, sir. A. I don't remember any, no.

Q. Anything else that you learned in New York in talking with these people? A. Well, of major importance to us was, as we looked at our situation, was their procedure of having citizens' advisory committees to help them assess the situation, to make a study. Also, their employment of a specialist in this area, in the staff, and these were two major recommendations. We were looking essentially for procedural ways of looking at our situation; how they looked at their situations, what they had done. And these were two major things we brought back from New York.

Q. New York, relatively, has a high population of Puerto Ricans, does it not? A. It does, yes. Manhattan does. I think Manhattan does.

Q. Did this interest you? Did you see any parallel [2069] between the Puerto Rican problems in New York and the Hispano problems of Denver? A. The question again was, did I see any relationship or what?

Q. Yes. A. There were discussions, as I recall, during our visit there and I was aware of—yes, of Hispanos in Denver, and in New York the Puerto Ricans there. They're not in Denver, however. I think you have quite different situations in New York than you have in Denver.

Q. So you didn't see that you could learn anything that might have utility in Denver with respect to New York City experience? A. Here again, I want to reemphasize what I said just a moment ago. We were trying to find procedures and ways of studying the situation and what we ought to do; not primarily substantive matters that you're referring to.

Q. But substantive matters were not ignored? They must have come up in these conversations. A. That's right. And we took that into account. But my comments, if you will note, with respect to the board, were related only to the procedural matters, and that is what this report is.

Q. Yes. I noted that. Now, then, did you go to Detroit? [2070] A. We did.

Q. And how long did you spend in Detroit? A. I don't recall, several days.

We spent several days in each case.

Q. You don't recall what the racial composition of the Detroit school district was in 1962? A. I do know there was a substantial number. I can't recall the composition.

Q. You don't know whether it had sprung over the 50-percent minority at that time? A. I could not testify as to that, no.

Q. Detroit was also studying its problems? A. It was.

Q. And had there been any interim or final reports by its study group? A. Well, there were two reports referred to in my statement; one was the general citizens advisory committee on school needs and out of that was set up a study committee on equality of opportunity.

Q. Pardon me. Which one was the Romney Committee? A. That was the first one set up in 1957. The citizens advisory committee of the school, chaired by Mr. Romney, and this was to take a look at the school needs of the city generally. They had five subject committees and, in a large way, we finally fashioned our so-called study [2071] committee after the Detroit experience. They had, growing out of this so-called Romney Committee, appointed another committee which did a special study with respect to

equality of opportunity, and that was the one that we were mainly interested in because it related to our question.

Q. Was the subject committee operating at the same time with the base committee that was operating? Is that right? A. You're talking about the five subject committees referred to in this report?

Q. Yes. A. This came at a later date. You see, the first committee was appointed in 1957. The second committee was appointed in 1960. And this is the one appointed on equal educational opportunity. It is the one that had the five subject committees, if you're looking at the report. It shows at the bottom of Page 3. And then continues over to Page 4.

Q. Now, had that committee that was studying equality of educational opportunity in 1962 issued any kind of a report? A. As I recall, there were several reports which we looked at in the assistant superintendent's office.

Q. Did that report find a relationship between inequality of educational opportunity and concentrations [2072] of minority students?

Mr. Brega: Object to the question. It calls for a hearsay answer.

The Court: Overruled.

* * * * *

[2073] * * *

Cross-Examination by Mr. Greiner (Cont'd):

Q. Dr. Oberholtzer, this morning we were discussing the standards that the School District was employing, namely, that in certain of the schools of the District it was felt that because of the programs being carried on in those schools a lower teacher-pupil ratio was required. Do you recall,

Doctor, when you first lowered the pupil-teacher ratio at Manual, was it done for old Manual? A. There was no particular stage at which you said there will be lower. As I recall, there was a gradual lowering of the pupil-teacher ratio.

Q. Was the lowering process of the pupil-teacher ratio at Manual still in progress when you left as Superintendent? A. Yes. The most recent principal, Mr. Ward, had requested further lowering.

Q. Do you recall when the lowering began? A. I can't remember any specific date, no.

Q. Do you recall when the District formulated the policy, [2074] when it made the determination that it would be advisable to lower the pupil-teacher ratio in these low-achieving schools? A. This was one of the early determinations when I came to Denver, and I think there had been some recognition of that prior to my coming, but not as much as subsequently.

Q. Now, were there schools at the time of your departure, Doctor, which had achieved what you believed to be the appropriate pupil-teacher ratio? I am talking still about the low achievement schools. A. Appropriate to particular schools. Again, there was no formula. It was an individual matter.

Q. Can you identify some of those schools for us? A. Well, we were working toward that—certainly one of the most recent studies that I recall was at Stedman School.

Q. Do you recall what the ratio had been at Stedman before this policy began to be implemented? A. I can't recall a precise figure, but it must have been between 25 and 30, and we were endeavoring to get it below 25.

Q. That was over a relatively short period of time, was it not, since Stedman, say, in 1960 was still a predominantly

Anglo school? A. Are you making an observation or a question?

Q. Well, did the program begin sometime after Stedman became a predominantly minority school? [2075] A. The particular program I am talking about came as the result of the recommendations of the advisory council.

[2076] Q. So that would have been sometime after the spring of 1964? A. After 1967.

Q. Oh, after '67? A. After '67 I'm talking about. This particular marked reduction.

Q. All right. Can you identify any other schools where at the time of your departure you felt that the pupil-teacher ratio had been reduced sufficiently? A. Well, we were in the process of doing this at the Greenlee School, as I recall, and the pupil-teacher ratios were approximately the same.

Q. Now, as I understand it, is it fair to say, Doctor, that your overall objective in these low achieving schools was to get the ratio down at least as low as twenty-five to one? A. Twenty-five or below, preferably.

Q. Now, as I recall the statistics published by the school district in 1968, and I have reference to an exhibit in evidence, Exhibit 83, some of the schools in the district had pupil-teacher ratios significantly below twenty-five to one. Is that correct? A. Some did.

Q. Some were as low as sixteen to one? A. Sixteen, seventeen; in there, yes.

[2077] Q. And the ratios for example at Moore and Morey and Cole were quite low, were they not? A. They were relatively low. And the situation at Morey is unique in that it was also a special education center for junior high schools.

Q. Well, as I understand it, special education teachers

and pupils were not included in those ratios, were they, generally?

Mr. Ris: If the Court please, I think it's only fair to the witness—if he's referring to—if counsel is referring to a specific exhibit, that the witness be given an opportunity to see the exhibit.

Mr. Greiner: I'm asking in general whether special education was considered.

Mr. Ris: May I finish my objection? To see whether the matter that he is referring to is as stated in that exhibit.

The Court: Well, if there is some particular information that you have at hand, you might call it to his attention. It would save time that way, I think.

The Witness: Let me answer your question to this extent, that the attempt at Morey—I know was to reduce significantly the pupil-teacher ratio.

Q. I'm handing you what's in evidence for example as Exhibit 83 and at the back that represents pupil-teacher [2078] ratio data in rank order. I am showing you the page that lists the junior high schools. Do you know whether or not that statistic as it appears in Exhibit 83 includes special education pupils and teachers? A. I do not, no. This was in 1968.

Q. What was the practice while you were superintendent? A. I think generally that it was not the practice to include it.

Q. Now, I take it, Doctor, that some of the schools which were the subject of this lower pupil-teacher ratio have been low achieving schools for a number of years. I'm talking

principally now about the core city schools. A. Relatively speaking, yes.

Q. What do you mean, relatively speaking? A. Relatively low.

Q. Well, they were the lowest in the city, were they not? A. Some of them—One has to be the lowest.

Q. That's a good point, Doctor; but, on the average, they were all below the city average, were they not? A. Most of them were.

Q. In the core area? A. Yes.

Q. And you started the triennial testing program in 1950, is that right? [2079] A. We started it in 1950, yes.

Q. And you had been testing—I suppose you were testing for achievement after your very first year here as superintendent, is that right? A. The triennial program was introduced in 1950, but individual schools had their own testing programs aside from that.

Q. When did you first become aware of the identity of some of these lower achieving schools, Doctor? A. Notably in 1950, with the first triennial survey.

Q. Now Doctor, I take it that you reviewed the results of this triennial program every three years, is that correct? A. We did.

Q. Did you find, Doctor, that this lowering of the pupil-teacher ratio had any significant impact on raising achievement in the schools? A. It did have an impact and through the years there was some improvement in the schools.

Q. Would you say, Doctor, that the achievement was up to grade level in those schools? A. In terms of the standardization achievement tests generally, no.

Q. Well, I take it the situation at Manual was similar, was it not, when we compare the achievement, for example, of [2080] old Manual with the achievement of new Manual?

A. Well, the achievement of old Manual I don't recall. We began as I said the triennial survey in 1950. That would be the first results.

Q. I guess that would have been the only result that you would have been familiar with of old Manual? A. The only one, yes, and it was relatively low.

Q. And then it was still low when you left the school district, was it not? A. It was still low but there was improvement in the achievement of the pupils.

Q. Was it up to grade level? A. No.

Q. Now, I'd like to call your attention to the boundary changes which were proposed in 1962 for the Park Hill area elementary schools. Do you recall that, at least initially, there was a proposal made to relieve overcrowding at Stedman Elementary School as one of those changes? A. You're talking now, I think, about the matter that was brought up yesterday in testimony in which, I believe, there was some question as to whether there were proposals anticipated in 1962 or 1964.

Q. That's right. And the thrust of my question, Doctor, is whether there was an initial proposal and for some reason it was changed, or whether there never was such [2081] a proposal? A. No, the intent—I think the intent was to make the proposal for 1964, not for 1962.

Q. Now, do you recall whether or not it's true, Doctor, that in 1962 Stedman was the most over-utilized of those Park Hill schools? A. I do not recall that point.

Q. Would you accept the fact that there is evidence in this record of that fact? A. Of what schools now are we talking?

Q. Talking about Smith, Park Hill, Philips, Hallett and Stedman.

Mr. Ris: If the Court please, I think, if there is evidence to this effect, whatever the exhibit is, the witness should be furnished with it.

The Witness: I would like to see the evidence, if there is such.

The Court: Well, he may if you have it.

The Witness: I don't recall that.

Q. I'll try to find that for you in just a moment, Doctor.

The Court: You're talking about overcapacity—or population in excess of rated capacity?

Mr. Greiner: Yes, and my question goes to—

The Court: At Stedman, more than the other [2082] schools?

Mr. Greiner. It's Exhibit 51.

Q. This is Exhibit 51, which is in evidence, which is a bar graph purporting to show the capacity utilization in 1961 at Stedman, Smith, Hallett and Park Hill. Now, at least according to that exhibit, which is in evidence, Stedman was the most overcapacity, is that correct? A. This exhibit shows that, yes.

Q. And do you know, also, Doctor, whether or not Stedman also had the highest Negro population at that time of those schools shown on that exhibit? A. I could not testify to that effect, but it was probably so because of its location.

Q. Now, if I understand what you have been telling us, Doctor, a school which is over-utilized and has minority population—significant minority population, it in effect gets over-utilized faster than a school that doesn't have minority population. Isn't that true? A. It would be generally so, yes.

Q. Well, can you explain then why the decision was made not to—why Stedman wasn't proposed for immediate relief in 1962, if that's what the fact was? A. I'm trying to recall, but I think there was some reduction in Stedman contemplated later. And we contemplated some changes in 1964.

[2083] Q. That is correct, but my question is, why wait two years?

The Court: If you remember.

A. I don't recall the reasons, frankly, at this time.

Q. Now, I believe you recall the subject of the actions taken at Harrington, Columbine and Stedman Elementary Schools? A. When?

Q. I believe that was in 1951, the school year beginning 1952. A. We have talked about several situations. I am not sure.

Q. Do you have any recollection of what the reasons for those changes in the boundaries was? A. In '51-'52?

Q. Yes. A. I am sorry, I don't recall.

Q. But you do recall telling me, do you not, Doctor, that optional zones were not one of the devices used by the District to relieve overcrowding? A. That's a general policy, yes.

Q. You mentioned the opening of a parochial school near Smith, and I don't believe that the record shows when that school was opened. Do you recall? A. It was opened, I believe, in the early 1960's. I can't give you a precise date.

[2084] Q. And do you recall that Smith was built in 1955? A. Yes.

Q. And the addition that you had reference to in your testimony was built in 1957, was it not? A. That's right.

Q. So by the time 1964 rolled around, both of those events that you have described had already taken place? A. I believe that is correct, yes.

Q. Now, handing you what has been marked for identification Exhibit 245, which is a newspaper clipping, I wonder if that refreshes your recollection, Doctor, as to whether the school District, and this speaks as of 1952, owned any other School sites east of Colorado Boulevard that might have been used for the Park Hill area? A. Are you referring now to an elementary school site?

Q. You built Barrett on the junior high school site so I guess no, I don't limit my question to that. Any school site. A. There were some in existence at that time, yes, east.

Q. And where were they? A. This map doesn't show any street designations.

Q. It shows— A. I am sorry, it does indicate 35th and Dahlia, 36th and Jasmine.

[2085] Q. 36th and Jasmine is where you ultimately built Smith, did you not? A. That would be the Smith School, yes.

Q. Now, you also mentioned, I believe, Doctor, that in the May 6, 1964 Board meeting quite a few important policies were passed by the School Board in response to the 1964 study committee report; do you recall that? A. I do, yes.

Q. Now, one of the recommendations of the study committee report—or can you tell me whether one of the recommendations concerned the use of transportation to relieve overcrowding? A. There was such a recommendation and a policy recommended.

Q. Now, you have reference, do you not, to Policy 1226A, which I will show to you? It is identified as Plaintiffs' Exhibit 34. I believe it is over on the second page, is it not, designated multiple pupil transfers? A. Yes.

Q. Just so the record is clear, Doctor, I'd like to point out to you that that particular provision was not passed until February 2nd, 1966, was it? If you will note the reference on the first page of the exhibit. A. This policy is effective February 3, yes.

Q. 1966? A. '66, correct.

[2086] Q. So you agree we do have the May 4, 1964, Board minutes identified as Plaintiffs' Exhibit 32, and I think that if you would look there you would find there is no reference in the 1964 meeting to this provision. A. I will take your word for it. I didn't think so.

Q. Now, if that policy had been recommended, Doctor, in March of 1964, why did it take some two years before the Board adopted it as policy, do you recall? A. I do not recall any specific reason for that, no.

Q. Now, you have on your desk in front of you two of the defendants' exhibits, I believe, that deal with compensatory education expenditures. I have reference to Exhibits EM and EN. Do you have those? A. Yes, I do. I have EN and EO.

Q. All right, we will take those, then. EN purports to show the expenditure of federal funds in junior high schools, is that correct? A. From '68 to '69. That was after my date.

Q. Were there any federal funds being spent in junior high schools during your tenure on such programs? A. My recollection is that there were some, yes. The Education Act was made effective at an earlier date, during the period when I was Superintendent.

Q. That was what, about 1965? A. I was thinking it was a little earlier. Might have [2087] been '65, '64, in that neighborhood.

Q. We are talking about the elementary and secondary schools? A. ESEA, right.

Q. What were the criteria for receiving federal funds, Doctor? First of all, did the District have to put up matching funds to qualify for this assistance? A. I don't recall that there were matching funds there. I think there were two basic requirements. First of all, you could not apply for funding unless the school was within the designated target, so-called target area, which was essentially an area of low income families.

Q. What did you use, the 1960 census data to determine that? A. My recollection is they were using the '60 census figures at that time, and the other was that you could not use funds in lieu of or in substitution for any programs that you had. They had to be either in addition to or new programs. Those were the essential criteria.

Q. In order to continue the funding for a given program in a school, would you have to submit any kind of an evaluative report on the program to the federal government? A. There were some requirements in connection with the application. You did have to have a plan of evaluation, yes, sir, testing and such.

[2088] Q. How often did you have to send in these evaluations? A. My recollection is that that was an annual matter.

Q. I take it that some of these programs were abandoned because the evaluation did not show the improvements which had been anticipated? A. There was no abandonment that I recall during my tenure.

Q. Well, did these federal programs work in raising achievement? A. There was some increase in achievement, but generally not significant changes in achievement.

Q. Now, in addition— A. Let me qualify, please.

Q. I am sorry. A. For some of the programs. Because I want to point out that there were some programs where there were significant differences. May I add that?

Q. Certainly. A. One of the most significant programs was one that we instituted in the way of summer school opportunities for elementary school children in the low-achieving areas, and my recollection is that they were run about six weeks and we had those centers in various parts of the city, and we concentrated on the reading program at first and we'd spend the entire morning, for example, simply on reading, which meant we were [2089] spending from two to three hours on reading only, and the results of those programs were significant. We did have achievement levels raised during a six-week period, as I remember, all the way from one to two and more years reading level. It demonstrated to us the necessity of concentrated programs, particularly in the basic subjects, and thereafter we did make some adjustments in time in the regular program. And where we were able to do that we did get some differences, significant differences.

Q. Now, do you recall how many students participated in that summer reading program? A. I can't recall because it started with a relatively small number of centers, as I remember, five or six centers, and expanded, and there would be, I think, two or three rooms at a center, and the general practice was to have groups of, my recollection is, 15 to 20 children, a relatively small group, and concentrated time available for study. We later instituted programs in arithmetic. The first programs were in reading.

Q. That was a District Y program, was it not? A. This was in various parts of the city, wherever there were low-achieving groups in schools, and we were trying to put them in centers where it would be relatively convenient for them to come to it from their homes.

Q. Did you find that it was possible to re-create the [2090] summer school situation in the regular classroom? A. It was feasible to create it in some instances, and we did endeavor to reduce the class sizes, more especially in the lower elementary school grades.

Q. Did you find that the children retained, Doctor, their increased achievement levels in reading? A. Unfortunately, there is a rate of forgetting as well as a rate of learning, and there was, in many instances, a rapid rate of forgetting as between the close of that period and the opening of school. So we did institute, as the result of that, some changes, with more concentrated efforts on the part of the teachers and the schools in the beginning of the school year to overcome the deficiencies.

Q. Do you recall during your last year in office, Doctor, approximately how much in the way of theses federal ESEA funds were received by the District? A. I am sorry, there was a substantial sum, but I can't recall the amount.

[2091] Q. Well, for example, EM shows that in 1968-69 some $601,000 was spent on secondary schools—pardon me, the elementary schools. Do you recall whether during your tenure similar amounts of money were being spent? A. In elementary schools?

Q. Yes. A. My recollection is that there was a lesser amount. I'm not positive about that. The figure of six hundred thousand sticks in my mind as a recommendation and I can't put it in point of time.

Q. Now, did you ever make any determination of the

cost per student of this type of program? A. There were some determinations—now, this type of program? Are we talking about the regular program in the school year?

Q. I'm sorry. I'm talking about compensatory programs that were undertaken in the schools. A. During the school year?

Q. Yes. A. There were some cost figures but I don't have them in my mind, frankly. If you were going to ask me about them, I can't recall. They were substantially larger. But generally speaking, those programs would run in the neighborhood of 51 percent or more per pupil above the normal average cost.

[2092] Q. What is the normal average cost? A. When?

Q. Well, let's take your last year in office. A. It varied as between elementary, junior and senior high schools.

Q. Well, if you recall, why don't you give it to us for each level? A. Well, it would have been on the order of, I suspect, around five hundred dollars for elementary, six hundred for junior and seven hundred for senior high schools. Something of that order. That would be the relative order of it.

Q. How much was it at the elementary level? A. I thought around five hundred. It might be—might have been less.

Q. Then you're saying that the federal programs infused another $250 per student? A. That would be generally the case in those programs.

Q. Do you know whether or not there was a great decrease in per-pupil expenditure after you left from the federal program? A. No, sir, I do not know.

Q. For example, EM, which you now have in front of you, shows that in the selected 20 minority schools there

was a little over a half million dollars spent, is that right? [2093] A. Well, for the year 1968-69, yes.

Q. And there were approximately 13,000 students in those schools which would come out to be about forty dollars per student, according to my arithmetic? A. Well, let me just remind you that the program was not applied equally to all students. There were selected programs within those schools. This isn't a grand total for the school. You had programs within the schools.

Q. I see. So far any given program you might only have a selected number of students participating, is that correct? A. That's correct. You would have those that were deficient in achievement, would be the general rule. It didn't apply equally to all pupils.

Q. Now, I wasn't sure what your response meant, Doctor, and I'd like to clarify it with respect to the busing out at Stedman to relieve overcrowding there. Did you say that there was no integrating purpose behind that busing out? A. There was at that time some idea of that purpose, yes. We're talking about 1964 now?

Q. 1960—

The Court: 1966.

Q. 1966, I believe. A. Yes. That was one of the elements in it.

[2094] Q. Then why were Anglo students allowed to be bused out? A. Because at that time we were not making a distinction in any school in the matter of transportation as to whether he was Negro or white. And we gave them the option of going. This was then a voluntary matter on the part of the parent.

Q. During your tenure, was it always voluntary? A. It was always voluntary.

Q. Had you set some sort of a goal for the number of students that you wanted to get out of Stedman? A. We had not at that time set goals of that nature, no.

Q. Subsequently, did you? A. No.

Q. Now, at the time of the junior high school proposal in Northeast Denver, that was in 1962, there was also then under consideration a series of changes in the attendance areas between Morey, Cole and Byers, were there not? A. I believe there were, yes.

Q. And do you recall that there was opposition to those changes on the basis of the racial results which might be achieved by them? A. I think there were such comments, yes.

Q. Now, was this about the same time that you were [2095] considering the junior high school in Northeast Denver? A. In the relatively same period of time, I believe.

Q. Was there as much opposition to those junior high school boundary changes as there was to the proposal to build a new junior high school? A. I do not recall. I can't state a proportion.

Q. But the same factors were being mentioned? A. Similar, yes.

Q. And can you recall why you decided, Doctor, not to build the junior high school on the one hand but that you did decide to go ahead and make the boundary changes on the other? A. We were faced with the situation in the one instance of an immediate action, and the other of a long period. The construction of a new high school is different—quite a different matter than changing a boundary line, and we were confronted then with the matter of the relative capacity of the schools and the programs of

the schools. This was a matter of concern then. And we were not concerned with the racial or ethnic factors.

Q. Well, you were concerned with those factors up at that 32nd location. A. We were not intially concerned. May I remind you, it became a part of our concern in subsequent time.

Q. Yesterday you mentioned as the most important [2096] factor affecting achievement, Doctor, something you called native ability. What is native ability? A. I'm talking here of what is generally reflected as the ability, the intellectual ability in this instance, to do school work; the capability of a child. You call it brightness; intelligence and such. This is a general term.

The Court: I think he wants to know what the source of it is according to your belief.

A. Well, I'll be glad to—

The Court: Is it inherited? Is it a product of the exposure to educated parents? I think you indicated that.

A. Well, I have indicated, I think, that I felt that there were some innate capacities in terms of intelligence, but I do not confine it to that. I think there are many important environmental influences, though it's a combination— What a child is able to do is a combination of these factors.

The Court: Does that answer your question?

Mr. Greiner: Not quite, Your Honor. I'd like to pursue it just briefly if I might.

Q. I take it then that native ability is something you're born with, is that right? A. That's the intent of that

statement, yes. You [2097] are born with certain genes with respect to the color of your hair and your eyes and your physical makeup and you are also with your intelligence.

Q. Now, are you familiar—I think you said it's called, I think the Jensen Report? A. I am in general familiar with it.

Q. Is that what you have reference to? A. No, I do not agree with the Jensen Report.

Mr. Greiner: I have no further questions, Your Honor.

Cross-Examination by Mr. Brega:

Q. Doctor, I'd like to ask you a few questions about the 1956 boundary changes at the time that you had Hill Junior High opened and then the contiguous areas changed.

The Court: The series of junior high boundary changes? Is that what you're referring to?

Mr. Brega: Yes.

Q. I think we have had an inference here that the only change that was of any concern was the Cole-Morey-Byers change. And I'd like to know if, during this period of time, in 1956 at the time these changes were being considered, whether all of these areas were involved. In other words, did they all come out of Hill? Is that where they started? A. The reason for the considerations at that particular [2098] arose from the opening of the new Hill Junior High School. That was the beginning. When you make a change in one situation, you also affect other represented situations that are contiguous. But it also afforded the opportunity for considering other situations.

Q. Well, I gather then that, had Hill not have been opened at that time, there probably would not have been any other boundary changes in Cole and Morey and Byers? A. That's probably so, yes.

Q. In other words, the Hill construction was what caused you to think about these other boundary changes? A. Right.

Q. And at the time these changes came up I presume that you published these for the general populace of Denver to see what you intended to do? A. As I recall, they were rather widely reported, yes.

Q. You weren't trying to hide the fact that you were going to make any changes? A. No. All such proposals are made at a public meeting of the Board of Education at the regular or special meetings, and they are subsequent to press comment and other kinds of public comment and information.

Q. Now, regarding the type of information that was presented to you about how the Cole-Morey changes would affect the racial balances of the schools, did anyone present [2099] figures to you of the percentage of blacks or whites being taken out of any one of the areas, for instance, in the Cole-Morey change? Did anyone come up and say, "You're going to take 75 percent of the black students out" or— A. I don't recall any such figures. We had no studies with respect to that, I'm certain of. But whether we were presented with them, I don't recall specific figures, no.

Q. To the best of your recollection, then, is that people were just talking about generalities of what would happen? A. That's my present recollection, I would guess.

Q. And there were several different groups that were

advocating different positions, I presume, at those meetings? A. Are we now talking about 1956?

Q. Yes. A. It is my recollection that there were several viewpoints yes, as to that.

Q. And, if I am correct, you mentioned that there were blacks who were in favor of the changes and blacks who were opposed to the changes at the Cole-Morey site? A. Well, if you are now referring to the series of meetings that I held in the Administration Building, yes. This was so.

Q. And these people really represented their own [2100] interests? In other words, rather than as a community interest to you? A. We were endeavoring to get a random sampling of people in various geographical parts of the area affected, though they were not representative of any groups so far as I know; only of themselves.

Q. Now, you mentioned in this regard that at this time you were not considering the racial factor in your changing of boundaries, and I just would like to touch on that a moment.

Does that mean that you were treating all of the races and ethnic groups equally in your determination of these boundary changes? A. I simply meant that this was not a factor in our considerations.

Q. In other words, you were dealing with pupils regardless of what their background was? A. Simply dealing with numbers of pupils, not with respect to their racial or ethnic factors.

Q. And at the time of these 1956 boundary changes, did you have any studies that indicated proposed mobility of the black community in this part of Denver? A. Studies of such?

Q. Yes. A. I do not recall any such studies. We had no [2101] studies based on race or ethnic factors.

Q. Did anybody present any studies to you at the time? A. I don't recall any.

Q. I would like for you to consider in this light—in light of what you thought or knew at that time, rather than what we have now to us—the facts that we now have—in considering the Barrett site, did anyone present a study to you indicating what the percentage of black and white students was on the east side of Colorado Boulevard? A. I don't remember any such studies, no.

Q. And did you have any of your own? A. I did not have.

Q. Did you have any idea that the black population on the east side of Colorado Boulevard would increase from 1960 to 1966 at the annual rate of 67 percent a year? A. We had no statistics or no predictions of such.

Q. In the exhibits before the Court it indicates between 1963 and 1968 that the population of the black students in the Denver Public Schools increased 45 percent. Did you have any idea that that was going to happen? A. We had some idea of a probable increase but not of a percentage. And this again was a general figure.

Q. Now, at the same time that you were dealing with these problems in 1966, Stedman, Smith and that area, the [2102] school situation in Denver was such that most of your schools were overcrowded at that time, were they not? A. (No answer.)

Q. Let me refresh you. The 1967 report—it indicates that in 1966 fifty-three percent of all schools in Denver were overcrowded during that year. A. If you are using this formula—and they did use that formula—I don't have a specific recollection of figures.

Q. Well, what I'm getting at—is the only problem you were facing in the Denver area—was it just Northeast

Denver? A. Well, there were relative degrees of overcrowding. When you take this figure now—I think you're probably taking the so-called rated capacity and anything above that rated capacity would be considered overcrowding. Is that what you're talking about?

Q. Yes. Would that same condition have existed in Southwest Denver and Southeast Denver and other parts of the city? A. It was rather general over the city. It was not confined to any one. But there were certain areas where it was more marked than others. At that time the Northeast area was one of the most crowded.

Q. Now, you mentioned that there were several steps [2103] before the letting of the contract in Barrett that actually committed you to the site. Would you tell us what you mean by that? A. Well, as a general rule, the steps are the superintendent or some member of his staff recommends that plans be made for a new school at a particular location. And the first step is to draw up some preliminary plans. Ahead of all this recommendation are some other steps. But insofar as the specific board actions, these are the steps. Then the preliminary plans are presented for consideration before the Board of Education. It either approves or rejects or it defers. Then there is an authoriaztion at that time to proceed to working drawings and the final plans.

The next step upon completion of those is to receive bids for the construction of the approved final plans. There is a time when those final plans are approved. The final step is to receive the bids for the construction of the school and to act upon them. Then you are committed to the school.

[2104] Q. And when you were involved in the consideration of Barrett did the staff investigate the traffic count

on Colorado Boulevard as one of its important aspects? A. This would be in general one of the aspects of our consideration in the environment, streets and such.

Q. And did it— A. I would have to answer yes, it must have been a part of it. I have no specific recollection of count as such.

Q. And you also, I presume, then, were studying the new construction that was taking place or going to take place on Colorado Boulevard? A. Yes.

Q. I believe the 1967 report indicates—excuse me.

The Court: Advisory?

Mr. Brega: No, I had the wrong one.

Q. In your consideration of the 1964 report, the Voorhees report, and you made those assignments out to the staff, the staff, as I understand it, filed a report with the Board of Education that "The busing of large numbers of students back and forth across the city to achieve racial balance would maximize to a serious extent the school's strangenesses and emotional strains of those students." A. May I see that?

Q. Yes (handing document to the witness).

Mr. Greiner: Is that an exhibit?

[2105] Q. Does this refresh your recollection?

Mr. Greiner: Pardon me. Is that an exhibit?

Mr. Brega: No.

Mr. Greiner: I would object to counsel reading from something that is not an exhibit.

Mr. Brega: I am asking him to refresh his recollection. I will make it an exhibit if you want. It is just another—

The Court: We will let him look at it. I don't see how that could do any harm.

The Witness: It might help.

By Mr. Brega:

Q. This was prepared by your staff? A. Well, no, this was prepared by the executive board of the committee on instruction. This is not a part of my staff. This is another group. It is a professional staff, so to speak, a representative group from different schools in the city. But there were instruction committees and there was an executive board, and that I believe is what—let me see. Yes, this is the executive committee of the committee on instruction. I did request them to make a study of the recommendations of the committee, and this is a part of that response. It is not my assignment to the staff that we were referring to earlier.

Q. Right. And they were requested to make a study partially on the advisability and feasibility of busing students? [2106] A. They were to make a study of all of the recommendations of that committee.

Q. And does this refresh your recollection on what their response to that was? A. Yes, in this particular instance.

Q. Would you tell us what that response was? A. You want me to read it?

Q. That would probably be the easiest.

Mr. Greiner: Well, I object, Your Honor. If he is going to read it, I would ask that it be marked as an exhibit, that it be identified.

The Court: This is a report of a committee to evaluate the advisory committee's report, as I get it, is that right?

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The Court: This is a report of a committee to evaluate the advisory committee's report, as I get it, is that right?

Mr. Greiner: I am not sure it has been established that he ever received it.

The Court: It hasn't been.

The Witness: I would be glad to indicate that I did receive such a report.

Mr. Greiner: You did? All right, then, we would have no objection to his reading it.

The Court: We can always Xerox that page and make it a part of the record.

Mr. Brega: The whole report, Your Honor, is a response to this, to the advisory committee's recommendations. [2107] I don't have any hesitancy about putting it in. It is just another huge volume of recommendations.

The Court: We wouldn't necessarily need the whole thing. Just take the page.

The Witness: I am sorry, we are now talking about the study committee, not the advisory committee.

Mr. Brega: That's right.

The Witness: The 1964. We are not talking about 1967.

The Court: You are not saying the Berge committee recommended compulsory busing?

Mr. Brega: No, the Voorhees committee.

The Witness: This is the first committee.

Mr. Brega: If we did, we would be in real trouble; this is the '64 committee.

The Court: I see.

By Mr. Brega:

Q. Would you read that section we are referring to? Let's start again. A. The paragraph is headed "Bounda-

ries, Busing and Emotional Security." Incidentally, the choice of subjects and the arrangement was the committee's choice. I don't know why they have this particular one.

"Busing large numbers of pupils back and forth across the city to achieve racial balance would maximize to a serious extent the school's strangenesses and emotional [2108] strains which already undermine learning for so many youngsters. The recommendation that this not be done (that was recommendation 6) seems sound.

Q. Stop right there. Recommendation 6 refers to the Voorhees report? A. Of the Voorhees report or the study committee report.

Q. All right. I wanted to ask you if you agree that this transportation of students did have an adverse effect upon their ability to achieve. A. This transportation, what are we talking about now?

Q. As we mentioned here, the mass busing of students back and forth the city, I want to know what the strangenesses and the emotional strains we are referring to are. A. Let me point out that this was an opinion expressed about a contemplated situation. That's all that is.

Q. We are facing that in this lawsuit.

The Court: He says he can't evaluate it until it is an accomplished fact. I take it that is what he said.

The Witness: We are talking simply about an opinion here.

Q. Do you have an opinion as to what it would do? A. I do not have a general opinion. I think it is possible that there could be such an effect, but I would not want to generalize.

Q. Now, I would like to call your attention to Exhibit [2109] 83, which is the triennial test scores of 1968, and I am going to give you an example, if I may, of two schools, Knight Elementary and Gilpin Elementary, and for Grade Level 5, the word meaning test score for Gilpin was 4.7 and for Knight was 6.7. And that indicates two grade differences, I presume, then, between the students and the word meaning. In the report it also reflects that the Gilpin median family income in that subdistrict area is $3,680 and that the median income for the Knight subdistrict is $10,000 plus, and I want to ask you if in your opinion the income level does have or can have any effect on the achievement level of those students.

Mr. Greiner: Your Honor, I would object. The income data which counsel has reference to is 1960 data. The test results which counsel has reference to are the 1968 tests. I don't think there is any proof —it is an apple and an orange. He has come up with a peach.

The Court: Can you answer the question? Do you understand?

The Witness: I am not familiar with the report, Judge. This is a 1968 report. I can only answer in general terms as to his question.

I have previously indicated to you that there have been studies which pretty well establish that the income of a family is one of the good indicators, only one, that has some bearing upon the achievement of pupils, but I would not [2110] rest on any one indicator.

Q. And also in this study in 1968 the average daily at-

tendance of Gilpin was 88.7 percent, and at Knight it was 94.5 percent. I will ask you if in your opinion—

The Court: Are you talking about different years now?

Mr. Brega: No, no, same year, under the triennial testing report, two schools, one of which has a high achievement level and one of which has a low achievement level. I am asking now if in the Doctor's opinion the difference in the attendance percentage at these schools in his opinion has any effect on the achievement level of these schools.

A. I would have to answer only in general terms that there is an effect, and in general the better the attendance the more probability of higher achievement. It again is one factor that has to be considered, and you are talking about generalities. This varies tremendously among individual pupils.

Q. Let's carry this on.

The Court: I think we can all agree that good attendance is desirable in this problem, and then we can get on to the next point. I don't want to hurry you, though.

Mr. Brega: I don't want to hurry on this, either, if I don't have to.

The Court: No, not necessarily. I just think that [2111] is fairly obvious, that attendance affects the results.

Mr. Brega: Your Honor, I believe the whole tenor of the plaintiffs' case is that the reason that we have low-achievement schools and the reason we have high-achieving schools is because one is minority and

the other is Anglo, and I want to bring out that there are as many other reasons as there are—

The Court: You go right ahead.

By Mr. Brega:

Q. Now, Doctor, in consideration of these factors of achievement, is it your opinion that race has anything to do with the achievement level of students? A. I have answered that question, I think, several times, that I do not think so, not race per se, no.

The Court: I don't think the plaintiffs have maintained that, have they?

Mr. Brega: Well, every one of their schools that they have presented to you—

The Court: I hadn't understood that they maintained that there is anything constitutionally inferior about a person of a minority race. I have not heard anything like that.

Mr. Brega: We don't maintain that, either.

The Court: You are not suggesting that they are suggesting it?

Mr. Brega: No, except that they are suggesting if you take minority students and put them in a school that is [2112] predominantly Anglo, there achievement record is going to suddenly change.

The Court: You go ahead. As I say, don't mind me.

Mr. Brega: I won't. It is an academic exercise.

By Mr. Brega:

Q. While you were Superintendent did you have various grouping levels within a grade in your clases? A. There was no plan for grouping which was applied generally

throughout the school system. This was at the option of a school or a teacher. There was some grouping particularly in the elementary schools, in reading, I think you would customarily find within any given grade, and I am talking particularly where they had the so-called home room or self-contained classroom with one teacher in charge throughout the day, and if that teacher were teaching reading the chances are there might be two or three groups within that class.

Q. And in your opinion is that a sound educational system? A. Well, this is a means for the teachers to work effectively with groups of children where there are less individual differences in a particular group.

Mr. Brega: No further questions.

Redirect Examination by Mr. Ris:

[2113] Q. Dr. Oberholtzer, do you still have Exhibit 34 there? A. 34?

Q. Yes. A. Can you tell me what it is about?

Q. 1226A. A. I'm not sure. I have got a lot of papers here.

Q. Here it is. I believe this was referred to you by Mr. Greiner, in particular, reference to page 2 and a date shown on page 2 being February 3, 1966, is that correct? A. Correct.

Q. What does that February 3, 1966, refer to? A. It says the effective date of the policy.

Q. All right, sir. Will you look on page 1 at the very top, second paragraph, entitled "References"? A. Yes.

Q. What is the first reference? A. Minutes of the Board of Education, May 6th, 1964.

Q. What does that mean? A. Well, it means that one

of the references in the development of this particular policy were the minutes of that meeting.

Q. Do you recall that the initial draft of this policy was prepared and enacted at the May 6, 1964 meeting? A. Well, that was my recollection, and I was wondering when this matter was presented to me. I couldn't recall a [2114] deferral for two years, and I thought all of those proposals were acted upon that night.

Q. Would you like to take a look at the minutes of that meeting?

The Court: I think this arose, if I may make a suggestion—

Mr. Ris: Yes, sir.

The Court: —in connection with the testimony that the Stedman meeting was in 1966 to formulate a policy to relieve overcrowding. He said, "why did you wait two years after the announcement of Policy 1226A was put in effect?"

Mr. Ris: The original one was in effect in '64 and the original enactment was in '64. That's all I am trying to establish. Counsel left the impression it was in '66, which was impeaching—

The Court: You mean started busing them out of Stedman?

Mr. Ris: Which was impeaching testimony with respect to his testimony on cross.

If you will agree the original enactment was in '64, that takes care of it.

Mr. Greiner: No, I will not. I have the '64 minutes here. It is not in them.

Pardon us, Your Honor. I am talking about multiple pupil transfer.

[2115] Mr. Ris: You are talking about an amendment, then, to the basic document?

Mr. Greiner: That was not passed until 1966, and that is what the busing out to relieve overcrowding was all about.

The Court: I think you brought out yesterday, Mr. Ris—

Mr. Ris: We may be talking about two different things.

The Court: I think that's probably right.

Mr. Ris: Rather than belabor it, we will compare a little later and we may call Dr. Oberholtzer back.

Mr. Greiner: If you are right, I will so stipulate.

Mr. Ris: All right. We may be talking about two different portions.

The Court: Here was the testimony yesterday, that Dr. Henderman went to Smith, Dr. Oberholtzer went to Stedman. There were citizens interested in the overcrowding problems at both schools. This was in January 1966. Then I suggested to you that you pursue the Stedman meeting. Do you remember that?

Mr. Ris: Yes, sir.

The Court: And you did it.

Mr. Ris: Yes.

The Court: He said they solved the problem at [2116] Stedman differently than they had at Smith, remember?

Mr. Ris: Yes.

The Court: They decided to use busing to relieve overcrowding at Stedman?

Mr. Ris: Right.

The Court: But not Smith.

Mr. Ris: That is right. What I was getting at

here was some testimony this morning concerning the May '64 meeting at which various policies were adopted, and I thought Mr. Greiner was attempting to impeach him that some of those policies were not adopted at that time. If he was getting off on another point, I was drawing a different point of inference. That is our point of difference.

The Court: I think the dispute is whether the School Board authorized busing to relieve overcrowding at Stedman in 1964.

Mr. Greiner: Or anywhere else. Our position is that they didn't, they didn't do that until this February '66 meeting.

Mr. Ris: I misunderstood. So I will go on to my next point.

The Court: All right. I think I'm about ready to take the afternoon recess anyway; then perhaps you can solve the problem.

Mr. Ris: I will take care of it during the recess.

[2117] The Court: All right. You may step down.

(Whereupon, the trial was recessed at 3:25 p.m.)

(Following the recess, the trial resumed at 3:41 p.m.)

Mr. Ris: If the Court please, with respect to Exhibit 34, we have resolved the matter. Apparently the items on Page 1, A, B and C, were a result of the 1964 action, and Paragraph D—Part D, Page 2, 1966 action of the board. So we're in agreement on that.

By Mr. Ris:

Q. Dr. Oberholtzer, prior to 1963 when new Manual was being planned, with all of the various aspects, site size and

so forth—at that time was there any projection of any substantial increase in the general population in the Manual area? A. There was not at that time.

Q. Now, with respect to the increase at East, that transpired and you were asked specifically on that, I believe, with respect to the 1953 period. Were there projections at that time with respect to potential population increase in the east with respect to specific school sites for secondary schools out there? A. Yes, we had anticipated some increase generally in that direction some years before that, as a matter of fact.

Q. Had the district acquired a site further east for [2118] a potential high school? A. We had acquired a site at the eastern edge of the city, I believe, or pretty well toward it at that time, at 6th and Monroe, somewhere.

The Court: Monaco.

A. Monaco. I'm sorry. Yes. Monaco.

Q. What year was that site acquired? A. 1948.

Q. What happened to that site? A. That site was sold but we did acquire another site which became the George Washington High School which was further south and we were obliged to make this change as we did in some other sites because of the rapidly changing situation and annexations and development of the city in the eastern part.

Q. Increasing population in that area? A. Yes.

Q. At the time of the George Washington site—at the time it was purchased, where was it with respect to the city limits? A. As a matter of fact, the site itself was outside the city limits and we were obliged to get action of the City Council to bring it in the city limits. It was contiguous to the city limits.

Q. What year was that site acquired? [2119] A. Let's

see, that must have been about—it was in the '50s, around 1956, I would guess.

Q. And then George Washington was built on that site in 1960, as I understand? A. The school was opened in 1960 on that site.

The Court: Well, you took that site in preference to 6th and Monaco because of the movement to the south and to the southeast? Is that it?

The Witness: It was primarily because that particular site was too far north, Judge, in relation to the developing population. You see, the eastern boundaries of the city was Aurora and the population moved south and the annexations were all southeast. So this was an attempt to meet the crowded condition at East High School and also to accommodate the rapidly developing annexed areas to the southeast that were expected.

Q. To the immediate east of 6th and Monaco, you have, of course, Lowry Air Force Base and beyond that you had Aurora? A. Well, there were boundaries—fixed boundaries to the east. The expansion was to the southeast.

Q. In view of the city limits of Aurora, that was your ultimate boundary in that direction at that time? A. Right.

Q. Dr. Oberholtzer, in the '50s, particularly when [2120] you were planning Barrett in 1958, did you have any general knowledge or any general information available to you from which you could reasonably predict or project what historically may now show happened to that northeast area and Park Hill as to the numbers of Negroes that moved into that area, the speed with which they moved in and the geographical area that resulted because of it? A.

Well, let me answer that in two parts: In the first place, again, we had no racial statistics or data. We were aware, as I think I have previously testified, of some movement of population. But we certainly were not aware of the rapidity or the extent to which this took place, as you look back on it now. We were not aware of that.

Mr. Ris: I have no further questions.

* * * * *

[2183] * * *

Mr. Greiner: Your Honor, the plaintiffs' only rebuttal witness will be Dr. Dan Dodson, whom we now call.

Dan Dodson, a witness called by and on behalf of plaintiffs, having been first duly sworn, was examined and testified as follows:

The Court: Give us your name and address, please.

The Witness: Dan Dodson, 4 Washington Square Village, New York City.

Mr. Greiner: Your Honor will recall that Dr. Dodson was qualified at the summer hearing, and we are offering Dr. Dodson as an expert witness. And I wish to inquire of counsel as to whether they question the foundation or the adequacy of it.

Mr. Ris: No. He was so qualified in July, and that qualification still stands. We would ask that his testimony be limited to rebuttal and not a repetion of what went on in—

Mr. Greiner: We will try not to be repetitious.

By Mr. Greiner:

Q. Dr. Dodson, with respect to the evidence which has been adduced by the plaintiffs in this case, with respect to

certain characteristics of the schools which the plaintiffs [2184] have designated as predominantly minority schools in this School District, we have evidence, for example, that these schools experience a higher rate of teacher turnover than the normal schools of the District; that these schools have more brand new teachers than the average in the District; that these schools have more probationary teachers than the average school in the District; that these schools have fewer teachers with ten or more years' experience, and that the median years' experience of the teachers in these schools is lower than that of the average for the School District.

We have also had in evidence that there are in these minority schools concentrations of compensatory educational programs; that these are in fact the schools which received such programs; especially those federally funded under the Elementary and Secondary Schools Act. We also have evidence that at the secondary level these schools contain greater numbers of sections of the so-called modified sections of courses which were the courses designed for slow learners. There has also been some evidence that in comparison with a group of Anglo schools, that these differences which I have just described to you between the so-called minority schools and the so-called predominantly Anglo schools—that these differences are even greater when we compare the minority and the Anglo schools than when we compare the minority schools with the averages for the District.

[2185] Now, I'd like you to comment, Doctor, if you can —Plus, we have had the fact that the achievement in the minority schools has for a number of years been significantly lower than the achievement for example in these predominantly Anglo schools. There is also evidence that

the minority schools have by and large older physical plants, smaller site sizes.

Now, Doctor, taking these factors which I have related to you into consideration, can you relate to the Court how if at all the combination of these factors affects the minority child's ability to learn school?

Mr. Brega: I object to the question. It's improper rebuttal. He has predicated it on a hypothesis basis on facts entered at the plaintiffs' case and not anything introduced by the defendants or the intervenors. The hypothetical question is one which is based upon certain facts which have not been disclosed by the evidence and which has been contradicted by the evidence. We don't believe it's—

Mr. Ric: The defendants also object for the same reasons stated by counsel and also for the reason that there is wholly an insufficient foundation. Merely conclusions as to broad summaries of what counsel says the evidence is.

Mr. Greiner: Your Honor, the point of the question is that we heard the day before yesterday for most of the afternoon, and part of the morning yesterday, that these [2186] minority students come to the school clothed and cloaked with so many disabilities, that the implication is that the school is helpless to educate them. We would like to point out through the witness that these disabilities can in fact be overcome and that it is the school itself, the minority school which ultimately causes the minority student this unequal educational opportunity.

The Court: Well, I think we ought to ascertain first whether he has an opinion on the subject. I assume he has.

Mr. Greiner: I believe he does, Your Honor.

Mr. Ris: We will stipulate that he has.

The Court: Ordinarily, though, we do ask an expert whether he feels he can give an opinion.

Is that right?

The Witness: Yes, I would have an opinion.

The Court: Do you have an opinion as to causation in terms of ability of the response of the child to this, whether it stems from his having grown up in a home that is economically and culturally deprived, or whether the substantial factor is the school itself? I think that's really our issue. I mean, as a cause factor?

The Witness: Yes, I would have an opinion on that.

The Court: I don't see why he can't discuss that. It's been the big issue in the case. The evidence on the [2187] part of the plaintiff has been presented, which prima facie tended to establish that the schools themselves were deficient. The defendant has offered evidence showing that they have put forth special effort, that the facilities are actually superior at a school like Manual; that the extent of their effort is greater at these institutions because of the fact that the subjects are handicapped in many ways. Dr. Oberholtzer said that the real problem is that they haven't had the start that the child has who comes from a home where the parents are pretty well educated and he sees the only remedy as being a Head Start program that starts at the—that commences at age three, to bring them into line with these other students by the time that they commence the first grade. So I think that this is an important issue in

the case. So we will let him comment on it. And the objections will be overruled for the reasons stated.

By Mr. Greiner:

Q. Do you have the question in mind now, Doctor? A. I think so. I hardly know where to begin with it. But I think that the point of takeoff would be that the school itself is reflective of the broader society or the dominant power arrangement of the community, and that when it comes to dealing with the children of minority, it has a problem of adjusting its programs that are designed for a majority to serve minority children for very definite reasons. Usually [2168] it is a teacher who is less experienced; usually it is a school that is older and so on. Usually it is a school by the time it becomes segregated that is looked upon by the whole community as being inferior. And when it is looked upon as being inferior this does make it indeed so, because you can't keep up the morale of the teachers nor the children, nor you can't keep up the expectations for performance and achievement in the schools. Teachers feel less privileged when they are sent there to teach and escape as quickly as they can. More than this, they come to look at these children as being less worthy and of whom less is expected. Consequently there has developed what's called the self-fulfilling prophesies; that because nothing is expected, no standards are held. And consequently the person comes to fulfill the prophesy that you had of him in the beginning. Some evidence of this is that the differences are not this great between children when they first come to school between the majority and the minority, and that with each succeeding year these children of the minority tend to fall further behind. The

alternative that I would pose to the position that the trauma resides—or the limitation reside in the pre-school experience, is that all this combines to teach these children of the minority that they are powerless people and consequently as all people tend to do when they feel powerless, they resign in apathy and that the limitations to learning is not in [2189] their cognitive apparatus nor abilities nor in the lack of pre-school stimulation, but resides instead in the apathy that stems from a pervasive powerlessness and impotence in the community.

Q. Now, Doctor, I believe that you were in court yesterday when Dr. Oberholtzer was testifying regarding the summer school reading program at which minority students had participated. Do you recall that? A. Yes.

Q. Do you recall the fact that he said that the results of that program were that in some instances reading levels were advanced by between one, two and three grade levels? A. Yes.

Q. And you also recall that he testified that the children also had a rate of forgetting just as they had a rate of learning so that they didn't retain that? A. Yes.

Q. Now, could you comment on the fact that these children were able to improve their reading ability? What does that demonstrate to you? A. I think what Dr. Oberholtzer suggests is that these kids are not dumb; that they are not incapable of learning; that they can learn these skills. But they learn for keeps what is required of them to cope with the life of which they are a part, and reading skills in a school that teaches them [2190] that they are powerless is not one of those skills that is needed to cope with the world of which they are a part.

Q. Well, is there an effect then on minority—on a minority child's motivation brought about in these minority

schools? A. This is the problem of motivation. I worked with the—I studied the unrest in the White Plains High School recently in New York—a suburb of New York. And I was impressed there that when these children got a dose of this black militant etiology, when there was something they could invest their lives in that they thought had significance for them, that their teachers reported they were carrying around "Senones Wretched of the Earth" (first word phonetically spelled) which is the bible of the new Left, and many of them were carrying around the Kerner Commission Report. A lot of these non-readers I'm talking about now were carrying around reports of this sort, that they read when there was something that motivated them to read. And it was not a limitation of innate skill at learning or ability. The school teaches them fundamentally to be dumb.

Q. Now, Dr. Oberholtzer testified as to a number of factors which in his opinion affected the achievement of these minority children. And I might relate some of them to you. One was the question of native intelligence. Secondly was the home environment, the educational level of the parent, [2191] the presence of reading materials in the home, the attitude demonstrated in the home towards the school. I wondered if you could relate in your opinion how these factors which Dr. Oberholtzer felt had to be corrected at a preschool age; how these factors relate to these causative factors that you have described that are present in the minority school. A. The question I would have on this is whether poor folks' and black folks' children get stimulation or don't get stimulation and this kind of thing. And I think that in our attempt to discover why children don't learn, we tend to look for the limitations in the potential of children rather than to look for the limitations of the establish-

ment itself. And that consequently we find what we tend to look for. The minority has always looked to the school to be an instrument of social change which would produce for its children an entree into the broad life of the community. Robert Lind's study of "Middletown" a midwest urban community—

> Mr. Brega: Just a moment. I am going to object to any editorializing on someone else's study.
>
> The Court: Overruled. This is not offered, I am sure, to establish the truth of the matter that he is citing. He is simply citing it to illustrate his conclusions, as I understand it. So, I will permit him to do it.

A. Lind quoted the taxi driver who said he realized he would never make it, but "By George, his kids would." He [2192] would pay the price and education would take them out of the status of life which they had and make them into people who participated in the main stream. This has been traditional in American life; that the minority looks at the school as an instrument that would provide the gateway through which its youth would move into the main stream. But, the black population has never been encouraged to believe that it could make the main stream up to very recent times; so very recent that it's very hard for them. They now look to the school to be the instrument of change. You can't tell me that the black parent doesn't have aspirations for his child. Unless and until, as so often happens, he too finds that the school is not going to provide this kind of service, then he either does one of two things; he becomes extremely militant and becomes a pressure to the reform of the school, or else, he just resigns in apathy and says "What's the use of trying to do anything?"

I think it's this kind of thing that we're dealing with that revolves around the expectations of the school that I think is involved with parent attitudes and with whether or not there is a motivation from the home and so forth for black children.

Q. Now, Doctor, with respect to these problems of educating a minority child in a minority school, first of all with regard to the question of efficacy of compensatory [2193] education programs that are undertaken in these schools, are you familiar with the question of whether or not these compensatory programs have proven to be effective in raising the achievement levels of minority students in these minority schools? A. There is a considerable body of evidence on this—data on this, I should say.

Q. Can you relate some of this evidence to us, please?

Mr. Ris: May we have some background from the doctor as to what his experience has been on this; whether he has done any studies or just what his background is?

The Court: I think he ought to describe the basis of his knowledge and his ability to make or offer the opinion.

Q. Can you describe for us, Doctor, your acquaintanceship with this problem? A. Well, I have been director for the Center for Human Relations and Community Studies of New York University for the past ten years, up to a year ago, and I have been pretty well related to all of this material. Now, I have not evaluated compensatory education programs, except I have been involved with the literature and helped in the literature of the researches that have accrued on it.

Q. So you personally have conducted no studies, is that right? [2194] A. To evaluate compensatory programs, that's right.

Q. But you are familiar with the literature in this field? A. Relatively so, yes.

Q. And you work with it and apply it, is that correct? A. Yes.

Q. Can you describe or identify for us some of the literature which you have reference to?

Mr. Brega: Well, Your Honor, I'm going to enter an objection to this testimony. There isn't any evidence that shows that there's a proper foundation for him to testify as to the literature on that basis.

The Court: All he's going to do now is describe the literature in the field. I can't see anything wrong with that. Now, the next question may be objectionable when he tried to summarize it. So, we will look forward to hearing from you then.

Mr. Brega: I guess I'll be back.

A. There are four or five studies that I would consider crucial in this. One was the High Horizons program of New York in which they spent first around a hundred dollars per child extra, trying to raise the aspiration levels of children in junior high by taking them to concerts, by trying to enrich a background, raise their horizons. Two hundred and fifty dollars extra per child at the high school level. They [2195] thought they had found considerable results in the first—

Mr. Ris: Just a moment. I am going to object to his testimony as to the results.

The Court: Let's just describe the literature first.

Q. Now, was there a report on that High Horizons program? A. It is included in "Racial Isolation in the Public Schools" produced by the United States Commission on Civil Rights.

Q. And what is another study that you have familiarity with? A. If I could just say—this data we were encouraging to them—

Mr. Ris: I am going to object and move that that part be stricken.

Q. Well, we will get to that. Let's just describe the project in general. A. When they tried to put it in operation on any large scale with any large state with $80 per child compensation they found no significant—

Mr. Ris: Just a moment. Could the witness just tell what his studies have been?

The Court: Just tell us what studies.

The Witness: This is the first. The second is [2196] called The All Day Neighborhood Schools of New York City, and here there was the attempt to put people into extra counseling and work with the children, kept them after school and so on. And this ran for several years in the New York City community.

Q. Was there a program in Rochester or Syracuse, New York, that you have familiarity with? A. A program in Rochester in which they tried to use reduced class size and they very carefully had a comparison between the class size of twenty of the desegregated programs that they compared them with. But, that was the Rochester study.

The Court: Well, these programs—these presumptions or suspicions wouldn't apply only to minority children, would they? I mean they would apply to anybody who is economically handicapped, I expect, white or black? It doesn't make any difference?

The Witness: It so happened all these were minority situations.

The Court: Well, there is no basis for distinction here, is there?

The Witness: No.

The Court: In other words, this handicap that exists in certain areas is perhaps common to whites as well as to blacks, isn't it?

The Witness: Except, Your Honor, that color stands [2197] as a badge of identity that doesn't allow the black child to escape into the main stream. If as when he does something for himself and—If he can be absorbed into the main stream, there is no problem. The black child doesn't have this prerogative.

The Court: I mean the problem of getting over this initial hump in terms of being able to speak acceptably and in terms of being able to read and do certain other fundamentals on a competitive basis—that doesn't exist as much for the—

The Witness: I would say these are not racial problems altogether at that level.

The Court: Right.

Q. Doctor, was there also a program in St. Louis, Missouri? A. Yes, the Banniker District program led by Sam Shepherd gained national attention in an attempt to take compensatory education and raise the aspiration levels, to raise the achievement scores.

Q. Now, you have in front of you what's been marked for identification as Plaintiffs' Exhibit 27, entitled "Racial Isolation in the Public Schools." You have mentioned the St. Louis program. Are the results of that program reported in Exhibit 27? A. Yes.

[2198] Q. And what about the New York program which you described? A. Yes.

Q. And was there also a program in Berkeley, California, on compensatory education? A. Yes.

Q. And are the results of that program described in Exhibit 27? A. That's right.

Q. Now, was there also a program in Rochester, New York? Have you described that for us? A. Yes, the Rochester program I have made reference to already, and it—I believe it is not described in here. It is described in a study done by the Board of Regents of the University of the State of New York called "Racial and Social Class Isolation in the Schools."

Q. Now, Doctor, we have had evidence in this case—

The Court: I'd like to find out first the extent of your personal exposure to any of these studies. How you come to know them.

A. I have had an intimate relationship with the High Horizons, the All Day Neighborhood Schools, and a considerably contact with Shepherd in the Banniker District.

Q. And you are familiar with how those programs were established, how they functioned? [2199] A. Yes.

Q. And how they were evaluated? A. Yes.

Q. And you are also then familiar, are you not, with the results of those evaluations? A. That's right.

Q. Now, Doctor, we have had evidence in this case that various types of compensatory education programs have

been conducted in the minority schools of Denver; that there have been efforts, for example, to reduce the pupil-teacher ratio, to reduce the class size, to provide remedial reading and arithmetic teaching to the minority child. And yet, we have also had evidence, Doctor, that these compensatory efforts have not been able to bring these children up to grade level with respect to achievement. And I would ask you if this is an experience unique to Denver?

Mr. Ris: If the Court please, I am going to object to that. There is an insufficient foundation again.

The Court: Overruled.

A. There is no evidence in any of this that the compensatory education has ever made up for these deficits. The evidence from the data seems to be that you cannot by compensation overcome these limitations.

Q. Now, the— A. Let me say—so much that the Board of Regents after [2200] having this study to which I have referred—

Q. That's the Rochester study? A. That's the one which included the Rochester material. But, it was a review of the whole material. It arrived at the conclusion that—

Mr. Brega: Just a moment. Now, I am going to object to conclusions arrived at by the Board.

The Court: Overruled.

A. —that the compensatory education is—that they are not against compensatory education but that compensatory education by itself has not produced results that the aims of the programs have set out to accomplish.

Q. And this is a report published by whom? A. It is a study done by the State Department of Education, its Divi-

sion of Evaluation, of New York State, looking at national data and drawing up recommendations which the Board of Regents of the State of New York adopted as their own.

Q. Now, you're not of the opinion that has no value, this compensatory effort?

The Witness: They would say that the compensatory education has not produced the kinds of results that the aims set out to accomplish.

The Court: Well, they are nevertheless using it wisely. As a matter of fact, Harvard started with a Head [2201] Start program for law students a few years ago, and it's been very successful. Now, most law schools in the country run a summer program to bring these college graduates into a place where they can compete with entering law students, isn't that right? And the same is true with Hispano. They're doing this in Denver. You don't think this kind of program has any value?

The Witness: Ordinarily they have done some other things, haven't they, like taking them out of an environment, out of a melieu into some—

The Court: Well, at that level I suppose they are living on the university campus.

The Witness: Exactly.

The Court: But I think Harvard brought these students out of southern Negro schools.

The Witness: But they took them out of a melieu and out of a segregated pattern into something that they thought would offer wider—a wider world for them.

The Court: You think then that under those conditions that compensatory education can have a real value?

The Witness: Their position was that as between compensatory education and desegregation, they had many evidences that desegregated education did achieve results where they had careful measurements as between students who were left behind, and they produced compensatory educations, [2202] and students who were desegregated without the compensatory education. And they said we need the compensatory education but that this by itself is not enough; that it has to be paralleled with a rearrangement of the encounters of children in the school system.

Q. In other words, I take it, Doctor, that compensatory education would still have some value but that it would be most valuable in an integrated setting? Is that the conclusion?

Mr. Ris: I'm going to move to strike that. I object to the question. It's a leading question. Anything that he wants to ask the doctor—

The Court: Well, it's a summing up. He has already said that.

Do you have anything else to say on that?

The Witness: The thing that compensatory education does not deal with is the inherent inequality that stems from segregation.

The Court: From isolation?

The Witness: From isolation.

The Court: Is this a factor—is this a result of the fact that young people seem to go in groups and they think in groups and whatever the normal group is, why, they seem to go—

The Witness: The Coleman report—

[2203] Mr. Brega: Just a minute. I hate to do this but I have to object. He's editorializing on other reports and things like that that aren't in evidence.

The Court: Look, this is a sociological issue to a degree and I don't see how you can close your eyes to all of the literature and study that has been done on the subject. I mean, we can't bring it all into court and read it. If I have a witness who wants to put an interpretation—

Mr. Brega: I appreciate that.

The Court: —on it, then— If you have got an interpretation different than this, why, you're free, of course, to put it in. But I must overrule your objection because I don't see how I can try to find some answers here if you close the doors to some of these sources. So I'm going to permit him to answer.

The Witness: The Coleman report, done for the Department of Health, Education and Welfare, a national study, concluded as one part of it that the greatest impetus to learning was to be in groups of wide ranges of ability as against the narrowed range of ability that isolation produces. That's where they had the contacts with youngsters who were further ahead of them or whatever, that they did better than in the isolation kind of thing. This, of course, went for whites as well as blacks, but as [2204] a general educational principle. The other problem of compensatory education tends to leave the impression that the limitations are in the children and consequently they must be compensated for and not in these things that I have described that are the limitations of the school system itself.

So that by the time you have set up compensatory education and set children off apart to be compensated, you have already created the psychological climate at that point and it makes it impossible to compensate for even the psychological damage of being set apart. And it keeps the attention focused on the limitation of the person which further traumatizes him.

The Court: I might add, in commenting on this evidence, I don't know that it's all relevant to a decision in this case, because some of it is material that would be properly submitted to the legislature. It may not hit the constitutional law target that we are shooting for here, you know. So I'm not here ruling, and I want the record to be clear on it, that this is all necessarily relevant to the decision that we will ultimately have to make.

Mr. Greiner: Yes, Your Honor. What we're simply trying to do, I think, is to fill out the picture of the inequality that exists in these minority schools.

The Court: I understand.

[2205] *By Mr. Greiner:*

Q. The evidence from the defendants, Doctor, has also discussed the factor of pupil mobility as having an effect upon the achievements of children. First of all, with respect to mobility, is that generally expressed as a percentage; turnover? A. The most common reference to it would be, what percent of people would you need to enroll during a year to keep your register to the level at which you started at the beginning of the year.

Q. Now, for example, a school that has—that had a turnover rate of even as high as 100 percent—does that mean

that the entire school population has turned over? A. Not necessarily. I had a doctoral candidate who was principal of a school where the turnover was one hundred and some percent, something over a hundred. But when he analyzed it he found that 80 percent were there the whole year and the rest was just a revolving door of 20 percent who did the turnover, that added to the 100-percent-turnover figure.

Q. Now, we have also had evidence, Doctor, that schools —particularly schools in Northeast Denver, have undergone transitions from once being predominantly Anglo schools to the point where they are now predominantly minority schools. And I wondered if you had had occasion to study any of the after effects of such a transition on the achievement [2206] in those schools.

Mr. Ris: Excuse me. May I ask—are you referring to Denver? Or generally?

Mr. Greiner: In general. In particular, I'm referring to a study that was undertaken in Newark.

A. Traditionally the standards have tended to—that is, the norms for reading or other achievement indicia of achievement, have fallen when these changes have taken place, particularly if it is a rapid movement, because this is a mass movement of people rather than a slow, gradual long-range change. And I'm working now in Newark, New Jersey, and the pattern seems to be there that when the community starts changing the norms of reading started going down and went down until the school had changed its composition. Then it leveled off for a bit and then it plummeted again and it is at this point, it seems to me as I examine that data and look at it, that at this point the school lost any legitimacy in the community, the re-

jection by the whites of the blacks, leaving it segregated, and so on, created a loss of any confidence that the school was their school or that it was a legitimate institution in their community. And it's about at the bottom of that drop that Newark burned and it seems to me the frustration that comes from this sense of segregation and isolation, creating the despair that has attended, has come in the wake of that [2207] thing in the Negro community, and has created schools that are really custodial institutions. They are not really—when a school loses its legitimacy, when it is not—when the authority is not by consent of the governed in the school, it becomes a custodial institution. At that point its growth and development tends to stop because no custodial institution has produced growth and development of the people.

Q. Now, the effects of the Head Start program have also been discussed and evidence presented, and I wondered if you were familiar with any studies regarding the effects of this Head Start program. A. The New York study to which I have referred already concludes as the result of its evidence that Head Start has produced no discernible achievement.

Q. Is there generally any sort of a followup program for Head Start children? A. You mean—

Q. Was there? A. They move from Head Start usually into public schools.

Q. Now, we have also heard some evidence, Doctor, that in schools that are undergoing transition, that, for example, schools which may be 50 or 60 percent minority, those schools would then begin receiving these compensatory [2208] education programs. I wonder, from your experience, if you can tell us how the Anglo community views or what holding effect upon the white majority these compensatory education programs of the schools have.

Mr. Ris: If the Court please, I don't think that the facts stated by counsel are in evidence in this case. I object to it for that reason.

The Court: I don't know what he hoped to get from the witness. I suppose—Mr. Brega asked a witness the effect of the majority community on compulsory busing; whether that has an effect on it. But I take it that this is in that area, is it not?

Mr. Greiner: It's the question, Your Honor, of how the whites who remain or who are left behind in the school in transition—how they view that school and the effects that it has on their decision of whether or not to depart from that school.

The Court: Well, we have had some evidence to the effect that they leave pretty fast, once it becomes committed. I don't know that this has any real value. I think it's pretty obvious what happens.

Have you got another question?

Mr. Greiner: We have no further questions, Your Honor.

Mr. Ris: If the Court please, could we have about [2209] fifteen minutes recess at this time to confer with Dr. Oberholtzer, primarily, before cross-examination of Dr. Dodson?

The Court: Yes, indeed.

Is there a point where the concentration of minorities accelerates? Is there a percentage point where it reaches a particular level and then the process of concentration accelerates? I mean, have you conducted any studies that reveal—

The Witness: There is a concept called "tipping point," and I have written on that a little from the observations and work that I have done. And we

have always been curious about what is a tipping point if one indeed exists. There are so many other factors that have to be taken into account that it makes it very difficult and dangerous to take a figure out of a hat and say this constitutes a tipping point. Many of the high schools in New York, when they reached about 25 percent, you begin to get a polarization of black and white. When you get about 35 percent you begin to get the withdrawal of the whites. But this does not take into account so frequently the kind of quality of program that makes a climate conducive to people staying there. In the New Rochelle community, I did study that and—

The Court: Now, at what point do you think a [2210] stabilization must occur in order to prevent changing the entire character of the school?

The Witness: This again depends much more on what the size of the black community is and what its proximity is to the particular school that is in question. In other words, in communities that have completely desegregated, so that all schools have some blacks and no schools are all black, there seems to be—

The Court: Where are these?

The Witness: —there seems to be no problem with this.

The Court: Where are these communities?

The Witness: New Rochelle, White Plains, Coatesville, Pennsylvania. Well, these come from my mind offhand. And where they have just completely desegregated the school system, this has taken the pressure off any schools reaching a tipping point and it has provided a stability of those communities that

has been outstanding. New Rochelle, particularly—which particularly has the longest experience, I think, stands out in that regard. And they have a school—the Mayflower School that was 44 percent black when I studied it before the Kaufman decision on New Rochelle, and the year before last, when I studied it again, it had still held 44 percent black over eight years' time. But they had desegregated the [2211] whole school system in the interim. But it had remained a desegregated school with that high proportional—the elementary school at that high proportion of black over that period of time. But, if a school is at the edge of the ghetto and there is a greater fear and anxiety about what's going to happen, and so on, then the tipping point is much lower, and you begin to get mass withdrawal at a much lower proportion.

The Court: All right. We will be in recess. You let us know when you're ready.

(Whereupon, the trial recessed at 10:30 a.m. and resumed at 10:52 a.m.)

The Court: Before you start, I have a question I wanted to ask. Do your studies reveal that the segregation of Hispanos or the Spanish-speaking or Spanish-surnamed presents identically the same problem as the Negroes?

The Witness: Mine has been with Puerto Ricans. But I would say identically the same problems.

The Court: In other words, that these produce the same isolation that you speak of and the same restrictive influences?

The Witness: The same sense of impotence, of apathy, withdrawal. Yes.

The Court: And in this community I think there is some evidence to indicate that the Spanish-surnamed have [2212] populated the areas that the Negroes have abandoned. And as Negroes have moved eastward, why, I think there has been a tendency on the part of—I expect, first, the Irish lived there.

The Witness: Probably.

The Court: You know, of course, that they put the Irish in the same category as the Anglos; an astonishing conclusion. They have never before in history been called Anglos, prior to this trial.

The Witness: Each group has come through the same process, seems to me, of being washed, in a sense, of being alienated—the bright ones, at least—and made over ultimately and absorbed into the main stream. The difference with the black, even more than the Hispano, is that the color stands as a badge of identity when they're ready to join the establishment. And, consequently, it keeps them set off in a way that is very difficult for them to gain acceptance and this makes race a factor in it that was not there for the others. When the others learned the language, the manners and the dress, they could escape identity. The blacks couldn't do that.

The Court: Well, in that respect, then, the Spanish-surnamed people are not subject to the same problems?

The Witness: Not the same. There is a difference. There is much more escaping or passing, as the blacks would [2213] call it, or being transmuted from identity with the ghetto Spanish-background people into

mainstream with the Spanish than there would with the black in our area, by far.

The Court: Go ahead.

Cross-Examination by Mr. Ris:

Q. Dr. Dodson, when you were in Denver you testified, and you testified last July—you indicated you made no studies at all of the Denver situation. A. That's right.

Q. Have you made any since then? A. No.

Q. Have you ever been a member of a school board? A. No, sir.

Q. Have you ever been a superintendent of schools? A. No, sir.

Q. Have you been on the administrative staff of a school district? A. No, sir.

Q. You stated that you have studied or made some studies of the Puerto Ricans. Would that have been in the Harlem area of New York? A. Principally, yes.

Q. Where else? A. There was some Puerto Rican element in the [2214] Mt. Vernon community, a suburb of New York City.

Q. It was all in the New York City metropolitan area? A. That's right.

Q. Were most of those people individuals who had come either originally or were just one generation removed from Puerto Rico? A. That's right.

Q. And speaking a Spanish language? A. That's right. And a few Cubans.

Q. Have you made any studies of the so-called Hispano group in the Denver area? A. No sir.

Q. Or anywhere in the West? A. No, sir.

Q. So you really have no knowledge of the Hispano

group so you could make comparisons with the Puerto Ricans, is that correct? A. No, sir.

Q. Is that correct? A. That's correct. I have not.

Q. I think we understood each other but sometimes it looks peculiar on the record. A. Yes.

Q. At the very beginning of your questioning by Mr. Greiner, he mentioned various facts in evidence. For [2215] example, the age of a school building. Does that have anything to do with equality of educational opportunity in your opinion? A. I think it does. If the tendency is that the majority of the black population tends to be relegated to these outworn, overused, old buildings, it stands as a symbol of their impotence in the community, that they don't have facilities comparable to the others. And it lends to the aura produced in the community that this is a place of less choice, and you go there only because you're not able to require that you be allowed to go someplace else.

Q. It's a psychological thing then? A. That's right.

Q. But insofar as the age of a building itself, if it has been properly maintained and modernized and—it would be just as good physically as a new building, would it not? A. I have had a doctoral thesis on this problem and it tends to say that the new building, at least in a short run, didn't make that much difference; that there was not a great amount of difference.

Q. A doctoral thesis by one of your students? A. That's right. But it is the psychological effect of it that is involved.

Q. That is tied in directly, the fact that in many [2216] instances families of a lower socioeconomic status move into the older areas of the city, is that not true? A. That's right.

Q. So that's a matter of normal population movement rather than anything the school district has done at that point? A. I would say it's the typical pattern.

Q. Now, with respect to the experience of a teacher, are younger teachers today, as compared to five, ten years ago, better trained in human relations? Do they have any different social outlooks with respect to racial and ethnic relations, do you think? A. We would hope that maybe they are better trained. But I would doubt it.

The Court: They probably have more spirit and drive and idealism at the outset, don't they? Doesn't that make up for something?

The Witness: You don't escape the problem. Hunter College recruited 100 young people, trained them specifically to work in the ghetto, helped them to develop all the understanding they could about this great challenge of working in the ghetto, and fifty of them resigned their appointments when they understood they were going to Central Harlem. You just can't escape the pervasive, do what you will, the pervasive feeling; the less privileged, when you're [2217] assigned to the ghetto community.

Q. Well, you're a professor of education, aren't you? A. Yes, sir.

Q. And you are educating people to be teachers? A. I am alleged to be, yes, sir.

Q. Isn't that what you're hired for? A. That's what I'm getting paid for.

Q. Well, isn't that one of the things you're attempting to do? A. Yes, sir.

Q. Train these teachers to accept this situation and work with it? A. Well, I hope I'm not training them to accept the situation. I hope I'm—

Q. I mean, to recognize the situation and to— A. To correct the situation, yes.

Q. To correct it? A. Yes. But I do not believe to train them to just accept and go to work in that situation—

Q. Well, to correct it. A. —does them service either way. My students are trained to try to understand these conditions and situations but I would hope that they would understand also the context I have tried to describe here; that this can't [2218] be a substitute for a creation of community schools that bring all the community together in a common encounter.

Q. Well, then, one of the problems is that people who come to you to be educated as teachers, come with fixed ideas, whether from whatever source? A. Yes, they come with—well, a normal range of attitudes, I would guess.

Q. And you think that they're leaving your school now with no different attitudes than as of ten years ago when teachers graduated? A. Well, I would hope so but I don't think, by and large, teacher education has made that much difference in ten years.

Q. What are you doing about it? A. Well, I'm attempting to train a different teacher, one who works also to change the structure through which people relate to each other. At the same time, that she has to begin with the kinds of conditions into which she is going to go.

Q. You're still trying? A. Beg pardon?

Q. You are still trying? A. Still trying.

Q. Then you havn't achieved your aim in that regard either, have you? [2219] A. I certainly have not. In all humility, I confess.

Q. Now, you have referred time and again to the powerlessness of minority pupils. Can you expand on what you mean by powerlessness in that context? A. Wherever there are social orders, there is a status arrangement for ordering of people. And the consensus on dominant values and so on makes some people then able to have their interest taken into account in the communal decision making and others do not have that capacity when decisions are made affecting their destiny. Consequently, there is a power arrangement in the community in which people who are relatively speaking powerful, and others who are, relatively speaking, powerless, and the issue that we are dealing with, all out of proportion, in my judgment is this of power relations and that the people who are powerless tend to resign in apathy in the face of pervasiveness, powerlessness, and that this is the fundamental phenomenum we're dealing with.

Q. Well, you have the same breakdown as in decision making in all—in any group, do you not? A. You have sub-subgroups in which there would be a power arrangement within the group.

Q. Right. A. But when the groups come up against each other, then there are the powerful and powerless.

[2220] Q. You are taking the two different groups again here? But in each group you have the very same thing, down to the small—

The Witness: There is an element of power.

Q. —you have the so-called pecking order in every group, don't you? A. There tends to be some.

Q. Now, with regard to programs in the Denver Public

School system, in the so-called predominantly minority schools, there has been substantial evidence here concerning such programs. You didn't hear that evidence and I don't presume you have read the transcript, have you? A. No.

Q. You have made no study of the programs so you don't know how the Denver programs particularly at Manual and Cole Junior High School compare to any of the programs in any of the cities you studied? A. No.

Q. So you're expressing no opinion as to the specific Denver programs? A. That's right.

Q. Now, with regard to the handicap a child coming from a family in a neighborhood and a lower socioeconomic status, you wouldn't deny that those children are handicapped as compared to me, would you, before they ever get into [2221] school? A. I would deny that the experience that they have brought with them, the experience through which they have come by the time they are of school age, has so impaired their sensory mechanisms that they do not have the capacity to acquire and organize, experience in ways comparable to what you or I might have done at a comparable stage of our lives. I would be planting corn in East Texas today if teachers had seen the low socioeconomic status kid and the limitations of him and his inability to learn because he didn't have all these things and had believed them.

Q. You aren't alone in the courtroom in that regard. But you will concede that they do come handicapped as to a child coming from a middle-class neighborhood, middle-class family, and with the opportunities that have been offered that child at three, four, or five years old, would you not? A. A scholar named Hune—J. McVey Hunt best described

my position on this. He said that the computer was devised with the mind—the way the mind works in view as a model, but once the computer was developed it then was something that could be compared with the mind and the way the mind works. He said the computer is a marvelous instrument but it works on only that which it is programmed to work on. And I would say that is a comparable kind of [2222] thing; that each of us out of the heritage from which we come have that computer between our ears, programmed to work on what was required for us to do in order to cope with our environment. If you doubt that, take a well sandpapered middle-class child and put him in a slum environment and see how he copes and who is the dumb one and who is the bright one, because the slum child learns to cope with the environment out of which he comes.

Now, because that program—because that computer between his ears is not designed to work on a lot of education doesn't mean he is not capable of learning; doesn't mean he's not capable of being re-programmed. It does mean some different context in dealing with it, but it doesn't mean by any means he is dumb or incapable of acquiring experience and so on.

Q. I don't feel—you still haven't answered my question. A. All right. I think that if the school is going to present these children with a standardized body of middle-class mythology, values and rituals and knowledge, and measure his work by the extent to which he comes up to—acquires this material, that he is at a disadvantage. Consequently, it is the limitation of the school in not beginning with the child where he is in expanding his world of environment from where he is, to take him through a [2223] process that brings him into growth and development. He is handi-

capped only because the school presents him with this kind of a standardized pattern that teaches him he is different and apart. And that's the sort of disadvantage rather than the limitation in the potential of the child.

Q. And so, by putting a man into a middle-class integrated school—isn't that exactly what you're doing? A. If the school is simply going to put him there and then say "There, you're dumb because we're not going to make any allowance for the fact you're here," it may create some problems. Although the data tends to say that, put into these situations, under these circumstances, they learn better than with compensatory education segregated.

Q. Well, you don't deny that compensatory education has a valid function in the educational system, do you, Doctor? A. If compensatory education is not used for continued segregation, which it often is, and— The British learned a long time ago that the way to control tensions in the colonies was to squirt a little more welfare on them and that would keep them sufficiently tranquilized in Egypt that they wouldn't dissent to the Promised Land. Consequently, their use of welfare as a tranquilizing function is well developed in this country and compensatory education [2224] in large measure is squirting welfare to keep down tension and to control, to make people acceptable to segregated patterns rather than to help produce a desegregated society.

Q. You don't know that that is done in Denvor, do you? A. I would be surprised if it were not.

Q. I say, you don't know, do you? A. No, I don't know.

Q. Getting back to this power relationship, do you think it's the function of the school to change this power relationship among citizens? A. The school—

Q. Is that one of the duties of the school system? A. The school system seems to be the handmaiden of the power arrangement, and consequently, its local program is geared to support the power arrangement that is. Consequently, its aim and objective is what is called socialization, that is, to socialize everybody into the values and the mythologies of the dominant society. If the black is really socialized into this, the Kerner Commission report says it's a racism society. It means that he is socialized into that which teaches him that he is a second-class citizen. He has to become socialized to the fact that he is a second-class citizen. The result is that the minority community presses for the school to [2225] be an instrument of social change rather than simply socialistic and this is the big conflict in education today.

Q. And there is a conflict in that, is there not? A. Yes, exactly. There is a big issue between the black community and the dominant society.

Q. The question as to whether the school is to educate it and go beyond it or be an instrument of social— A. Whether it is to be socialistic or whether it's going to be an instrument of change that is going to provide school experience where all children can be educated comfortably together.

Q. Now, Doctor, what happens to a first grader if he is sent to a middle-class integrated school and every night he goes back to his home, which is again in the ghetto area, and his ghetto community and ghetto neighborhood and so forth? Does the fact that he is still a resident of this community and of this family environment have any effect, in your opinion? A. This would depend on how his family interpreted it and it would depend on the—and I'm assuming you are assuming that he got a good experience at the

integrated school. I would say that would be a window that would open his vision to the vistas on the horizons and give him something to aspire toward, even though he came back to squalor or to a segregated, poor environment.

[2226] Q. But would that make the difference, you think, then, between the law students who are taken into completely new environments where they live and spend their leisure time? A. I think this would be part of it. That depends in part on what is the readiness of a person and sometimes depends on many other kinds of things. But I would not say that you would relegate a child, even in his schooling, to a second-class citizenship thing if you could help it. That would be an opportunity for him to see the world beyond.

The Court: You mentioned that you were talking about aims of education. Do you think that integration indeed does have a tendency to increase polarization of the races, consistent with what you have said here before?

The Witness: This depends on how it is handled, Judge. The mixing of bodies doesn't guarantee that people are going to love each other. Getting to know you may mean, "I don't like you as well as if I didn't know you so well," in spite of a beautiful little lyric. But that depends on the kind of climate that is produced when they are brought together in the encounter. It depends on the climate of the encounter.

Q. There is no guarantee then? A. There is no guarantee. But it is a certainty that, if they are not brought together, that these problems are [2227] not healed.

The Court: But, surely, this is an objective, I assume, from a sociological standpoint, to decrease polarization?

The Witness: It is hoped that, wherever these encounters are arranged through education, that there would be a cutting down of the polarization, the growing differences of goals and objectives. And in most desegregated situations, if it is handled at all well, this is what tends to happen.

The Court: So then the object of the educational process even the one you're talking about, is not to develop a militant black segment?

The Witness: No.

The Court: I think that that inference was left by one of your questions, Mr. Ris.

The Witness: On the contrary, I would say that the alternative to militancy, as to the—as in New York and other large cities, they are now pressing for the local school—to break up the school construction and make for local control. The alternative to it is a desegregation program that would arrange so that everybody has a stake in every school and that there wouldn't be this polarization, and I think it's bound to come until we do make these common schools mean that they serve everybody rather than these-schools-are-ours-and-those-schools-are-theirs kind of [2228] thing, that come through segregation.

The Court: So then, concentration—the result of it is going to be a complete polarization, a militancy that goes with it, I suppose?

The Witness: I think a parallel could be drawn—Well, yes. The increased concentration with the in-

creased difficulty of segregation, I think, undoubtedly makes for increased polarization.

Q. But it sometimes has some very adverse results, does it not? A. The polarization?

Q. Yes. A. Oh, yes.

Q. Washington, D.C., is an illustration of that, is it not? A. Not particularly, I would say. The whites didn't stay. They fled to the suburbs.

The Court: That's what he means.

Q. That's exactly what I mean.

The Court: He says, if you have integration, why, it will result in concentration because, he says, all of the whites will leave. They won't submit to it.

A. There are two points I would make on Washington, D.C. The first is, while I helped to draw up the plans for the desegregation of the schools of the district, if I were [2229] to do it again I would do it differently in light of the experience that we had.

But the second is that I would doubt seriously that the public schools of Washington, D.C., that the core city of Washington, D.C., is any more segregated than is the core city of Chicago, where they fought desegregation to the very bitter end; that it was a phenomenon of blacks taking over the entire city and suburbs being lily-white to where a black could not get in, so there was not the opportunity of the blacks spreading out and the Capitol district being so restricted as an inner-core city area. I doubt seriously that the schools' desegregation made a great contribution to that living arrangement that is the Capitol district now.

Q. Well, Dr. Dodson, is it true then that it depends a great deal on the local situation as to the population overall, the percentage of minorities to the overall population? A. I think the size of numbers is a factor. I would also say that policies of schools become a factor, too. I was in a case in Little Rock, Arkansas, in the federal court on desegregation and here the board's policy of ringing off their school and the next one to it as the neighborhood expanded as being black schools and so on, meant that the housing arrangement—the schools' policies created [2230] segregated patterns within the city itself and was the major contribution to the segregation within the residential patterns of living.

Q. Well, let's get back to my question. It makes a substantial difference as to the local variables, does it not, as to the size of the city itself? A. Each city is different, yes.

Q. You have constantly referred to New Rochelle and White Plains. Those are the cities where you have done most of your studies, is that correct? A. Where I have done two of my studies.

Q. Have you done any others? A. Yes.

Q. Where? A. Mt. Vernon; Orange, New Jersey; Englewood, New Jersey—

Q. And you found substantial—

Mr. Greiner: Could the witness be allowed to finish his response?

Mr. Ris: Yes.

The Witness: This is sufficient.

Q. And there were substantial variations in those communities with respect to the geographical size of the city?

A. Yes. All these happened to be suburban-type [2231] communities. New York City, where I have served as consultant at various times—I was consultant at the time of the boycott and the severe turbulence there—and that would be a different kind of problem to the suburban community.

Q. You really can't compare White Plains with Manhattan, can you? A. No, that's right.

Q. So that the various generalizations you have made here are just broad generalizations and not applicable specifically to any one city in every respect? A. They would be generalizations based on the impression of experience with whatever data I have to back them, yes.

Mr. Ris: That's all. Thank you, Dr. Dodson.

Cross-Examination by Mr. Brega:

Q. Doctor, in relation to Denver, have you had occasion to visit any of the Denver Public Schools? A. No, sir.

Q. Have you seen the older schools or the new schools? A. No, sir.

Q. Have you analyzed any of the maintenance programs on in these schools? A. No, sir.

[2232] Q. In other words, the opinion that you gave on the school buildings having effect was just a general overall opinion of yours? A. That's right.

Q. Have you had occasion to study in Denver the Hispano and Negro groups? A. No, sir.

Q. Have you studied the mobility of the Negro and Hispano groups anywhere? A. Yes.

Q. In regard to those studies, have you found that generally they tend to live in clusters? A. They tend to be segregated in urban communities, yes.

Q. In other words, they moved in with like race or ethnic

groups? A. There may be reasons for that but that is the fact, yes.

Q. Now, in looking at the situation in Denver, have you studied the mobility of the blacks or Hispanos in this city? A. No, sir.

Q. Have you given any study to the historical background and their origin in Denver? A. No, sir.

[2233] Q. In regard to Denver, have you— And when you discussed the schools that you mentioned that were black, were you referring to schools that were all black or all white? A. Predominantly so. What I would refer to here, that by the time the imbalance occurs in either direction, to the point where the community begins to say— where one part of the community begins to say, "These are our goals," and the others begin to say, "These are ours," why, then, you have lost the content of the community school and these have become schools that are then identified with whatever type group it is.

Q. I see. And that's where you reach this tipping point? You mean then it goes predominantly black? A. That's right.

Q. Do you have any explanation why Manual High School in 1969 in Denver was 60 percent Negro and in 1968 was 76 percent Negro? A. I don't.

Q. And it reversed in this case to the—

Mr. Greiner: Your Honor, I object to that because the question doesn't reflect what was happening to the Hispano enrollment in Manual. I think it is quite unfair and misleading.

The Court: Overruled.

[2234] A. I know nothing of the problems of any of your schools in Denver.

Q. And you don't know or do you know that Denver does not have an all-white or all-black school in its entire system? A. This I do not know.

Q. Now, you mentioned the Coleman report and Mr. Ris questioned you about the preschool factors of environment, home life, and you mentioned that you didn't think that was something that would be a permanent block, I presume. A. Yes.

Q. Are you familiar with the portion of the Coleman report which states that the school brings little influence to bear on a child's achievement; that that is independent of his background and general social context? Are you familiar with that part of the Coleman report? A. That's part of the findings of the study. But because there is a correlation doesn't mean necessarily that there is causation.

Q. Well, there is some correlation, is there not? A. There is correlation but it doesn't mean there is causation.

Q. Now, isn't it also true that in your study you found that race is not causally related to the achievement level in these minority schools? [2235] A. That's right.

Q. It is causally related probably because of socioeconomic stature of many of these areas racially oriented? A. And because the dominant society defines race and behaves with reference to race in the way that it does.

Q. But now, in considering these achievement factors, the socioeconomic class is one very significant factor, is it not? A. It is highly correlated with—

Q. Achievement? A. —achievement.

Q. And also correlated with achievement is a motivation of the parents of the child? A. This I know of no solid data on.

Q. Well, certainly, your opinion would be that that would be a correlating factor? A. I think, where parents en-

courage the children, it would be better. The issue here though is whether poor folks encourage their kids or not. And I think you're grabbing at a stereotype when you conclude that, because they are poor, they don't encourage their children.

Q. No, I haven't said that. A. You didn't say it but I'm adding it as a qualification to what you're asking.

Q. Well, the educational background of the parent [2236] is significant, isn't it? A. Not necessarily. If it were, a lot of us would be condemned now because we came from backgrounds where our parents were not educated.

Q. Well, I suppose that's right. Isn't it also significant that it is important in some cases? Do you think it's totally unrelated to achievement? A. I think it does not present insuperable barriers to a school that wants to do a job.

Q. We're not talking about insuperable barriers. We're talking about whether it has effect on the achievement. A. If you mean by this that this in some way limits his capacity to learn, I would say no. If you mean by this that the school then begins to look at him as a person who comes from this kind of background and begins to behave toward him this way, sets standards for him that are not relevant to his heritage, then he faces increasingly mounting problems that are of the school's making, not his.

Q. In other words, you think, then, that it's the school's problem? A. I certainly do.

Q. And so your opinion is that the school has an obligation for a social change? A. That's right.

Q. For the entire community? [2237] A. That's right.

Q. Not for just the—not for the achievement or academic aspect of the school? A. That's right.

Q. I presume you include in that housing patterns in the various communities? A. I would say there is a—I was

just saying a few minutes ago that there is a very definite relationship between policies of boards of education in many of these places and the housing patterns that are there. As I tried to say in my testimony last time when I was questioned on this point, the housing patterns cannot—community housing patterns cannot stand in the way of a child having his chance; that the school has an obligation to intervene in his behalf to the end that the circumstance of his birth and where his parents were forced to live shall not deprive him of his chance, and the school has this as a definite obligation.

Q. Is it your opinion then that the school system or the school board has the obligation to create housing patterns to integrate the races? A. It doesn't have the obligation to create the housing patterns but it has an obligation to overcome the limitations that are set by housing patterns.

Q. In other words then, you mean that the board must [2238] cure any racial imbalance created by housing patterns in their school system? A. I think that's right.

Q. Now, merely by bringing people together is not going to achieve integration, isn't that right? A. But it's certainly—you're not going to achieve it unless they are brought together.

Q. But if you forcibly bring them together, isn't it a fact that they have more militancy than before? In other words, than if they had voluntarily come together? A. Not necessarily. There is not a high correlation between the resistance that the whites put up at the time of the desegregation. Desegregation—once it is instituted—

Q. Didn't you do a study in two schools, one of which there was resistance to the integration and the other went along smoothly and they found, in the resistance school, that they had trouble all along? A. There is no guarantee

—Well, you find differences in the acceptance of desegregation. Mt. Vernon district on Long Island fought to the Supreme Court against desegregation; fighting the Commissioner of Education's order that they desegregate. Once it was clear that the pattern was changed and that this was going to be the way it was, they turned right around and very quickly passed appropriate measures to develop a school that would be an educational [2239] park in the middle of the district and the whole thing was forgotten within a year's time.

Q. You are also familiar with Atlanta, are you not, that forcibly integrated eight years ago and is now virtually and totally segregated because of the resistance? Are you familiar with that? A. I don't think that you can say it was because of the desegregation. But I'm aware of the problem that Atlanta has faced, yes.

Q. What I'm getting to, really, is the point that if the people are brought in on a voluntary program such as New York had and that Dr. Fox—or Mr. Fox studied, whom I'm sure you know— A. Yes.

Q. And this was a voluntary open enrollment program, was it not? A. That's right.

Q. And wasn't it thought that this voluntary program would have more benefit or could be more beneficial than a forced program? A. No. It was a stopgap measure, because there were other things that the community would not go along with at the time. The voluntary program or whatever, is a very limited method of dealing with the problem. It places the whole onus on the parent who wants to see desegregated [2240] education for his child. It siphons off his leadership from the community that would press for more education if he stayed to fight for education for everybody. It relieves the board of education of any

responsibility for doing what is its obligation, which is to arrange the encounter between children to the ends that they learn the skill of the citizenship with the era of which they are a part.

The Court: Are you talking now about unconditional free choice? Or in this reciprocal kind that they have put into effect here? That is, whereby you have to get a corresponding white person to exchange? Do you think there is any difference between the two?

The Witness: No, sir. I would take the position that, as long as you leave it to the parents to seek his civil rights, the board of education is reneging on its responsibility; that it's the function of the school system to arrange these encounters for everybody and not for the few.

Q. Well, I presume then it's your opinion that all of the schools in the district must be racially balanced? A. That would be my hope.

Q. And you consider that, then, the obligation of the school board? A. That is correct.

Q. Now, I'm sure you are familiar with the studies [2241] in New York where the enrollment programs show that there was no basic difference in achievement level after those children were bused and put in a new school for integration purposes? A. I would say that this experience with open enrollment, and I did a comparable study of six schools and found almost comparably what they found on it, that this kind of experience did not show a dramatic difference in results. But this does not preclude the need for— It doesn't take into account the citizenship values. It

doesn't take into account the length of the operation of the program, and it doesn't take into account many other factors that I could relate to. It does say fundamentally that the open enrollment did not accomplish miracles.

Q. And New York started in 1962? They have been working now seven or eight or nine years on it? A. That's right.

Mr. Brega: No further questions.

Mr. Greiner: No further questions.

Mr. Ris: Nothing further.

The Court: Very well. You may be excused.

(Witness excused.)

Mr. Greiner: Your Honor, at this point the plaintiffs rest.

Mr. Ris: We have no rebuttal.

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[8] • • •

The Court: Now, you undertake to represent the Hispano community too?

Mr. Greiner: That's correct, Your Honor.

The Court: And are you certain that they wish to be bused, integrated? Every word I get, every piece of evidence I get is that there is a difference of viewpoint here, a very major difference. That they would resist any effort to integrate.

Mr. Greiner: Your Honor, the only answer that I can give the Court based on the record in this case is that we had no intervention in this case after notice of publication and quite a bit of publicity. We had no intervention from—in behalf of the Hispano community that would indicate that divergent view. I think one of the questions—

The Court: Well, I think we ought to keep this in mind in presenting the evidence, this inquiry in mind, and consider whether it's proper for a Court and counsel to determine what's good for them and order them to do it whether it is of their consent or not, you know. I don't see that that is saving their constitutional rights, if this be true.

Mr. Greiner: Well, I think, Your Honor, it's going [9] to be what it—what it boils down to is a question of, is there another reasonable, realistic alternative? That's what this hearing is all about. And the question of the consent of the people who are to be affected by the plan of relief is really a secondary question. The question is, how do you remedy the inequality? A lot of children in the school district wouldn't go to school at all—

The Court: I'm not talking about the children. I'm talking about the people, you know. No, I'm merely saying that our basic legal problem is remedying the invasion of the constitutional rights. And, if it's true that there is a segment that says their rights are not violated, why, I don't see that it is any of our business to say, "Well, they are. And you're going to get them remedied whether you like it or not." I just don't—Not a single Spanish-origin person has appeared here demanding relief or even suggesting that any should be granted to them.

Mr. Greiner: Well, I think the only basis upon which we can proceed, Your Honor, is the status of the record and the record—in the record there is no dissenting Hispano intervenors.

The Court: Okay.

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[13] • • •

JAMES COLEMAN, a witness called by and on behalf of plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Greiner:

The Court: Give us your name and address and profession.

The Witness: James Coleman, Baltimore, Maryland. I'm a sociologist at Johns Hopkins University.

By Mr. Greiner:

Q. Dr. Coleman, you're currently in the Department of Social Relations at Johns Hopkins, is that correct? A. That's right.

Q. How long have you held that position? [14] A. Since 1959.

Q. What are your duties and responsibilities in the Department of Social Relations? A. I'm Professor of Social Relations at Johns Hopkins.

Q. Have you prepared a resume of your experience and qualifications? A. Yes, I have.

Q. Handing you what's been marked as Plaintiffs' Exhibit 512, and I would ask you to identify that, please. A. Yes, that is my resume.

Mr. Greiner: Your Honor, we would submit Dr. Coleman's resume. It is part of our memorandum which has previously been supplied to counsel.

Mr. Ris: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 512 was received in evidence.)

By Mr. Greiner:

Q. Dr. Coleman, I wonder if you could relate for us just briefly some of the experience which you have had in the field of the analysis of the factors which led to inequality of educational opportunity in schools which are racially isolated? A. My initial and major experience in this direction came with the analysis of the survey of equality of educational opportunity which was requested of the Commissioner of [15] Education in the Civil Rights Act of 1964. That was published in July of 1966. Subsequent to that time I have carried out some further examination of the same data and more recently some examination of data from a number of specific cities which have carried out some studies of their own.

Q. Can you identify some of the cities for us? A. Yes. New York, Chicago, Philadelphia, Baltimore, Los Angeles. These were not detailed examinations but simply looking at some of the work which—reviewing some of the work which those cities have done themselves.

Q. You mentioned this 1966 publication. I'm handing you what's been marked for identification as Plaintiffs' Exhibit 500 and entitled Equality of Educational Opportunity and ask you if that is the document to which you have reference? A. Yes, it is.

Q. Can you tell the Court, please, Dr. Coleman, what your duties and responsibilities were in connection with that study? A. In connection with the survey which led to this and the publication of the report, I was director of the staff which produced the report.

Q. What was the purpose of the study? A. The purpose of the study was to fulfill Section 402 of the Civil Rights Act which requested the Commissioner of [16] Education to carry out a survey of the lack of equality of educational opportunity in the United States, as a consequence of several factors, the principal of which was racial characteristics of the students.

Q. Now, would you describe briefly how the study was conducted? For example, how many students were the subject of the study? A. The study was conducted by carrying out—by selecting a sample of schools, first selecting a sample of high schools throughout the United States and then selecting a sample of feeder junior high and elementary schools which served those high schools and then examining the characteristics of the schools, some of the characteristics of the teachers, and some of the characteristics of the students in Grades 1 through 6, 9 and 12.

Q. What characteristics were considered? A. Well, there were a number of characteristics of the schools and of the school districts which were considered which included the major characteristic that educators have characteristically examined in terms of school quality. Most of the kinds of things which school financial resources go into purchasing and then a number of characteristics of teachers, ranging from things of having to do with their attitude to things, having to do with their experience, to a test of verbal skills which was given to the teachers.

[17] Q. What method was used to survey the teachers? A. The teachers were surveyed by essentially a relatively short questionnaire which they completed. This was in similar form of that which was completed by students, but shorter, and the test involved—associated with the questionnaire—was also short.

Q. Do you recall approximately how many students responded to this questionnaire? A. Yes, there were something over 600,000 students in the five grade levels that I mentioned throughout the United States, around 4,000 schools being involved.

Q. And approximately how many teachers? A. If I recall correctly, something around 60,000 teachers.

Q. What were the geographic characteristics of this survey? A. Well, the geographic characteristics of the survey were 50 states of the United States and the District of Columbia, without carrying out a representative sample of each state; nevertheless, carrying out a representative sample of regions in the country. So that properties of the survey and the sample were to have a representative examination of schools serving children in different regions and particularly children of different races in those regions, different races or social origins.

[18] Q. Did you also study children in urban and rural settings? A. Yes, within each region there was a separation between students who attended schools in metropolitan areas and those who were outside metropolitan areas.

Q. Was Denver one of the areas which was the subject of this study? A. With regard to that, I have to indicate I am not at liberty to say for the following reason: that in carrying out the survey an explicit promise was made to the superintendents of schools in all of the districts which were surveyed that none of the districts would be identified in publication or otherwise, so that there has been—this has been adhered to in the past, and unless I am formally directed to do so, I would prefer not to.

Q. For what period of time was the study conducted? A. The study was conducted in the fall of 1965—beginning in September—and extending through to October, covering a very short period of time, and the analyses of the data were then carried out in the winter and spring of—the winter of 1965 and the spring of 1966.

Q. And then what has been marked for identification as Plaintiffs' Exhibit 500 was published at what time? A. In July of 1966.

Mr. Greiner: Your Honor, at this time we would [19] offer Plaintiffs' Exhibit 500.

Mr. Ris: May I voir dire the witness?

The Court: Yes.

Voir Dire Examination by Mr. Ris:

Q. Dr. Coleman, you are the director of this survey as you have indicated. You had substantially—a substantial number of people who were actually doing the detail work on it? A. Yes.

Q. Who drafted the questionnaires? A. The questionnaires were drafted principally within the Office of Education by a group of staff members there.

Q. There have been substantial criticisms since the report was published and before the survey was completed as to whether some of the questions were not quite fair, isn't that correct? A. Well, no.

Q. You're not aware of any such criticism at all? A. I'm not aware of the criticism about the fairness of the questions. I think there was a good deal of concern in various localities of the country about some of the questions which were asked, but I don't think having to do with fairness.

Q. What were the nature of the objections to which you [20] refer? A. I think objections had to do with the question—the objections were of several sorts; that is, a short time prior to that in some states there had been either—in some local boards there had been resolutions that there would be no racial identification of children. Now, in Grade 1, where the teacher completed the questionnaire, the teacher was required to fill in the questionnaire which required filling in the race of the child. And that was seen in some localities as being in violation of the resolutions which had recently been passed by these localities. So I think that was probably the major—that, and the very fact that having children identify themselves with regard to race or with regard to ethnic origin, because there was also a question having to do with whether a person came from Mexican-American or Puerto Rican background, and those questions, I think, were the ones which excited the most concern. Simply because there had been, as I indicated, a number of district resolutions passed against any kind of racial identification.

James Coleman—for Plaintiffs—Voir Dire

Q. Were you aware that Colorado had a constitutional provision pertaining to classification of students by race? A. I don't think that that constitutional provision was—I don't know the details of that constitutional provision, but it was not in the judgment of the attorneys at the U.S. Office of Education—it was not violated by [21] this.

Q. The question was, were you aware of such a provision? A. I was aware in a number of states that there were provisions of this sort.

Q. Is that the type of objectionable situation it was; as to race and—and then the geographic areas? A. Yes.

Q. Now, you say you're under some orders not to disclose the cities that did not—the cities that did participate. Can you tell us then that Denver is not one of the participants in this area? A. I cannot say anything in regard to systems which did not participate.

Q. And under whose direction is this order? A. Alex Andermood was Assistant Commissioner of Education at this time and he is the one who made that—

Q. But you will answer it if ordered by the Court? A. I certainly will answer it if ordered by the Court. I would like at the same time to communicate with the Office of Education before doing so.

Mr. Ris: If the Court please, may I ask the Court to order him to answer whether Denver is represented in the study?

The Court: Well, this is voir dire. For what purpose? What are you seeking to do?

[22] Mr. Ris: It's one element—

The Court: This is premature.

Mr. Ris: The Court may be right. Maybe it's a little premature and he has to communicate with

Washington. Later in cross-examination—but it might save some time if we could resolve it now.

The Court: You're going to object to this coming in?

Mr. Ris: Yes, sir.

The Court: Doesn't it teach us anything? Wouldn't it be of any value at all?

Mr. Ris: I think it may be of some value.

The Court: Do you think it's prejudicial to the defendants?

Mr. Ris: I don't think it's competent. As I am going to continue my voir dire, there is a great deal of raw data that the Department is not permitting access to anybody on it and the Hopkins case refused admissibility on that basis, and this is the next step I'm going to take. But I was trying to get this one point at the moment which I think would be relevant later on.

The Court: Well, I suppose we could assume that Denver was included. Do you have reason to believe that Denver was not studied?

Mr. Ris: I'm informed that Denver was not and I [23] just want it as a matter of record. I'm informed by the superintendent of schools.

The Court: For purposes of your objection, I expect we could assume they were not.

Mr. Ris: All right.

Do you stipulate then there is not—

Mr. Greiner: I don't know that to be the fact.

The Court: Okay. I expect then you can tell us, Doctor, whether Denver was not.

The Witness: As I say, if possible, I would like to communicate with the Office of Education because

there were two categories of school systems which did not participate; those which were not originally sampled and those which were sampled but refused to participate.

The Court: Do you know the answer to the question?

The Witness: No, I'm not clear which of these categories Denver was—

The Court: Well, he's not in a position to answer it right now, anyway.

Mr. Ris: All right.

By Mr. Ris:

Q. Then, at a recess, can you verify this? A. Yes.

Q. Is it true, Doctor, that there were eleven major school systems which, for either one of the reasons you just [24] stated, are not included in the study? A. Yes, there were a lot of—a large number of systems were not included for one of these two reasons.

Q. I'm speaking of major—say, over 500,000 population. A. Yes. I don't have the specific numbers but I would certainly think that would be approximately right.

Q. Now, Dr. Coleman, is it true that all these questionnaires came in and were reviewed and you—I presume were computerized and so forth? Is that correct? A. Yes.

Q. And the raw data itself is locked up in the archives of H.E.W.? A. The data available is on tape to any researcher who wants to carry out further examination of the data, and a number have done so.

Q. Are they available for court purposes? A. Yes.

Q. Would they—were they available in the Hopkins case? A. They were available in the Hopkins case.

Q. Isn't it true that H.E.W. declined to produce them?

A. H.E.W. declined to permit identification of the particular systems involved; that is, H.E.W. declined to have a specific analysis of the District of Columbia schools [25] carried out, pursuant to the agreement that had been made with the school superintendents when the survey was carried out.

Q. So Judge Wright declined the admission of the report, is that correct? A. I don't think so.

Q. Do you know? A. I testified in that case.

Q. I understand.

The report was not admitted into evidence, was it, Doctor? A. Well, I'm surprised that—I testified at great length in that and I had thought that the report was certainly discussed in the case.

Q. But it was not admitted into evidence? A. Well—

Q. Do you know? A. No, I'm sorry. I am—my impression is that it was admitted into evidence. Now, if you know to the contrary, then—

Q. I have been so informed and I am surprised that you thought it was. A. Well, I think it was, yes.

Q. Who actually did the correlating of the answers to the questionnaires? The staff people? [26] A. Yes.

Q. In the Deparement of Education? A. In the U.S. Office of Education.

Q. So the report itself, Exhibit 500 in this case, contains the ultimate conclusions rather than any of the basic raw data from which conclusions were drawn? Correct? A. That's right, yes.

Mr. Ris: If the Court please, we would object to the admission of this—any more than any textbook or other document to buttress the testimony of the witness—

The Court: Do you wish to have it introduced simply for reference purposes?

Mr. Greiner: That's correct, Your Honor.

The Court: Or cross-examination?

Mr. Greiner: I am going to ask the witness to relate—to advise the Court as to what the major findings of the study were; what the conclusions were that were reached and most of these causative factors.

The Court: Well, can he refer to it? We will withhold a ruling on that until a little later on. But he can refer to it all he wishes and it can be used to cross-examine him.

Direct Examination by Mr. Greiner (Cont'd):

Q. I believe you said there were some 600,000 students [27] surveyed.

The Court: Were you offering it testimonially as well? For the purpose of utilizing its content as if it were evidence in the case, testimony in the case?

Mr. Greiner: I believe, Your Honor, what I'm about to do is demonstrate through the witness that the survey was broad enough in its scope, it covered districts like Denver even if it may not have covered Denver, so the question as to its relevancy or its pertinency, vis-a-vis Denver, which—we think it is pertinent and relevant because it was the broadest survey ever conducted and it is very thorough. So I think, to answer Your Honor's question—

The Court: Well, really, I think that the facts and figures in it might be of some value to us. I suppose—if he's going to give conclusions that are

contained in it, I suppose he can be cross-examined by those.

Mr. Greiner: That's correct, Your Honor.

The Court: Very well. Go ahead.

Q. Now, Doctor, you said that there were some 600,000 students surveyed. A. That's right.

Q. And some 4,000 different schools? A. Yes.

Q. And can you tell us whether or not urban school systems such as Denver were in fact included in this survey? [28] A. There were a very large number of urban school systems which were included in the survey. The original sample was carried out in such a way as to be representative of regions of the United States as well as representative of the United States as a whole, and one classification within regions was urban areas. Now, no school district is exactly like any other and that is why we have a representative sample; so we can get a broad conclusion as to which are representative of the country as a whole, and of regions. Something like between 60 and 70 percent of the schools selected in the sample or in the school systems selected in the sample participated in the survey and others declined to do so.

Q. Are you familiar with the existence of any other study of equality of educational opportunity which was as comprehensive as that you directed? A. There has not been, to my knowledge, any similar survey. There have been plans which have been discussed in the U.S. Office of Education for the carrying out of further national surveys. There is also a national assessment of education which is currently being carried out, but there are no such surveys covering elementary and secondary education which are as broad as this one.

Q. Have lawyers' studies been used as a basis of other studies of equality of educational opportunities? [29] A. Yes, it served as a basis of a number of local studies which have been carried out in local school systems and they have carried out changes in their systems through school integration or some other activities. They have used that as a source. There has also been a number of things in various places which have stemmed from this in one way or another, the organization for economic cooperation and development in Europe has established equality of educational opportunity which follows very much the pattern which was initiated by that survey.

Q. Can you summarize or capsulize for us Exhibit 500, several hundred pages in length, on what were the major conclusions reached by the study? A. Well, first of all, let me say that there were a number of sections to the survey or a number of things which were reported in that volume, and the only ones which I will make any statement on here are those which have to do with elementary and secondary education, for which this major survey that we described was carried out. There were also other surveys for secondary education and some other examinations which are in the report which I think are not relevant to the present case and so I will report only on those that I see as possibly relevant.

The survey attempted to examine the question of equality of educational opportunity in what might be seen as [30] three different ways. One is through looking at the input resources into schools and how those varied according to particular classifications of students that were surveyed. I should remark at the outset that the survey examined the equality of educational opportunity with regard to the following racial and ethnic groups: Negro,

Mexican-American, Puerto Rican, Oriental, American Indian, and whites other than those who were included in the previous classification.

So, with regard to these six groups and with regard to Negroes and whites in particular regions of the country, there was an examination of, first of all, as I indicated, the input resources into schools.

Q. Can you give use some example of those resources? A. Well, there were a large number of items having to do with schools which were examined—which examined such things as the number of books in the school library, the age of the textbooks, the age of the school buildings, the size of the site on which the school building existed, the kinds and number of curricula that existed in the school, the existence of audiovisual equipment, the existence and character of science laboratories; whether they were free public kindergartens or not, and a whole variety. The classroom size, per pupil expenditure of instruction; the number of items on this—of this general character.

Q. And what was the second? [31] A. The second was the degree of racial segregation in schools, that is, as with the first, not taking as a given or as answered the question of whether this in itself constitutes inequality of educational opportunity, but rather recognizing that our task was to examine inequality of educational opportunity as it may be defined by a number of people in the population and in the Congress and in the Executive of the federal government. Our task was to examine the different possible definitions of inequality of educational opportunity and one of these is clearly the degree of racial segregation in the schools. So that this was the second major area that we examined, that is, the racial composition of the schools.

The third major area that we examined was to look not at the input resources into the schools but at the output resources of the schools, and in that we took a fairly narrow definition of output. We didn't look at the kinds of social attitudes or anything of that sort that might be seen as a legitimate output of education, but took a narrow definition, really, examining principally verbal skills and mathematic skills of children of these six different groups and, as I said, of Negroes and whites in different regions of the country.

Q. This then was the achievement data? A. That's right. This was the achievement data and [32] again, not viewing this per se as a measure of the equality or inequality of educational opportunity, but viewing this as an element which is relevant to the question of equality or inequality of educational opportunity because the further examination of that data was to see how this achievement varied as a consequence of different resource input into the school and then to see how those resource inputs were related to the race of the child. So that, essentially, this third area was to examine what might be described as those resource inputs of the school that were relevant to the outputs of the school; that is, those which exhibited some degree of impact or effect upon the achievements of students in the school.

Q. Can you tell us what the major factors were in the school which contributed to the presence or absence of unequal educational opportunity? A. Well, if I could go back to the prior question, I think it didn't—I didn't completely answer that. I should say that, in examining those three kinds or three definitions of what might constitute inequality of educational opportunity, we found a smaller degree of difference with regard to input resources at the

—of the sort I described before, a smaller degree of difference between schools attended by persons in these different racial and ethnic groups than had been previously anticipated or that had been previously felt to be [33] the case. So that, with regard to that measure of inequality of educational opportunity, we found smaller differences than anticipated.

Q. You're talking about the physical resources? The hardware of education? A. That's right. Now, with regard to the third conception of equality of educational opportunity that I just described, the question came, what were the sources in the school or what were the characteristics of the school that were most highly related to the achievement of students or the output of the school. And we grouped those characteristics of the school into three broad categories; those which were characteristics of the school of the sort I described before with the physical input into the school, including things about the curriculum but not including characteristics of the teachers. The second broad set of characteristics was those having to do with characteristics of teachers and the third one was one which was introduced only in a later stage of the analysis and what might be described as educational resources brought by other children to the school. What was done was to measure the characteristics of the home environment of the children who were in the school and then to examine how a child in that school—how a child's performance was the function of family background of the other children in the school. That was the third general set of resources [34] in the school that we examined.

First, as I said, was more merely the physical and curricular aspects of the schools and the second was charac-

teristics of the teacher and third was the characteristics of the students in the school.

Now, we found, first of all, that schools differed. Schools attended by these different racial and ethnic groups differed least with regard to these first two categories and most with regard to the third category. That is, they differed least with regard to physical input of the schools and next with regard to the characteristics of the teachers in the school and the most with regard to the characteristics of other students in the school. Secondly, when we related the output of the school to—the performance of students to the other three characteristics; that is, when relating performance of students in the school to these three clusters of characteristics, we found that the one which was least related to performance was the physical and curricular aspects of the school. What was the next most related to performance was the characteristics of the teacher, and what was the most related to the performance were the characteristics of other students. So that there was roughly an inverse order between those characteristics which were effective in producing educational output and those which were similar for the schools attended by children of different racial and ethnic [35] groups; that is, those characteristics in which the schools attended—for example, were attended by Negroes and whites—differed most with characteristics of the other students in their schools, and with the ones which were shown to be most effective in the analysis.

Q. Now, with regard to this third factor, student environment or the environment created by the student group, did you also have occasion to study the peer group environment created? I know you have studied the black

school children and the environment created by those children, is that correct? A. Yes.

Q. Now, did you also consider Mexican-American or Hispano children separately? A. Yes.

Q. What did you find was the relationship, if any, between the types of school environment created by those two groups? A. Well, first of all, I think it can be fairly stated that of the six racial and ethnic groups that were described there were four which had roughly similar levels of performance and roughly similar levels of family background when one looks at the kinds of resources that existed in the family. Those were Puerto Rican, Mexican-American, American Indian and Negro, and two which had both higher levels of performance [36] and higher socioeconomic characteristics of background, those of whites which I mentioned before and Oriental Americans. In terms of kinds of impact that a child from one of these first four groups—the kind of impact that the average family background of children in these four groups and that is not of any particular child, but I'm talking about average family background in terms of its socioeconomic resources, those were roughly similar across these four groups.

Obviously, of course, there are major differences between, for example, American Indians and the other three groups, but at least among the other three groups, especially when urban-rural differences are controlled, with socioeconomic backgrounds which are not extremely different, then what was found, and it was found in the study, was the—what was found was the socioeconomic backgrounds or the educational resources in the home rather than specific racial characteristics of the student which related—which was the environmental resource that I described earlier.

Q. Now, Doctor, on the basis of that factor, the similarity of the types of background, for example, and the Hispano—and that Hispano and Negro children bring to school with them, did you or can you reach any conclusions as to the effects of the peer group, the student peer group in schools which are predominantly minority in their character, such as, for example, 40-percent Hispano and 40-percent black, and [37] contrast it with schools which are predominantly composed of one minority group. Is there a difference? A. In terms of our examination, there would be no reason to see any difference at all. As I say, in elaboration of that, the important set of variances or the set of variables which were found to be important were that educational resources brought by the child into the school from his home and which then had an impact upon other children in the school, and these were related to the racial characteristics of the children, but it was not the racial characteristic or the ethnic characteristic per se, but these educational characteristics as it affected other students.

Q. And there is a correlation, is there not, between the socioeconomic factors and the race? A. Yes.

Q. Now, did you also have occasion to study the different mixes of the ethnic groups and racial groups in these schools? A. There has been a good deal of examination of that. That was examined only in fairly small—a fairly small report that we are discussing, but it's been examined with regard to these same data in subsequent analyses. And first of all, I should say it's difficult to make strong inferences in this area. Essentially, if I understand your question correctly, you're asking what is the effective [38] student body of different socioeconomic positions,

for example ranging from, say, zero to a hundred percent middle class. Is that your—

Q. That's right. A. First of all, I should say that the inferences cannot be absolutely conclusive in this regard, but there seems to be a kind of majority effect, that is, that if the school is predominantly middle class, then there are beneficial effects on those students who are not middle class in the school or who come from family backgrounds which have poor educational resources in them; without being deleterious, effects the quality upon the other children.

If the majority is in the reverse direction, there seems again to be this kind of majority or climate effect of the school which leads to the—which does away with those benefits. As I say, the inferences in this area cannot be entirely conclusive, but that is both on the basis of these data, principally to further analyses which have been carried out, and on the basis of some other research which has been—

The Court: Well, then, the culturally-deprived whites would be exactly in the same position in your mind?

The Witness: Yes, sir.

The Court: As the Negroes or Hispanos or Orientals, is that right?

[39] The Witness: Yes, sir.

The Court: And with similar deprived—

The Witness: Yes, sir.

The Court: Well, they say it's the middle class—upper middle class influence that produces most significantly; whether the students are Negro or whatever they are.

The Witness: Yes, sir. That's certainly the evidence of our survey. Now, there has been some other examination which is not entirely consistent with that but I think all of the examination of this question shows that the major influence is that of the educational resources in the child's home, which are principally derivative from the socioeconomic background of the child.

The Court: That's what the defendants here said at the trial. They said that the whole problem was that of the culturally—cultural deprivation, economic deprivation, and not the schools themselves. This was the education that was being offered; that they were just dealing with a group of students whose level of basic knowledge was low. And so on.

The Witness: I'm not talking now about the influence of the child's background upon his performance. I'm talking about the influence of the background of other children in the school upon his performance and, if I understand what you just said—

[40] The Court: Well, you said that was what determined the inferiority of the schools, that is, whether or not they had a large number of white middle-class students.

The Witness: Yes, sir.

The Court: Isn't that what you said?

The Witness: Yes, sir.

The Court: So it follows that, if our culturally and economically deprived are in the minority, why, then the school itself is going to be an inferior one.

The Witness: Yes, sir. That would certainly be the conclusion.

The Court: And I take it that you're saying that the quality of the educational effort is not going to make very much difference.

The Witness: What I'm saying is that inferiority of that school is for, let's say, for example, for a hypothetical child whose school is a predominantly lower-class black school, for example, or predominantly middle-class school, that his educational experience will be very much a function of that social composition of the school more than of the explicit resources which the school has put into the system. In other words, I think that's what you just indicated.

The Court: So you're spinning your wheels trying to improve these schools and thus improve the educational [41] experience of the child in them by programs of this kind?

The Witness: Yes, sir. I think that would be the principal inference one would draw from the results of most of these programs as well. That is, our survey didn't examine explicitly programs—that is, special programs that had been introduced because in many respects many of these programs began only after our survey was carried out. Many of them have been done, for example, in response to Title I of the Elementary and Secondary Education Act which came out about—only subsequent to that, but the results of these further—of studies of these special programs have not been very encouraging with regard to their effects.

Mr. Greiner: We're about to get to that, Your Honor.

The Court: I figured you were. I will let you develop it.

By Mr. Greiner:

Q. Dr. Coleman, you have mentioned studies that were conducted subsequent to that which you directed. Are you familiar with the report of the United States Civil Rights Commission which was based in part upon the data gathered in the Coleman report? A. Yes.

Q. What was the nature of the study conducted for the Civil Rights Commission? A. Well, the Civil Rights Commission report directed [42] itself much more specifically to questions of school integration in comparison to compensatory programs than the survey that we carried out did. Ours was directed toward broader questions and so that there was analysis—there was both further analysis of the data which had been gathered under our survey. Analysis of some special data in particular localities. One examination very—one very intensive examination of the effects of socioeconomic and racial integration in Richmond, California, for example, that is reported in the appendix to that survey, and then there was an examination of compensatory education programs which existed at that time.

Q. Now, was this study then put out in published form? A. Yes, it was.

Q. I'm handing you what's been marked for identification as Plaintiffs' Exhibit 27 and 27-A, being the appendix to Exhibit 27, and ask you if you can identify those for us? A. Yes, these are the reports to which have been—to which you have been referring.

Q. Now, what role did you play, Dr. Coleman, in the creation of the study now represented by Plaintiffs' Exhibits 27 and 27-A? A. I played no role whatsoever other than as a consultant to the study and was not very deeply involved.

Q. As a consultant, what did you do? A. I simply discussed at a meeting of consultants of [43] that study the general directions that the survey might take and what kinds of data it might use. One of the persons who worked intensively with me on the equality of educational opportunity was a major staff member in this report. He carried out the analysis of—a further analysis of these data.

Q. Now, Exhibit 27 was published when, Doctor? A. I believe it was 1967.

Q. And how much time subsequent to the publication of the Coleman report was this? A. I think it was less than a year.

Q. Now, does Exhibit 27 then attempt a further evaluation of, for example, the then compensatory education programs? A. Yes. It carries out a further examination —or a more explicit examination of the compensatory programs and certainly our survey didn't carry out such an examination at all. I should say, however, that partly because of the fact that many of those programs have been subsequent to the publication of this, there has been much more recently, by the New York State Department of Education, a very comprehensive survey carried out of both compensatory programs and school integration activities at local levels which has a title similar to this. I've forgotten exactly the title.

Q. I think we just happen to have that with us, [44] Doctor. It's been marked for identification as Exhibit 508. That's Dr. O'Reilly's study. A. That is the Report on Racial and Social Class Isolation in the Schools. That's the most recent and comprehensive survey which has been done up to this point. I think, in contrast to nearly everything that's been done before which was quite partial and

quite—well, either partial or a little early with regard to the evaluation of compensatory programs, and I think this is really kind of a benchmark for evaluation of these programs at this point.

Q. Now, turning your attention back to Exhibit 27 and 27-A—do you recall what conclusions were reached in those studies regarding the efficacy of compensatory education programs in these isolated schools? A. Yes, the conclusions that were reached were essentially conclusions—the conclusion that compensatory education programs had not shown any generally effective methods for increasing achievement of children from disadvantaged backgrounds. That is, it was a fairly discouraging conclusion with regard to those compensatory programs. And those fairly discouraging conclusions, I think, have been really characteristic of most of the examinations of compensatory programs which have been carried out.

Q. Now, when we talk about compensatory education, Dr. Coleman, what kinds of programs are we talking about? What [45] are some of the objectives of these compensatory programs? For example, does it include remedial instruction? A. Well, the objectives of the programs, the objectives of the—of many of the programs are very directly to increase achievement in cognitive skills which are viewed as the principal resonsibility of elementary education. That is, verbal skills and mathematical skills. So that the goals have not completely focused upon that but very largely focused upon these two things, verbal and mathematical skills.

Q. What about factors such as—I believe it's called cultural encouragement or broadening the horizons of the child? A. Well, there has been some of these, as well. However, from the point of view of the kind of evaluation

which has been used both in the report under question, racial isolation in the public schools and other evaluations, most of those valuations have to do with these specific cognitive skills, that is, the question of whether a given compensatory program increases such cognitive skills more than would be expected by the regular program that the child would attend through that period of time.

Q. Well, factors such as building self-esteem, for example, and overcoming a negative attitude in the child, or getting additional parental involvement with the education of the child? Aren't those factors which would also lead to [46] improvement in these cognitive skills? A. Yes, these certainly might well do so, and it's just that the final criterion which has been used principally for evaluating these surveys is whether in fact cognitive skills are increased. Now, many of the things of the sort you described have some value in their own right and also may be factors which, if improved or if effected, then, in turn affect cognitive skills which are the principal criteria that have been used in evaluating the cognitive skills.

Q. Dr. Coleman, I'd like to turn your attention to the question of integration. What is the nature of your study on the question about the causal relationship, if any, between integration of the minority child and, by that, I mean placing them in a—let's say a majority Anglo school? What is the relationship between that process and the improvement of the minority child's achievement? A. I'm not sure I understand the question. Well, could you state it in other words?

Q. Well, can you tell us if there is any beneficial effect upon the minority child? A. If there is any beneficial effect upon the minority child? Can you continue the question?

Q. By integrating the child. A. Well, I'm sorry. Let's say that the survey that [47] we carried out was a survey which examined only children in those schools in which they were found and so what we had to do was to examine children who were in integrated schools and had—and had this similar background but in integrated—segregated schools. The only was I can answer your question is to say that, in terms of the analysis that we carried out, the analysis was limited not to moving children from one school to another and see what the consequences were, but limited to examining children in the schools in which they were found, controlling insofar as possible on the backgrounds of these children, and then looking at their performance in the schools that they were with. And, as I indicated, the performance was more strongly related to the educational background of the other students and by that factor, the racial composition of the school they were in, than to any other single characteristic of the school—

Q. What was the relationship? A. That the higher the educational resources of the other children in the school they brought with them from their homes, the greater the achievement of any particular child in that school, controlling on his own family background. So that it was a positive effect of the educational resources in the homes of the other children who were in the school.

Q. Then what in your mind is the primary factor that is present in the integrated school, the predominantly Anglo [48] schools, that led to their improvement and achievement of the minority child? A. Well, I must make inferences because of the fact that one has simply the statistical education and then the question is, what are

the mechanisms involved, and if I understand your question, you're asking what are the mechanisms?

I am tempted to express—and a number of people have at some length—the inference that I would draw from various evidence that I have had—I have seen is that it has to do with the linguistic and conceptual challenge that environment brings to a child. Well, that environment brings for a child—that linguistic and conceptual challenge is the thing which is provided for—created by the environment of the other children in the school. What that means in effect is that, if the inference is correct, is that a child from a linguistically-impoverished background will be most affected by a school situation which has a—which is more linguistic, particularly the rich or different educated environment.

Q. Are you familiar, Doctor, with any programs of compensatory education which supply this factor that you have just described? A. Well, I think that, if a program of compensatory education were to be effective, it would probably have to be through that kind of mechanism. I think that the major [49] problem with compensatory programs is that it's much more difficult and, if possible, much more expensive to introduce such environmental changes in the child's environment, not only within the classroom but outside the classroom when the actual social environment that he experiences in the sense of other children he talks to remains homogeneous with his past.

Q. Now, did Exhibit 27 also consider these same factors? A. Yes. Again, it's difficult to isolate these factors per se and as a consequence I think one must depend upon inferences with regard to this.

Q. But with—were the conclusions which you have just described also reached by the Civil Rights Commission

study? A. The conclusions that I have described were certainly compatible with the conclusions that they reached.

Mr. Greiner: Your Honor, at this time we would offer Plaintiffs' Exhibit 27 and 27-A.

Mr. Ris: We would object on the grounds of insufficient foundation.

The Court: Are you offering the content of both of these as testimony?

Mr. Greiner: Well, I think really the function of these is simply to inform the Court of the state of the art, so to speak, insofar as the analyses which have been conducted [50] concerning really the primary issue we have before us and namely what works and what doesn't work.

The Court: What part are you going to rely on? The whole thing?

Mr. Greiner: There is a particular section there, Your Honor, toward the back which contains the analysis of compensatory programs as well as an analysis of the then integration programs which were in existence at the time that report was published. The appendices, which is 27-A, is simply data used by the study in reaching its conclusions.

The Court: Are you familiar with this material?

The Witness: Yes, I am.

The Court: Have you read it?

The Witness: Yes.

The Court: No, I mean Mr. Ris.

Mr. Ris: I have read so much that I—

Mr. Greiner: We listed that as an exhibit on about June 16th last year.

Mr. Ris: I'm familiar with the volume and I have a copy, yes, Your Honor, insofar as the particular part counsel is referring to.

The Court: Well, he's got a paper clip there.

Mr. Ris: Mine didn't have a paper clip.

Mr. Greiner: I'm not sure that paper clip is in the right place, Your Honor.

[51] The Court: Well, we will receive it for whatever value it may have, bearing in mind that it is hearsay, of course. This is somewhat an unusual type case, but if there are parts of it that you feel are particularly incompetent, why, you can call my attention to those.

(Whereupon, Plaintiffs' Exhibits 27 and 27-A were received in evidence.)

By Mr. Greiner:

Q. Dr. Coleman, calling your attention then to the breadth of these surveys represented by Exhibit 500, Exhibits 27 and 27-A, in your opinion are the results of that survey sufficiently founded in the data—is the data comprehensive enough that you would consider it to be reliable in applying it to a school district such as Denver's?

Mr. Ris: I'll object to that because the witness stated he had very little to do with 27 and 27-A except on a consulting basis, and so, by his own admission, he has not examined the data and cannot draw such a conclusion.

Mr. Greiner: Your Honor, I believe the witness has stated that most of the data upon which 27-A is based is data that was developed in the course of preparing Exhibit 500.

Q. Is that correct? A. That's correct.

The Court: Are you familiar with the Denver condition?

[52] The Witness: I am familiar with some considerable part of the Denver situation now. I have read a number of documents relating to this case, yes.

The Court: Well, do you feel you can answer this last question, as to whether this 27 is germane to the problem here?

The Witness: Yes, I would certainly think it is germane, that is, surveys which are carried out on a school system other than a particular school system under consideration have, I think, characteristically been used as a basis for policy in particular school systems.

The Court: The thing that worries me about all this is that what you say is that the schools are not inferior as counsel proved at the trial, but that the students are inferior. They proved it overwhelmingly that the schools were inferior; their offerings were inferior. Now, in coming up with a new tack—it's not the schools at all, it's the students and their economic and cultural deprivation that makes the educational experience one that is noncompetitive. It's dull; not exciting. I mean, I get that from what you're saying. Sort of a self-defeating proposition. They proved the constitution was violated and now they are unproving it.

Mr. Greiner: Your Honor, what we're trying to avoid is a duplication of the testimony that the Court has already received. We could go into teacher attitudes, teacher [53] experience.

The Court: Well, he says it is of no consequence.

The Witness: I'm sorry. I didn't mean to say—

The Court: You said these programs were worthless. I'm exaggerating a little bit to make my point. Isn't that what you're saying?

The Witness: No, what I am saying—

The Court: Virtually worthless?

The Witness: I'm really trying to say the following that is, that first of all that, of the school resources which are provided by the school system, those which show most relation to a child's achievement are the characteristics of the teachers, in particular the verbal skills of the teachers. But that these are not as important for the achievement of the particular student in terms of our analysis as the social composition of the rest of the student body. Secondly, that with regard to compensatory programs, if one evaluates these programs simply in terms of the increase in performance that occurs as a consequence of them or that occurs for children who have participated in them, there is very little cause for optimism with regard to the overall effectiveness of these programs. But, of the things which the school board provides, the characteristics of teachers and in particular the verbal skills of teachers seem to be the most important characteristics.

The Court: We will take a short recess.

[54] (Whereupon, the trial recessed at 11:06 a.m. and resumed at 11:23 a.m.)

Mr. Greiner: Your Honor, Dr. Coleman isn't back yet.

Your Honor, we are just about finished with Dr. Coleman. I don't believe the Court has ruled on 500, and we would offer that at this time. Perhaps we could dispose of that while we're waiting.

The Court: Well, he's going to give us some information on it, isn't he, as to whether Denver was considered?

Mr. Greiner: We can certainly check on that.

The Court: I mean, before we ruled on it? I mean, we were withholding a ruling. He didn't know the answer.

Mr. Greiner: I'm sorry, Your Honor. We can't seem to find Dr. Coleman. He may be calling Washington, but I haven't been able to find him.

The Court: Do you have any other witnesses you wish to call?

(Colloquy not transcribed herein.)

The Court: Well, if you wish to take a recess while you find him, I'll be glad to do that. Would you prefer this?

Mr. Greiner: I would prefer it, Your Honor. I think things would follow a lot more logically.

The Court: Are you going to ask him how many white middle-class or black middle-class people he needs in order [55] to achieve the objectives? What percentage he needs?

Mr. Greiner: I believe he said the majority, Your Honor.

The Court: A simply majority?

Mr. Greiner: Yes.

The Court: In order to make any impact?

Mr. Greiner: You need a majority to create this environment that is necessary.

The Court: Okay. Well, let us know when you're ready.

(Whereupon, the trial recessed at 11:29 a.m. and resumed at 11:35 a.m.)

Mr. Greiner: We apologize. The witness thought we were in recess until 12:30 and therefore went ahead and tried to place this call to Washington.

The Court: That's all right. The reporter is having trouble getting his testimony. I don't know how we can remedy it but I'm afraid you're going to have to keep your voice up full.

The Witness: Fine.

By Mr. Greiner:

Q. Dr. Coleman, just prior to the recess, we were discussing the educational resources which the schools allocate to particular schools, which the system allocates. Now, is there a condition that you're aware of of these homogeneous residential areas which do exist and how [56] do these neighborhood residential patterns relate to the kinds of students that you find in the schools? A. Well, the answer to that depends very much upon the way in which the school system organizes its schools in relation to residents. That is, most school systems organize their schools in relation to the residents by having fixed school districts and some of these are very ethnically homogeneous. And a few school systems don't operate in that fashion. But the impact of the educational resources that I described before that are brought with other children to the school from their home really is the function very much

then of the social composition of the schools which are organized in most districts in the United States, are in turn the function of the socioeconomic and ethnic composition of the neighborhood.

Q. So then it's a matter of student assignment policy? A. That's right.

Q. Now, could you report to the Court on your telephone call and what the status was? A. The telephone call at this point is inconclusive. I indicated to the people of the Office of Education to give me an answer with regard to two questions, that is, the status of Denver with regard to which of these two categories it was in, and secondly, the question from their counsel as to what their position is with regard to the nature of this [57] information. So they are searching—they're doing that now.

The Court: Finally, Dr. Coleman, you mentioned that you were on this Cabinet committee. Can you give us the nature of—

A. Well, I'm not on the Cabinet committee because only Cabinet committee members are on the Cabinet committee. I'm a consultant to the Cabinet committee on school desegregation which is attempting to first develop legislation for $500 million worth for this year and a billion dollars for next year for implementing school desegregation, both in the South and North. And for then laying out guidelines for the conditions under which such money can be used by schools—by local school systems so that I am principally advising the committee with regard to the guidelines which school systems would—the guidelines for school systems with regard to the use of the moneys for school desegregation.

Q. In that context, does school desegregation include transportation? A. Yes, in the conception of the Cabinet

committee as it currently—I think I'm probably not really —the Cabinet committee is still determining the character of these things and so I'm not really specifically knowledgeable about what will be the outcome of the Cabinet committee's deliberations.

[58] Q. What is the time table for making this $500 million available? A. There will be some funds—it is expected that there will be some funds available by the end of June.

Q. Then, directing your attention back to the relationship between the neighborhood school policy and the homogeneous character of schools that are created by that policy, is there any way that you can see, Doctor, that we're going to adhere to the neighborhood school policy of attaining the racial and ethnic heterogeneity which you believe to be necessary for equality of educational opportunity? A. It seems to me there is a very—a specific incompatibility between neighborhood school policies and equality of educational opportunity as it derives from the social composition of the school itself. I think this was not necessarily the case in the past but there has been a general shift over a period of time toward increasing homogeneity, not solely with regard to race but increasing the homogeneity of neighborhoods, and this homogeneity of neighborhoods has, in terms of the evidence that I have seen with regard to school performance, has reduced the equality of educational opportunity as a consequence of the —of increasing the homogeneity of neighborhoods. I think, as a consequence, it's probably necessary in order for equality of educational opportunity to exist to have affirmative action [59] of sort that is not necessary when neighborhoods were less homogeneous than at present.

Mr. Greiner: We have no further questions, Your Honor.

Cross-Examination by Mr. Ris:

Q. Dr. Coleman, the budgetary amount that you are working on as a consultant to the Cabinet committee—is that to provide funds to the states for compensatory education programs basically? A. No, this is not basically what this is designed for.

Q. What are the funds designed for? A. The funds are basically designed to aid school districts in implementing desegregation.

Q. And certainly it's for providing additional educational curriculum, increasing teacher input and so forth, is it not? A. Yes.

Q. And to provide situations where the need appears that there can be smaller teacher-pupil ratio? A. Well, insofar as that is carried out in desegregated settings, insofar as the orientation of that program exists.

Q. But it is to provide that as one of the things—that's one of the things it's to provide, is it not? [60] A. It's to provide—yes, certainly.

Q. To provide more facilities, physical facilities, more teacher availability to the students to attempt to increase their educational achievement? A. Well, let me say two things. First of all, neither the legislation nor the specific guidelines for the utilization of these funds is completed. When legislation is completed then it may be changed in Congress. So that it's not possible for me to say anything specifically about what that legislation or—about the specific details of how those funds will be used. But, I can say that the major orientation of the persons who are responsible for administering those funds is for their use in aiding school desegregation.

Q. Well, the funds are not going to be limited to transportation of pupils from one school to another? A. No.

Q. Obviously not. A. No.

Q. So there are many other programs that are being considered for the use of these funds? A. Yes.

Q. To increase the educational opportunity of the children? A. Exactly.

Q. Has your entire career been engaged in sociology, [61] Dr. Coleman? A. Since I have completed my education, it has. Before that, I worked as a chemist for two years.

Q. And you have never taught in public school systems? A. No, I have never taught in the public schools.

Q. Never been involved in planning or administration of a public school system? A. No, I never have.

Q. Have you ever visited the Denver schools, in any of the individual schools? A. No, I have not.

Q. Have you ever visited with the superintendent or the members of the staff pertaining to vote conditions? A. No, no vote factors.

Q. Are you acquainted with the programs that are presently in existence or contemplated in the Denver schools, particularly Manual High School and Cole Junior High? A. Yes, I'm acquainted with some of their programs. I'm not acquainted with them in precise detail, but I have read about particular programs at Manual, and also programs at Cole and some of the elementary schools.

Q. And what has been the source of your information? A. Some of the material which I think was submitted by the defendants in this case.

Q. That came in during the previous trial? [62] A. Yes.

Q. Have you read some of the transcript? A. Yes.

Q. Is that the extent of your information? A. I also read some of the material which was presented by the Superintendent of Schools, both in 1968 and more recently.

I just scanned the material which was dated, I think, May 5th, 1970.

Q. You're not holding out yourself as an expert to the Denver situation? A. No, certainly not.

Q. Have you had some change of opinion yourself or some change in the inferences you have drawn from your study since the original publication of Exhibit 500? A. No, I think not. At that point or within a month after that was published I wrote a statement which was a review in an attempt to summarize some of the conclusions of that which was published, and that statement I think was substantially the same as what I have been indicating.

Q. Dr. Coleman, insofar as a child coming from a home and neighborhood environment where he has been culturally deprived in his beginnings, his awareness, preschool, and then attends say a middle-class school, was it your original thought as a result of your study that this child would absorb facts and learning processes from middle-class students [63] —students in the middle-class homes who came with the more advanced learning process and knowledge? A. That was not my belief prior to carrying out the study. Prior to carrying out the study I assumed, as I think most of us assumed, that there was far more impact of the usual school resources that we conceive of as school resources relative to the impact of these less tangible things that you were just describing. In carrying out that analysis and as a result of that analysis I was forced to come to that conclusion.

Q. Well, you have more of a feeling now, as I gather from your testimony previously, then, it's more of a matter of a motivation now rather than actually learning from the peer group? That is, he is more highly motivated rather than the learning process itself? A. No, I think

it's simply a matter of having to cope with a more challenging environment which is less like that that he has come in contact with in the past, and to myself, I have often used the analogy of an English-speaking child attending a school in which all the children spoke French. That is, this is the way in which you would—he would very quickly come to learn French; not through anything other than the fact of being confronted every minute of the day with the necessity for communicating with those students.

Q. Doctor, wouldn't you recognize that some children [64] when they go into a school, that basically they are frustrated and give up? A. Well, my assumption before carrying out the survey was that particularly—well, especially class—lower-class students, that is, students from especially deprived backgrounds—if someone separated, for example, Negro students in integrated schools between those who were white disadvantaged and those who were not white disadvantaged, that there would be a negative effect for those who were white disadvantaged. And I'm not surprised in both our analogy and in other analogies to find that was the case.

Q. You didn't find that to be the fact, though? A. No.

Q. You have never been informed of that occurring in individual cases in any of the schools systems? A. In fact, it's kind of a general conception that one gets from an anecdote case that would lead to having the prior expectation or certainly led me to have that prior expectation.

Q. Actually, your study didn't study individual students, did it? A. Well—

Q. I mean, you were studying the large mass of students? A. Yes, but we did that essentially by studying the individual students. That is, we just didn't look at the [65] average performance in the classroom. But we looked as

to how a particular child in that classroom—how his performance was affected by other children in that class, whether it was related to the performance of others in the class.

Q. What do you mean by a stable racial integration pattern, Dr. Coleman? A. Well, when I use that term I mean one in which the—essentially in which the population is stable; one in which the racial composition of the school doesn't change sharply over a period of time.

Q. And there are some schools that are not stable, although racially integrated, is that correct? A. That's right.

Q. There are problems if the school is not stable? A. I'm not sure I understand the import of your question.

Q. Well, is there any difference between a stable racially integrated school and a nonstable racially integrated school in its operation and achievement? A. I think there are both internal and external sources of instability. That is, some of the sources of instability have to do with simply population movements quite independent of the school. But some of them have to do with the problems that arise within the school; problems [66] that are not treated when they arise by the particular school principal.

Q. In your study with respect to teachers, you mentioned that verbal skills, you found, made a substantial difference. Did I understand you correctly? A. Yes.

Q. Was that the principal difference you found in teacher characteristics? A. Well, no. We examined a number of teacher characteristics but this was the one which was most highly related to the achievement of students in the schools of these teachers.

Q. You mean basically in minority schools? A. Well, yes, for minority students. Whether they were in predomi-

nantly white schools or predominantly black schools or predominantly schools of another ethnicity. That is, independent of that, the finding was that the student's performance was related to verbal skills of the teacher.

Q. This was regardless of the experience that the teacher had in teaching? A. Yes, the experience that the teacher had did not appear to be as important a factor in and of itself as those verbal skills.

Q. Was this also true and important regardless of the advanced degree the teacher might have? [67] A. Yes, although these other factors, in particular the education of the teacher, were not unrelated to the child's achievement; just that they were not as highly related as the verbal skills.

Q. Did you find, also, that this verbal skill was the overlying or important—

The Court: Beg your pardon? Keep your voice up, too.

Mr. Ris: All right.

Q. —that the verbal skill was the most important, again, regardless of the race of the teacher or the ethnic origin of the teacher? A. Yes.

Q. So that the race or ethnic origin did not make the difference that the verbal skill did? Correct? A. That's right.

Q. Now, in your study and your conclusions, Dr. Coleman, have you differentiated the predominantly white schools by socioeconomic class of the students attending those schools? A. We haven't classified the schools simultaneously by—well, if possible, let me start over again.

Q. Go ahead. A. Could I ask you repeat the question because I think—

The Court: Have you isolated schools in your study [68] upon the basis of racial or of cultural and economic deprivation?

The Witness: Yes. We certainly have.

The Court: You have made studies that were based upon this? This matter, regardless of race?

The Witness: Yes.

The Court: I think that's what he's leading to.

Q. That's exactly what I'm leading to. And, regardless of the race, if it's a low socioeconomic homogeneous neighborhood, you find low achievement? A. Yes.

Q. And that is true regardless of the racial composition of the school, if it's a low socioeconomic area? A. Yes.

The Court: Well, that's a problem for the legislators or the school board; not for the Court. In other words, there is no—according to you, there is no discrimination based upon race or color or national origin. The discrimination, if any, is based upon poverty. And that may not be anything a court can do. I mean, there is no constitutional deprivation.

The Witness: Two things have to be distinguished. One is the deprivation which arises to a child from his own background and the other is the deprivation which may accrue to him as a consequence of the backgrounds of the other [69] students in the same school that he is attending, and the research that I was reporting found both of those factors to be important in a child's achievement; the first being more important, but the second not being negligible.

The Court: Well, if you have a school that is 100-percent white but is economically and culturally de-

prived, why, its level would be just as low as one that is 100-percent black.

The Witness: The results of the research would say that a child in that school would be suffering lack of equality of educational opportunity as a consequence of the other students in the school, independent of the fact that it was white rather than black.

The Court: I thought that's what you said.

By Mr. Ris:

Q. Now, in addition to the family background of the child—the neighborhood background of that student is also of powerful impact? A. The survey that we carried out did not distinguish between the composition of the neighborhood and its effect and the composition of the school and its effect. The major reason it did not was because most schools—the composition of many schools, most schools, is similar to the composition of the neighborhood itself.

Q. Well, then, Dr. Coleman, we end up with the general conclusion that there are many factors, social and economic [70] factors that determine a child's environment and it has just a tremendous effect on how he is going to achieve in school, is that correct? A. Yes, I think that would be a—

Q. And I would gather then that we conclude that the schools have to take that child as he is and that we have very little impact on him? A. Well, I wouldn't conclude that because I would conclude that the schools, insofar as—well, the schools which themselves have a certain social composition and thus constitutes a certain environment, do either reinforce his family background environment or act apart from it. Insofar as they do reinforce it and insofar

as he does come from a disadvantaged background, then I think the schools do exercise a kind of—in a sense a depressive effect in that regard.

Q. Then the search at the moment—the search of the sociologists and educators and all is how to find a program within the school that is at least in part going to offset this socioeconomic background to this child—that the child is subject to up to this point? A. Well, that would be the strategy, to carry out such a search. At the same time, the social composition of the schools has been shown to be important and this social composition of the school is in itself a factor which then [71] either releases the child from this background environment or fails to do so.

Q. What happens when the child gets out of school and goes back home to his home in the neighborhood environment? Does he have some regression? A. Well, I think two kinds of questions can be asked. One is, what happens to the child? Well, I'm sorry. I thought you mean after the end of school. I think I misunderstood the question. I mean, when he leaves the school during the—

Q. Right. And in the summer vacation. A. There is some evidence now, particularly during summer vacations, that there is a strongly depressive effect upon, for example, Negro children, whether it's neighborhood or home or whatever, but during the summer period.

Q. Dr. Coleman, you were quoted in a recent Senate hearing as expressing an opinion that children should have some experience in a psychological minority environment and some experience in a psychological majority environment. What do you mean? Did you make such a comparison? A. Yes, I did. If I were designing an educational experience for a child, I would certainly include both these

kinds of experiences; the experience of being in a psychological majority and the experience of being in a psychological minority. I think both of these are quite important. Now, [72] these are independent of the question of what is the kind of environment that is most conducive to learning cognitive skills. These have to do with the types of environment that affects a child's social attitude and his sense of self-esteem and things like that, and so I was referring to those when I raised the question of being in a psychological minority and in a psychological majority.

Q. Would such a plan be consistent with a child spending part of this time in his homogeneous neighborhood school and part of the time in an educational center where he could be a minority there as compared to a majority elsewhere? A. Yes, I think that would certainly be consistent. Now, the impact upon his cognitive skills would depend really upon the proportion of time in those two environments.

Q. Did you express in your opinion that an ideal or an optimum would be about 50 percent each way? A. I am not sure what I said in that.

Mr. Ris: That's all we have at this time.

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Redirect Examination by Mr. Greiner (Cont'd):

Q. Doctor, would you report to us, please, on what you learned from your conversation with the Washington office? A. Yes. I'm sorry if my fears were unfounded and—well, I'm happy that my fears were unfounded and the Office of Education—it was indicated that the proscription was against releasing any data on particular schools or school districts which had participated, and not against indicating

[81] which had not. The Denver school system was not drawn in the initial sample of the schools which were sampled or school systems which were sampled for the survey. It had a probability of being drawn but it was not drawn. So it was not part of the survey.

Mr. Greiner: That's all we had from Dr. Coleman, Your Honor, unless you have further questions.

The Court: No.

(Witness excused.)

Mr. Greiner: Our next witness is Dr. Neal Sullivan.

NEAL SULLIVAN, a witness called by and on behalf of plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Greiner:

The Court: Give us your name, address and profession.

The Witness: Neal Sullivan, 287 Harvard Street, Cambridge, Massachusetts.

By Mr. Greiner:

Q. Dr. Sullivan, have you compiled a resume of your experience and so forth? A. Yes, I have.

Q. Handing you what's been marked for identification as Plaintiff's Exhibit 513, I ask you if that is your resume? A. Yes, it is.

[82] Mr. Greiner: Your Honor, we would introduce it at this time.

Mr. Ris: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 513 was received in evidence.)

By Mr. Greiner:

Q. Dr. Sullivan, by whom are you currently employed? A. The Massachusetts State Board of Education.

Q. What position do you hold with the State Board of Education? A. I'm the Board's secretary.

Q. And how long have you held that position? A. For sixteen months.

Q. Now, what are your duties and responsibilities for the State of Massachusetts? A. To carry out the policies adopted by the State Board and by the general court and to oversee the operation of the public schools, housing, and 1,250,000 students.

Q. Now, does Massachusetts have a statute requiring the elimination of racial imbalance? A. Yes, they do.

Q. Do you, in the course of your duties, administer that statute? A. Yes, I do.

[83] Q. Can you give the Court some indication of what is involved in the administration of that statute? A. That was a mandate of the general court indicating that when a school—when a single school would have more than 50 percent black students that the local school committee would have to take action to reduce that and keep it below 50 percent.

Q. Now, what kinds of action have been taken by these local school districts? A. Redistricting, reorganization,

pairing of schools, busing students, to the development of educational parks.

Q. Can you give us some idea of the types of programs that are now under way in the public schools of Massachusetts that are directed towards either desegregation or integration of student bodies? A. I think the one that would be the most significant to this Court would be the City of Boston, with approximately the same student population. A large city, but with a similar public school population. The reason for the size of the school population being about the same is that Boston has an extremely large parochial school population, so that I think it's significant that when I am in Denver I talk about what's going on in Boston— Boston is busing students. Boston is discontinuing neighborhood schools. Boston is developing an intricate program with 28 affluent white suburbs. Boston is doing everything that is necessary under the law to desegregate and then integrate its schools. And at the same time the State Department of Education is running an experimental school in the heart of the black section of the City of Boston that is a suburban school, bringing together black and white children.

Q. Now, these integration programs, many of them, I take it, are brought about by the mandate of this state legislation, is that correct? A. Boston was, or the school committee of Boston gained national notoriety for feet-dragging, procrastination, and doing all those thing that many school committees do. A lot of talk and no action. The law certainly stimulated them. I think I stimulated them a little bit, too.

Q. Now, with regard to the transportation of students in Boston, for example, can you tell us what is involved there? How many students are being transported? A.

Boston is now transporting children on an inner city basis to the suburbs to—to 28 suburbs. I would estimate approximately 2,000 students are being moved out of the city every day in what is known as the MEDCO program and a bridge program. That is, blacks going out.

Q. That's one-way busing, is that correct? A. That's one-way busing; out of the city to the suburbs. There is another program in which Boston cooperates [85] with the state when we bus white youngsters into the city now with state money. The state legislature this year has provided funds for that program. In addition, in the City of Boston, using state money, there are black and white children, many thousands of them, elementary, junior high and high school students, being bused to accomplish integration.

Q. Now, is this busing essentially voluntary, Doctor? A. Yes, it is at the present time.

Q. Now, has that voluntary program in Boston succeeded in turning any formerly all-black schools into predominantly Anglo schools? A. No. As a matter of fact, I am critical of the voluntary nature of the program. It still is a program that wouldn't solve the problems of the City of Boston. The thing that is going to solve Boston's intricate racial problems, school problems, is the assistance given Boston in school buildings. Now, there—they are now planning $200 million worth of new schools and this is the thing that is going to make the difference in Boston. I would predict that there would probably be fewer students riding ultimately in the Boston plan. They are building these large educational park-like schools on the periphery of the ghetto, and with Boston's transportation system, the public transportation system, there is a strong possibility that the busing aspects of this will not be of major concern.

[86] Q. Now, how long has the MEDCO program been in existence? A. I think approximately four years.

Q. Has there been any attempt to evaluate the effects of that program on the achievement of minority children being bused into the Anglo schools? A. Yes, indeed, and also achievement of the Caucasian children in the lily-white suburbs. And that research indicated that the black child's achievement improved and that the Caucasian child just went along on a very steady pattern that he has been achieving on for all these years.

Q. What kinds of racial compositions are being achieved in these formerly Anglo schools? A. Well, it's not the significant type we're talking about because we move 2,000 black children out to 28 communities. What happens here is that there is an attitudinal change on the part of white parents. It was not easy. There was trouble in the 28 communities. There was resistance on the part of the white suburbs, but not resistance enough that practical educators didn't go ahead with the program. It was a good program educationally, sociologically and psychologically, so you do what is right and you convince the school committees. You don't have to convince every person in the suburb. If we waited for that we would never have any integration.

Q. Now, the plaintiffs in this case, Doctor, in [87] designing their plan for relief, have really split it into three parts, the first being desegregation and the second being integration. In other words, programs directed for smoothing this transition when you first have the desegregation.

What types of programs have you—have been used in the Massachusetts programs to achieve that transition? A. Well, the Massachusetts, I think, was similar to most states and educational systems. Initially it was a moving

body type of concept and program, assuming that everything would fall into place, And large amounts of money. It was not budgeted by school committees nor the state in order to prepare children, nor to prepare faculty in order to prepare the ancillary services that relate to the child once he is moved. At the present time we're doing better in Massachusetts. We're far from a position that would be worthy of imitation. We have a long way to go. I think desegregation is moving faster than integration and it is certainly the latter goal that we are working toward. Desegregation is just now getting started. Integration is to achieve something that is worthwhile.

Q. Now, you mentioned programs directed toward, first of all, preparing the faculty of the staff. What kind of programs do you have in mind? A. Well, I would have to cite the efforts made in Berkeley where we have a staff of a thousand teachers where we [88] gave that our prime consideration, our prime budgetary effort, which was made in the area of faculty. There would be no sense in integrating children or trying to desegregate if the faculty wasn't ready to accept the child and to accept the philosophy of the program. So, for a period of two years, we put hundreds of thousands of dollars into the Berkeley program and I think overall it might have—well, during the period I was there, it would have exceeded well over a million dollars. It meant a complete retraining of those teachers who were going to be affected, particularly in the elementary schools. It meant taking them out of their lily-white schools and their ghetto schools—taking them away from there. It meant giving them courses in human relations. It meant taking the children, mixed groups with the teachers, to science camps outside of the city where they lived together. We did everything that a good school

system does in order to prepare those teachers who were going to supervise it and carry it out to prepare them for the day of integration.

Q. Now, you have mentioned Berkeley, Doctor. You were, for some period of time, the Superintendent of Schools for the Berkeley School District, is that correct? A. Yes.

Q. Is that the position you held before your current position? [89] A. Yes.

Q. What was the period of your tenure in Berkeley? A. Four and one-half years.

Q. During what years are we talking about? A. 1964 through—to February, 1969.

Q. Now, during that period while you were there—while your were Superintendent of Schools in Berkeley, was Berkeley undergoing the implementation of a plan of integration? A. Berkeley started its integration certainly after I arrived.

Q. Was one of your duties as the superintendent the administration of a program for integration? A. Yes, indeed.

Q. Now, as I understand it, the program in Berkeley was done in stages, is that correct? A. That is correct.

Q. What was the first stage of the program? A. To integrate the junior high schools. There are three large junior high schools, one black, one white and one in between. And the first assignment was—and these were Grades 7, 8 and 9. The first assignment was to break away from the old 7th, 8th, 9th-grade organization and reorganizing them, completely desegregated, on a 7th and 8th-grade basis. And the 9th-grade children in the city, on a single campus, and that completely desegregated the [90] junior high schools with that one act.

Q. Then when did the segregation of the elementary

schools at Berkeley commence? A. Well, actually it went on in pieces during the period of 1964 through 1968. For example, we bused hundreds of black children into the prestigeous lily-white schools in the hills; those nice neighborhood schools, and we conducted that program and carefully evaluated it for a period of three years. It went so well that the lily-white schools and the parents in those schools were prepared to accept completey desegregation of the Berkeley elementary and primary schools and early-childhood schools that was effected in September of 1968.

The Court: What is a lily-white school?
The Witness: All white, Your Honor.

By Mr. Greiner:

Q. So I take it integration of the elementary schools was first undertaken on a pilot basis, is that right? A. Indeed it was.

Q. How many schools were affected? A. All the schools, some black children, and incidentally a cross-section of black children, some slow, medium, some fast; different age groups. The different sections. Some in trouble, some not in trouble. All bused to every single school throughout the Berkeley area. They had—they all had some—

Q. Were any Anglo children bused into the black schools? [91] A. None.

Q. Did those schools then remain predominantly black? A. They did.

Q. What is the racial and ethnic breakdown of the Berkeley school population? A. Forty-three percent black, five percent Chicano and fifty-two percent white.

Q. There is some Oriental there, is there? A. Yes, and as a matter of fact, I guess I gave too many of the Chicanos

in there because we would have to add Orientals in that group.

Q. Now, as I understand it, the chronology of the integration program was to start at the junior high school level first. Was that your own choice? A. No, it was not. If I had complete freedom to integrate a school system and I, as superintendent of schools, couldn't expect that—but, If I had, I would integrate the early childhood and kindergarten and the first grade first. And not junior high schools.

Q. What's the reason for that? A. The great payoff is the earlier you do it the richer the reward. Very difficult to integrate thirteen, fourteen, and fifteen-year-old students. They have their minds set. They have attitudes that have been reinforced by living in isolation for thirteen years, and it's tough. [92] As a matter of fact, around the country the integration of our high schools has not worked for that very reason. So the great payoff comes at early childhood education, but it's been rarely tried.

Q. Now, you mentioned that the pilot elementary integration program was studied, I take it, for its results, is that correct? A. That's correct.

Q. Can you describe for us what aspects of the program were subject to the study? A. Everything. It was carried on by Professor Johnson from San Francisco University—San Francisco State. It was Dr. S. I. Hayakawa's school, not San Francisco University. I want to make that distinction. This was the very distinguished professor who headed the program up and he conducted it over a period of three years.

Q. Now, for example, was the effect of the integration upon the minority child's achievement evaluated? A. Yes, it was.

Q. What kind of findings resulted from that evaluation? A. That was the most interesting, I thought, part of the research, other than the attitudinal results and the research on the black youngsters transported into the white schools clearly indicated improvement; improvement in achievement. He reacted to the composition. Many of these [93] youngsters had been straight-A students in the black schools. When they got up into the white school they were straight-C and B students by comparison. And they were receiving poorer marks. Their parents went to the white schools and visited there. We saw to that. It was only fair. They saw the great differences in the two buildings; libraries, rugs, properly-lighted schools, lunchrooms that were adequately staffed as against the large blackboard-jungle-like school that we had along the waterfront. Now, the black youngster went into this school during the daytime and returned to his own home at night and he had—it had a great effect on the siblings in his own home. He had homework to do. He had homework in his other school, too, but he didn't do it for one reason or another, and I think I can advance reasons why he didn't. But when he came home from the white school and when he was going back the next day to compete with whitey he started to do his homework and the results were most satisfying to the parents who suddenly insisted that they wanted the same good things for the siblings in the family and all of the neighborhoods also.

So the results were clearly indicated; changed achievement rates on the part of the black students.

Q. Now, when the elementary school integration program was fully implemented in Berkely, can you tell us—tell the Court, please, just what was involved in that program? [94] A. Well, that was a complete desegrega-

tion program and a great deal of planning went into that. I probably spent, and my staff, most of our time during a two-year period to make sure that it would go well. The first year we spent working with the community orienting and educating them as to the why of integration. And that is a major job. We did the same amount of work with the staff and the same amount of work with the students. This was an around-the-clock preparation. We were, at the same time, analyzing the budget and extrapolating the costs to see what it's really going to cost to integrate a school system; to really figure out honestly what it costs to bus half the students in the city. All those intricate details were worked out. Every answer was given. Meetings were held; radio, television. We printed our own newspaper with our stories.

Everybody was given a chance to come up with a plan. We asked the community this one question: Is integration in America and Berkeley a worthwhile goal? And that was the question. The answer was a resounding yes, and then we asked the community if the answer is yes, would you help us find ways of carrying it out. We had hundreds of plans submitted and finally ended up with two and it narrowed down to one which turned out to be the Berkeley Plan. And that was the one that was implemented.

Q. Now, in describing the Berkeley Plan, what sort of [95] other studies did you have available to you to give you guidance? A. Very little.

Q. When was this plan taking place? What time period are we talking about? A. The period 1966-1967, 1967-1968. Those two years where we made the all-out efforts for total integration of the primary elementary schools.

Q. Were there any other integration programs then in existence which you could use as models for your own pro-

gram? A. No. Riverside had made a good move—Riverside, California, and Camden, New Jersey; Evanston, Illinois; and there were others. We felt that there was one missing dimension that—to the few that made an effort, and that missing dimension was this: they didn't seem fair to all concerned; fair to the whites. They didn't seem to us to be fair to the blacks.

Q. Why not? A. The black child was the only one taking the bus ride.

Q. Now, we were inquiring, Doctor, about the components of the integration program in the elementary schools. What was done? For example, did you simply close the formerly all-black schools? A. No, we didn't. Every school—and there are old [96] schools in Berkeley—they have the same problem that a city has like Boston. Berkeley could spend a hundred million dollars on its schools right now because many of them should be torn down. The interesting thing was that the schools that were in shambles were the black schools. These at one time were white schools prior to World War II. When they were finally taken over completely by the blacks, no changes were made. The library, cafeteria, fluorescent lights, the rugs went into the white schools. Also, the teachers who were more experienced seemed to follow the white students and not the black child, and instead of having trees and grass, we had asphalt jungles on the playgrounds. It was similar to those stories that we can read about in the inner city school. Berkeley was no exception. The blacks took over old schools and they became more old and tired. Very interesting. Once those schools were integrated, the first thing that the school committee had to do was put in a sprinkler system in them. Also, the town took out the incandescent lights and put in fluorescent lights. They did

all these things that should have been done many years before just for humane reasons. And it wasn't until the white child was to enter those schools did the community really make the decision to put the money into them to correct them.

Q. Now, how were these formerly all-black schools utilized? What did you do with the grade level difficulty in [97] the elementary schools? A. We're now talking about the Berkeley Plan and the high schools. They were very small. Some of them were as small as eight groups; cozy neighborhood groups, I like to call them. Some were slightly larger than cozy, but really not big. They were delightful schools for the upper middle class and middle-class people. Those schools had limited playground space and for that reason they became the K-3 schools. All of the white children in those schools, all the fourth-graders, all the fifth-graders and all of the sixth-graders were given bus rides into the black section of Berkeley where those schools were made into middle-class schools, Grade 4, 5, and Grade 6. That basically was the plan.

Q. Now, was that reassignment mandatory? A. Absolutely.

Q. Was that bus ride mandatory? A. Absolutely, until someone wanted to have his mother drive him or get on a bike. He had to go to school.

Q. Now, prior to the implementation of the Berkeley program, how many predominantly white schools were there in Berkeley? A. Well, let's look instead at the predominantly black ones. I would say six predominantly black and fourteen or fifteen predominantly white in that area.

[98] Q. What was the total student population? A. Sixteen thousand.

Q. Now, once you mentioned programs directed toward faculty and staff. What was it that you found that it was necessary for the faculty and staff to learn in connection with this integration program? A. Well, we learned a great deal. We learned, for one thing, that the universities and colleges in preparing teachers for this wonderful profession of mine completely ignored the entire factor of human relations.

Q. What do you mean by human relations? A. You have to live with one another; the social ethics of getting along together, the climate of the community, the respect for the other people; understanding a little bit, at least, about the history; what was true about the black man, really; what happened to him in America; the history of the things; the history of the Oriental; the history of the Mexican; the history of the white man in America.

Q. These were programs of minority history that were taught to the teachers? A. Oh, yes. We had to start over, teachers and students.

Q. Now, were there also minority history programs that were implemented for students themselves? A. Absolutely. We introduced a kindergarten through the twelfth grade, a social science curriculum that included [99] the history and the culture—the cultural achievement, the giants in our history who were black in the world and the —and who had been somehow or other left off the history pages. This was put in the program, yes.

Q. Were you also breaking new ground, Doctor, in the development of those curricula? A. Well, not really. I think most school systems in the country are sensitive to this problem and I am very proud of what's been done from Maine to California in this area. I think educators have been quite responsive.

Q. Now,—so the Berkeley Plan then was a plan premised on integration? A. Absolutely.

Q. Now, prior to the implementation of the Berkeley Plan, what, if anything, in the Berkeley school system was done or attempted to be done to improve minority achievement through compensatory programs? A. Well, the first thing they did—they just about doubled their tax rate in order to have many, many millions of dollars to pour into these black schools.

Q. How long did the compensatory effort last? A. Four years, and it continued. When integration was effected, compensatory education didn't stop. You see, I believe that's the best compensatory education; integration. So all this was a compilation of those things that we learned. [100] For example, the thrust in our curriculum was that everyone is going to learn to read. And we first had to convince teachers that everyone had the ability to read. That was one of those reasons for the in-service program because a lot of teachers look at someone and say he is black and he can't learn, and if you're white you can read. So they work with you. They don't work with the people over here. So we had to do a great deal of work with reading and we all became reading teachers and we mandated reading courses and proper methods courses for our entire staff, and I mean the entire staff, all the way through high schools. Those teachers who were teaching English and social science were expected to become versed in the program.

Q. That was part of the integration program? A. Absolutely. They certainly wouldn't have moved into a desegregation and an integration program without preparing the students for this, and one of the ways to prepare them is to better educate them. Now, the results of our efforts

clearly indicated that we were not going to do it in isolation. It was a missing component, and we found this missing component when we bused black children into the white schools. Different things happened.

Q. Now, before you had the integration program at Berkeley, can you describe for us the types of compensatory programs which were attempted? [101] A. I think Berkeley, like every other community that has a heart, tried everything that had been called to our attention. The major thrust was obviously where the money is, and that is what the teachers insisted upon, is to lower classes—lower class size. That costs money. That costs considerable money. Class size then was given the first consideration. The second was materials and equipment. Hundreds of thousands of dollars for the electronic equipment that most schools have now. Those new books that try to incorporate the black man in our history. The addition of paraprofessionals. In other words, children that the youngsters could identify with. Lots and lots of black administrators at high levels. That's very important. Berkeley gave that top priority. Black principals in white schools. We felt that was only fair. White principals in black schools. We felt that was good. You name it and we tried it.

Q. Did you have cultural enrichment programs, for example? A. Yes, we did. We bought all the records and all those humanity series and Encyclopedia Britannica and others that do just an excellent job. We gave them the ride to the school, and a ride to the park. The ride to the super market, the camp, and a ride to the police station. We wanted them to have—to meet everything.

Q. Did you have programs that were designed to build [102] the minority child's self-esteem? A. We tried.

Q. Well, so you had four years of primary emphasis on compensatory education. What was the impact of compensatory—the compensatory program on the minorities' achievement? A. It had no effect.

Q. What, in fact, did happen? A. We integrated the schools. What happened was overall there was retrogression in all the black schools in achievement.

Q. Now, since the full implementation of the integration program at Berkeley, have there been continuing studies of its impact on minority achievements? A. Massive studies; overstudies. I'm not there any longer, but there they are under the microscope, yes.

Q. What are the results of these studies? A. Of course, they have only been in there sixteen months, actually, of school following the complete integration of the schools. I talked to the superintendent of schools there. I haven't personally seen the evidence. He tells me that—

Mr. Ris: Just a moment. We will object to this. If there is some evidence of this, we would like to see it.

The Court: Sustained:

By Mr. Greiner:

Q. Well, what was it then that led the [103] Berkeley community to decide to change its student assignment policy? A. It was based on—obviously the school committee had an effect on the community. A school committee that was committed to doing what was right for the children and a superintendent who believes in quality integrated education, a staff that cared, and a selling job to that community, and then not waiting for the consensus on the part of a hundred and twenty-five to a hundred and

fifty thousand students. But the school committee voting to do what was right and they did.

Q. Now did you, as the superintendent at Berkeley, feel that there was an educational premise to the integration program? A. If I hadn't, I wouldn't have recommended it.

Q. What other bases were there for the decision to integrate? A. Psychological and sociological and legal and moral.

Q. What about the psychological basis? A. Well, my experience with black children—and I have taught in black schools in the South and when I served there as a superintendent of schools in Berkeley I am a teacher. In meeting these children, it was very clear to me that in their isolation they were completely rejected and psychologically this came through. Inferiority complexes; a [104] feeling that they couldn't accomplish anything. So, psychologically, the experience was devastating and has been for 200 years. Sociologically, we are stereotyping black people. We don't have fair housing in states where I have worked. So they live in ghettos. And that tells the community something. Morally, I think as an educator I should do what I consider is right. And legally I would leave the courts to decide that. I followed what I thought was meant by the Sixteenth Amendment and the Civil Rights Act of 1964.

Q. Now, when Berkeley was considering all these plans before the ultimate plans were actually decided upon, was the alternative of simply increasing the compensatory education and leaving the schools segregated? Was that an alternative? A. Yes, absolutely. And a segment of the community pushed real hard saying that the money that we were going to spend for busing, if it could be put

into programs in the ghetto schools, everything would come out okay. Now, that's the oldest promise of them all, and it was rejected.

Q. During this period of emphasis on compensatory education, what were the costs of that compensatory program? A. Well, the tax rate was $3.25 when I went to Berkeley. In order to do all these things that I talked about doing, the lowering of the pupil-teacher ratio, increasing teacher salaries, improving facilities, using money for transportation, the tax rate went on a vote of the people from [105] $3.25 to 4.75. That happened two years after I arrived in Berkeley.

Q. Well, approximately how many million dollars were spent for compensatory education before the integration program was implemented? A. I would hesitate to give you a figure here today.

Q. But that money was not effective in raising the minority achievements? A. No, it was not.

Q. Now, did you have any experience with regard to using larger class sizes in the integrated school than had been possible in the segregated school? A. Well, we moved during those years into differentiated staffing, into large groups, small group organizations. But we did not, when we went into integrated classes, indicate to people it would save money. As a matter of fact, we retained those pupil-teacher ratios we had introduced into the all-black schools when we totally integrated the system. We continued to have a lot of pupil-teacher ratio in the integrated schools.

Q. Now, what in Berkeley—did you have complete community acceptance for this integration program? A. No, certainly not. There was a recall election during the early years of my administration.

Q. They didn't like what you were doing? [106] A. A

good many people didn't like what I was doing, that's right.

Q. Now, what was done to marshal community acceptance of the integration plan? A. I mentioned earlier that we used the media completely. I had my own radio programs. I had my own column in the local newspapers. We found this effective. But I think probably our most effective communication vehicle was the openness of the school committee meetings, the willingness of the school committee to everything; where to move around the community to hold its meetings in black schools and in Oriental areas and in the hills. It was an all-out effort by not five people nor one person, but an entire staff. The staff, for example, the union, clearly indicated in its negotiations with the school committee that they wanted integrated schools. The students themselves spoke out on the subject. We spent a great deal of time with the clergy; the clergy took a position on the subject. Spent a great deal of time with the Chamber of Commerce that was reluctantly opposed to—initially opposed to school integration; came around in favor of it. The town businessmen. The university staff. We worked with all of them and asked for their support and in the end got it from most of them.

Q. Now then—

The Court: Well, you have had that kind of [107] acceptance of your ideas and your program in Massachusetts, apparently.

The Witness: Your Honor, I think that integration is widely accepted across Massachusetts today. We have pockets of resistance, particularly in Boston and Springfield.

The Court: But you're doing it quite differently in Massachusetts. You're following different patterns.

The Witness: Yes, in a way. As Commissioner of Education, I have several hundred committees for which I am responsible. But I'm continuing to use the media. I'm continuing to ask every school committee to do those things that I did in Berkeley. I have my own study advisory council, my teacher advisory council on a state basis, so I'm doing the same things I did in Berkeley but now on a state basis.

The Court: Well, is this a statewide system?

The Witness: No, it is not, Your Honor.

The Court: How come you can exchange students inside—or to the suburbs?

The Witness: That has to be by vote, Your Honor, with the school committee in the respective suburban community. It has to be by cooperation. And not by edict of the state. I only have persuasive power in this area.

The Court: And so these suburban schools agreed to receive the students?

[108] The Witness: (Nods affirmatively.)

The Court: Is this an exchange program?

The Witness: No, it was a direct movement of blacks into the white schools. There was no exchange. Now there is a movement back in the suburbs into the city, but that's a separate program. The two are not related.

By Mr. Greiner:

Q. Doctor, when you got the minority child into the desegregated school, what did you find with regard to that child's level of achievement? A. It was many years below the level of the white child. We didn't discover that when he got there. We knew it before he went.

Q. Now, what did you do to help the minority child catch up? A. I think the greatest thing we did was to integrate every classroom in the same manner we integrated the city. Every classroom in every building also had to be integrated and in this same degree. They were heterogeneous classes. Berkeley had been a district tracking school system. And it continues to have some of the tracking aspect at the secondary level, although they are quickly eliminating it. But at the elementary level we went from homogeneous groupings to completely heterogeneous arrangements. And in my opinion it had the greatest effect on the black child.

The Court: Well, to what extent? What do you [109] regard as heterogeneous composition?

The Witness: This would be, Your Honor,—

The Court: What do you mean by your telling us that?

The Witness: Children of different intellectual capacities, ranging from the area of the low 90s, the high 80s in the Intelligence Quotients to the 150s and 160s. The wide range. We would not put the low students together. We would not put the fast students together.

The Court: What about racial composition?

The Witness: The same way, Your Honor. In each classroom we used computers to do this. There

would never be in a classroom—and again I indicated at the secondary level there is still a trace of the tracking system that goes on. But at the elementary level the classroom would have somewhere between 30 and 35 percent black children and the other composition, the 55 to 65 percent would be either a combination of blacks and Orientals and Chicanos or all blacks in some cases. But each classroom would have the same racial composition as the school and as the community.

By Mr. Greiner:

Q. Now, prior to the implementation of the integration program, I believe you mentioned that the minority schools in Berkeley continued to have less experienced teachers, is that correct? A. No question about it, that's right.

Q. What about the rate of teacher turnover at those [110] minority schools? A. Three to four times as high as it would be in the white schools.

Q. Now, what had been done prior to integration to try to hold the experienced teachers in those ghetto schools? A. No particular bonus, but instead an effort to provide all teachers with top salaries. That was the thrust at Berkeley. I'm not about to say that teaching in an all-white school is a picnic, but teaching in a black school is just an impossible situation. Both the all-white school and the black school can indeed be challenging, and should be rewarding. So the Berkeley Plan was to upgrade the salaries of all teachers; not some teachers.

Q. Now, did you consider the alternative of additional compensations as an inducement to get these good teachers into the black schools? A. It was considered and rejected.

Q. Why did you reject it? A. It was not fair. It wouldn't

get the job done. Providing additional money in communities that I'm familiar with where there have been insensitive programs, providing transportation in and providing some extra money—it hasn't brought out better teachers. Instead, when Berkeley completely integrated its schools, the greatest reward for the recruiter was that we had 300 applicants for many of our [111] jobs. Teachers like to teach in an integrated setting if salaries are commensurate with the challenge.

The Court: You mean they prefer integrated schools over the segregated schools?

The Witness: No, I didn't mean to say that, Your Honor.

The Court: I'm curious.

The Witness: No. I think teachers—the teachers that I have been employing now for these good many years since moving with the Kennedy administration into the South and recruiting blacks and whites, teachers by and large would prefer teaching in an integrated setting.

The Court: And this is a—there is a tendency for them not to like to teach in a segregated school?

The Witness: Particularly segregated black schools, Your Honor.

The Court: I suppose, like anybody else, they don't like to travel long distances.

The Witness: Your Honor is right. That's one of the reasons.

The Court: They probably prefer to live in more pleasant areas.

The Witness: That's one of the reasons.

The Court: Go ahead.

By Mr. Greiner:

Q. Prior to the implementation of [112] the integration program, can you describe for us the types of classroom discipline problems, keeping the child's attention, and so on, which took place in the minority schools? A. It was similar to those minority schools that I visited and that I have operated all over the country. It just happens that when you put black children together in isolation you bring out the very worst of them, and I think that is true with any minority group. It certainly was true in the Irish ghetto school I attended outside of Boston when I was a kid.

I don't think you bring out the best in people when you isolate them and when you add to their frustrations of their being rejected, and it makes it doubly difficult and so discipline has been hard and it was hard in the Berkeley schools in the all-black schools.

Q. Does this take teacher time away from teaching? A. It makes it almost impossible at times.

Q. Now, what was the experience on classroom discipline problems in the integrated environment? A. Well, this probably was the most satisfying part of the integration program, particularly for the teachers who were coming from the all-black schools. Now, we found for the first time perfect control, perfect relationship; group self-discipline. And there indeed was a controlling and a leveling factor brought into the school, brought into the [113] classroom by the white child. There was no question about that. It became an easier situation in order to conduct an educational program.

Q. Now, approximately how many children are now being transported under the Berkeley program? A. Four thousand.

Q. And in considering this transportation—let's see. That's about 20 percent of Berkeley's school children? A. Yes, and we're talking about the elementary school and that's about half of them. There is no transportation provided for the junior high school youngster. They get there on their own.

Q. I see. So, half of Berkeley's elementary school population is transported? A. Approximately.

Q. Now, when you were considering transportation as an alternative, was this opposition on the school based on safety reasons? A. Absolutely.

Q. What did you find? Did you study the safety factors and the—in the school transportation system? A. An exhaustive study was made.

Q. What was it that you found? A. It was the safest way to get to school.

Q. Was there a—was this a local study or did you go [114] to national sources? A. We started in the State of California and that particular system—we had the complete cooperation of the California State Patrol and we used their research. The year that we studied it they didn't have a single death in the transportation of hundreds of thousands of students under extremely difficult conditions. Miles and miles. The same general observation was made with the national study through the National Education Association. The most dangerous way to get to school was to walk, and the most dangerous place to walk is in your own neighborhood, and the next most dangerous way to go to school was to ride with your mother or father in that second car.

Q. Now, have you also had an opportunity in the Berkeley program to study the impact of integration upon the Anglo child's achievement? A. Yes, indeed.

Q. Were there adverse implications? A. No.

Q. What happened to the achievement levels of the Anglo child? A. Continued on its very steady pattern. No change.

Q. What kinds of racial composition are we talking about in the integrated schools? A. Thirty-five to 45 percent black in every classroom.

[115] Q. Now, from your experience as a school superintendent and in your position with the Department of Education with the State of Massachusetts, you have had some experience in both compensatory programs and in integration programs. A. That is correct.

Q. Do you have an opinion, Doctor, as to which is the most effective way to go about this? A. Yes, I do.

Q. What is that opinion? A. That is the best compensatory educational program that I know of is integration.

Mr. Greiner: No further questions.

Cross-Examination by Mr. Ris:

Q. Are conditions in Boston comparable to those in Berkeley from the school standpoint? A. Public schools, I would say no.

Q. What's the school population in Berkeley? A. As I indicated in the testimony, 16,000.

Q. What is it in Boston? A. Approximately 100,000 of public school students.

Q. What is the parochial school population? A. Close to 50,000.

Q. In Berkeley what is the geographical area of the school system? [116] A. I would estimate in the area of 25 to 30 square miles.

Q. Do you know what the average busing distance is for

a child under the present plan? A. I would estimate around three or four miles.

Q. And what's the general nature of the population in Berkeley? A. Are you speaking now of school population?

Q. No, I'm thinking of professionals and the occupation of parents. A. I would say it's a cross-section of America; lots of poor people and quite a few rich.

Q. Would you say that the average intelligence of a native of Berkeley is higher than that of the average person in the State of California generally? A. No, I wouldn't say that.

Q. You wouldn't say that? A. No.

Q. Do you say that the problems of any school district are the same as the problems of any other school district? A. If they have similar racial compositions, yes, and socio-economic conditions, I think they're very similar.

Q. Can you take one plan for one system and apply it to another? A. No, I clearly indicated that I thought each city [117] should develop its own plan of integration.

Q. Each city has to be handled—has to handle their problems on a case-to-case basis? A. Yes, I think that you involve all the people to come up with the Denver plan.

Q. Now, your first plan in Berkeley, you indicated was a partial plan. How many children were involved in that before you went into your September, 1968, all-city plan? A. Are you talking about the busing of the primary youngsters to the hill schools?

Q. Yes, sir. A. Three or four hundred.

Q. Was it more than 250? A. I would estimate from three to four hundred here today in this courtroom.

Q. Well, you wrote an article in the Harvard Educational Review, didn't you, concerning the Berkeley Plan,

the Berkeley Unified School District? A. I recall writing for the Harvard Review, yes.

Q. Do you remember stating that approximately 250 Negro elementary school children were being transported from overcrowded areas? A. Would you repeat that question, please?

Q. Approximately 250 Negro children have been transported from the overcrowded poverty areas of—

[118] The Court: The question is, did you write that?

Q. Did you write that, sir? A. If it's in the Harvard Review—What's the date of that?

Q. Well, I don't find the date on it. I'm sorry. A. Because 250 might be the right—

Q. Well, did that expand? A. Yes, it did increase as it went along; not to any great degree. I indicated three or four hundred would be tops.

Q. Now, this was your first plan, was it? A. At the primary level?

Q. Yes, sir. A. Yes.

Q. And were these children selected to do this or did the parents volunteer? A. The parents had to be involved.

Q. And they had to volunteer their children to do it? A. That's right.

Q. Do you know whether this was—whether there was any correlation at all to the socioeconomic area of the people who were interested enough to volunteer their children as to the balance? A. Well, we had sufficient volunteers so that we could—

Q. Well, not everyone that volunteered was taken? Did [119] you make any study to determine the family back-

ground of the children who were volunteered? The parents of those who volunteered as compared with those who had not volunteered? A. No, because we felt it was a cross-section of the school but never attempted to find out—

Q. What that—what exactly that correlation might be? A. Yes.

Q. What did you do? A. What did we do about what?

Q. Attempting to determine this socioeconomic background of the family from which each of these children volunteered? A. We determined the socioeconomic background of all children in Berkeley.

Q. I'm asking you, did you do it on an individual basis? A. Yes.

Q. How did you do that? A. By questionnaires to the parents.

Q. And you did that on these 250 children? A. Did it on all the students.

Q. What did you find out? A. A real wide range of socioeconomic conditions in the community.

Q. And then what did you do with that information? A. In selecting the students to become involved in the integration plan, we took a cross-section of them.

[120] Q. And in each instance you actually went back into the child's background and determined what that background was? A. We tried.

Q. What type of questions did you ask? A. I don't remember specifically because I didn't work on the questionnaires.

Q. Did you see the questionnaires? A. I recall seeing them.

Q. Do you recall what the questions were that were included in that questionnaire? A. No, I don't.

Q. But you did not select anyone who had not volunteered through their parents? A. That's right.

The Court: Well, in this busing program—that's a voluntary program?

The Witness: Yes, it is, Your Honor.

The Court: Well, did you design that?

The Witness: No, that was designed by the school committee of the City of Boston.

The Court: In other words, this doesn't represent any change of viewpoint that you had from Berkeley to Boston?

The Witness: No. Again, my powers are persuasive, Your Honor, and this was a voluntary system and in an interim [121] period prior to the erection of these many new school buildings.

The Court: In other words, you still hold the views that you had when you were in Berkeley?

The Witness: Yes, I do, Your Honor.

The Court: But you're not able to put them all into effect in Boston?

The Witness: That's right, Your Honor.

By Mr. Ris:

Q. With respect to the achievements of the pupils in Berkeley, was the district norm higher than the national or state norm before your integration went into effect? A. I think so, definitely.

Q. And so you started out on a higher basis to begin with at all levels? A. Not at all levels, no.

Q. The average? A. It would be higher.

Q. Now, with reference to your—one of your writings—it's impossible to separate the effects of integration and

the effect of the students' social class. How do you analyze the effects of integration? A. In terms of the class a child is coming from. If you would read a little more there—

Q. In the comparison of predominantly Negro schools [122] with the hill school levels, are the foothill schools the ones that already were partially integrated? A. That would be correct.

Q. And in your article you're talking about three schools, the three levels: one, the hill schools which would be under, it says here—

The Court: Then the foothill schools were what? You haven't mentioned those before.

The Witness: This would be partially integrated.

Q. Now, how many were there of the so-called hill schools? A. Well, I would say eight.

Q. How many foothill schools? A. Four.

Q. And the Negro schools? A. Four.

Q. Now, in comparison—and I will go back in the quotes here—in comparison with the predominantly Negro schools with the foothill schools, it is impossible to separate the effects of integration . . .

Now, if you can't make a distinction to the effects of integration and the effects of the students' own social class, as stated in this article, then how do you determine the effects of integration you previously testified to? A. Through the experience that we had by moving the [123] black youngster from the very low socioeconomic areas of the city into the higher socioeconomic areas.

Q. You can't determine the effects of integration after you move, can you? A. That's right.

Q. As you say here, that you cannot separate the effects of integration from the effects of the students' own social class? A. Well, we're talking there about the foothill schools and just as in most communities, thank God there are some black people who make it despite the system.

Q. Lots of people, white people, make it despite the system? A. Indeed. We have a different type of circumstance with black—with the black child responding altogether differently to the environment than the youngster whose family didn't make it and hasn't made it and is in great trouble.

Q. Now, even after these youngsters from the Negro schools moved to the hill schools, was the achieving gap closed between the children that were moved up in the hills and the children who were originally on the hill? A. I indicated that there was progress made; slow progress initially on the part of the black youngsters moving up with no slowing down on the part of the white child.

Q. But you stated in the article nevertheless it [124] remains a considerable achieving gap between the Negro and other students even at the hill schools? A. Indeed, and that's correct. And that's why we can't delay with integration.

Q. Then integration per se is not the only answer, is it? A. I think it's the only answer in America. If we're going to have—

Q. All you do is integrate, and that solves everything? You don't mean that, do you, sir? A. It might not solve everything but, if we have to make some choices here as to what we're going to do in our society, I suggest to you that the top priority I would give would be to give inte-

gration a chance. We haven't given it a chance. That's all I'm saying.

Q. Well, that, in and of itself is not sufficient, though, even under your theory, is it? A. Under the Berkeley Plan, I felt that there were so many indicators in Berkeley after the complete integration that it became a more mature community where people were living together in harmony so that I was convinced that, with that experience and the experience that I had in the South, that indeed it was the answer today. Economy is needed. Everyone has to make a living. We have to have health services. We have to live in decent surroundings. I'm not saying a [125] school is going to correct all these things. It's going to help, though.

Q. That's what I'm trying to get at—that mere integration isn't the beginning and the end. You don't deny that? A. It's going to go a long way, but there have to be other factors involved in America.

Q. Now, also, even under your own theory that integration in the schools has to be—as you say in the article, a massive educational revolution? Right? A. I like that expression.

Q. Well, that's yours, isn't it? A. You bet. I like that language.

Q. You need something more than integration? A. You bet. Massive reform.

Q. Massive education revolution for which community— A. Would you read that?

Q. Certainly there can be no educational—equal educational opportunity in Berkeley or any other place without racial integration of the schools, and this is italicized—massive educational revolution for which community educational centers offer the most promise. A. I'm talking

here about a part of the Volume II: Racial Isolation. That was given to you this morning as an exhibit, in which I wrote one of those articles—one of [126] the suggestions, and it was the—on the educational part. What I'm talking about here is a much larger community center for a single campus where we would bring together larger numbers of children where we would have the libraries, the cafeterias, the gymnasium facilities, the classrooms, the speech teachers, special facilities, the nurses and so forth that you can't have in a small neighborhood school. That's what I'm referring to here.

Q. And this is why you get into that particular type of center, a differentiated staffing as you mentioned? A. Exactly.

Q. So one without the other is still ineffective, is that right? You have to have a continuing thing? A. Well, one without the other is what Berkeley has now because Berkeley doesn't have the other that I'm talking about. They're spending a great deal of extra money educating children in an integrated setting in small schools. Small schools are expensive to operate. And the final Berkeley Plan on my leaving there was a recommendation for a series of educational parks to replace the neighborhood schools for reasons of economy and services.

Q. And that has not been accomplished even at Berkeley, then? A. Not yet.

Q. Now, even beyond that, that is not going to solve [127] all the problems of the disadvantaged youngster, is that correct? A. That is correct.

Q. Still a lot of things that the school district can't do anything about? A. (No answer.)

Q. That has to be done by—it's got to be done by other governmental agencies? A. Let's assume all school sys-

tems will make the massive and the humane effort that Berkeley made and then there would be fewer of these things left out.

Q. Well, you have your own theory in this article. You said that education and reform itself is not sufficient. So I think it has to go beyond the school district for all these problems before all these problems are solved. Isn't that true? A. Indeed it does. Reform has to be a cross-sectional thing in our society.

Q. Now, you talked about Berkeley, that the entire system became engulfed in a reading program; all the teachers at all levels. A. I indicated that, at the secondary level, those teachers, English and social sciences—

Q. Now, this great effort that was done went beyond the normal curriculum, did it not? [128] A. Yes, it did.

Q. And it involved additional programming? A. Yes.

Q. Additional teachers? A. Yes, indeed. Machines, everything.

Q. And how do you distinguish between those inputs from compensatory education? A. They are part of compensatory education.

Q. Oh, they are? A. Yes.

Q. So they're still needed, are they? A. Indeed.

Q. Even under your theory? A. Yes.

Q. To what extent did you have student mobility, particularly in the core area schools in Berkely? Was it a major factor? A. Which school?

Q. In the core area. A. Extremely high mobility.

Q. Did you find a decrease in mobility after the integration? A. We found that to be true but we also found another phenomena that is understandable. We found the heavily-populated blacks in Oakland and Richmond segregated schools [129] falsifying records and doing all sorts

of things in order to get into the Berkeley schools. I couldn't blame them. I didn't like at all the falsifying of records but I could understand what they wanted.

Q. You got an influx then? A. Yes, we did.

Q. Now, you talked about an increase in the tax rate. Much of that went for things that were other than strictly compensatory education, did it not? A. I would say yes.

Q. Capital improvements, increased teacher salaries, increased costs of doing business, so to speak? A. Indeed.

Mr. Ris: That's all.

Redirect Examination by Mr. Greiner:

Q. Dr. Sullivan, it's a fact, is it not, when Berkeley was considering its integration program, that there were great fears expressed that integration would lead to white flight? A. Yes, indeed.

Q. Now, you mentioned there was an influx of blacks into Berkeley. Was that also—was there also an influx of Anglos? A. That probably was the most satisfying of all the [130] phenomena that occurred around the Berkeley Plan. You see, Berkeley, since 1948, had started to lose its white population. The mayor of the city was concerned concerned. It was not until Berkeley took the first initial steps to desegregate its schools did the white migration stop and turn around, and during my years in Berkeley there was an increase in the white population. I'd like to make it very clear in answering the question from the defense about the increase in the black population—we had to be extremely rigid and find those black children who were illegally entering the school system and asked them to leave. But there was a stop in the white movement out and there was a slight increase in movement in.

Mr. Greiner: No further questions.

Mr. Ris: Nothing further.

The Court: I gather from what you have said, Doctor, that you believe that the isolation of the black students is one major problem in the inferior education?

The Witness: I definitely do, Your Honor.

The Court: And then you do not agree with Dr. Coleman's thesis that the big problem is economic and cultural deprivation and that the solution is to integrate the deprived with the culturally-adequate group?

The Witness: Judge, as you report what Dr. Coleman said, I will accept it. I was in the courtroom earlier this [131] morning and I must say I couldn't hear Mr. Coleman. I'm sorry.

The Court: I may be oversimplifying what he said.

The Witness: If that's what he said, then I would enter a demurrer. I think the big problem in education is the isolation of black people.

The Court: I believe he said that, if you had a school populated by blacks, if 50 percent of them were from homes that were economically and culturally secure, that the result would be just as good as if you had 50 percent of students from white homes that were middle-class homes.

The Witness: Your Honor, I have read that and I suggest to the Court today that what we should start to do is become equally interested in at least what happens to the attitude of these people. Let's assume that making—I am concerned about their hardened attitude about their brother whites and yellows and browns. I have supervised black schools and I can

report to you that we had some singular success in achievement, but I can report to you that the attitudes didn't improve. Instead they worsened, and that concerns me even more than achievements.

The Court: I can understand that. What do you think you do to accomplish this improved atmosphere? Do you stimulate the student to do more work? You say there is an attitudinal change.

[132] The Witness: Absolutely, and you put your finger on it, Your Honor. The word is stimulation. Indeed. And it is stimulated and I think I heard you say this morning that the black man is competitive when he is given that opportunity.

The Court: I don't think there is any question about that.

The Witness: I thought I heard you say that. And I agree with you. And I suggest that, if we provided him with those opportunities to compete against the white student, that the—that his own level of achievement would richly reflect the competition. The achievements would change. We know this to be true, if they were given that opportunity.

The Court: Well, am I to understand that you took a couple of years to get this program really set up and off the ground at Berkeley?

The Witness: Yes, Your Honor. It took two years in order for me to guarantee to the parents that there would be something good at the end of the bus line and that I could guarantee that for them. It took two years for us to do it, to complete everything.

The Court: And in Boston, when you get these new facilities completed, do you expect to carry out

the same kind of a program you have had in Berkeley?

The Witness: Yes. We're moving toward that direction in Boston now, retraining of staff, and there is [133] real receptivity in the city and in the staff in preparation of programs.

The Court: But your view is that there should be a combination, apparently, is that correct?

The Witness: Absolutely.

The Court: That people now say there ought to—they ought to have a home school and a campus school as well?

The Witness: No, I'm not saying that. My experience here indicates that that is doubly expensive and I oppose that type of arrangement.

The Court: How would you work it out, then, for them to have the exposure?

The Witness: I think the way that I worked it out in Berkely and that it is being worked out now in Boston and in innumerable other communities throughout the United States, where a child is given a single campus and on that campus—it's large enough to have a multiracial setting with different types of facilities that that student and his fellow students need, and I think the best arrangement is to do that—the best way to do that is by keeping them on a single campus, on a permanent basis. That doesn't say you don't give them the rich rewarding field trips and exposures. You do that, Your Honor.

The Court: But this is a long-term program, this campus idea, isn't it? You can't use the same facilities that [134] you have at present.

The Witness: You can use some of the same facilities, Your Honor, but again you're being very perceptive and I have strongly recommended that the state and federal government provide our cities with dollars so that school administrators can built these facilities without pushing harder on local bond issues and overburdening local property taxpayers on the tax basis. I think we need state and federal help for these buildings and I think we're going to get it. We have it in Massachusetts now.

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GEORGE BARDWELL, a witness called by and on behalf of plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Greiner:

[135] The Court: Please state your name and address.

The Witness: George Bardwell, 22801 South Harrison, Denver, Colorado.

The Court: You're the same George Bardwell who has testified before and has been qualified, is that right?

The Witness: I have.

By Mr. Greiner:

Q. Dr. Bardwell, in front of you on the witness stand you will find a stack of exhibits, the first of which has been marked for identification as Exhibit 509. Would you please describe Exhibit 509 to the Court? A. Yes, Exhibit 509 is a table showing the twelve of what are designated elementary schools showing the enrollment data by

the Anglo percentage, Negro percentage and Hispano percentage; teacher experience data for 1968 for new teachers, probationary teachers and median experience; and percentile median achievement for 1968, Grade 5.

Q. Now, with regard to the percentile achievement of the schools which to date the Court has designated, how many such schools are there, first of all? A. Excuse me?

Q. How many Court-designated elementary schools are there on that chart? A. There are twelve.

Q. And what is the source of the data on Exhibit 509? A. The source of the data, the Defendants' Exhibit F-1, [136] Plaintiffs' Exhibit 246, 247 and 377.

Mr. Greiner: Your Honor, we would offer 509 at this time.

Mr. Ris: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 509 was received in evidence.)

Q. Dr. Bardwell, referring to Exhibit 509, how many of the Court-designated schools are achieving at below the 25th percentile? A. Eight.

Q. Now, next in front of you is what has been marked for identification as Plaintiffs' Exhibit 510. Would you please describe that to the Court? A. Yes. Exhibit 510 shows ten target schools which we have classified as Plaintiffs' target schools, showing the ethnic enrollment, teacher experience data, and the median achievement.

Q. And the source of the data on 510 is the same as the source of the data on 509? A. Yes.

Mr. Greiner: Your Honor, we would offer Exhibit 510 at this time.

Mr. Ris: No objection.

The Court: It will be received.

[137] (Whereupon, Plaintiffs' Exhibit 510 was received in evidence.)

Q. Now, first of all, Exhibit 510 shows certain of the achievement data for these target schools, is that correct? A. Yes, it does.

Q. How many of these target schools are performing below the 25th percentile? A. Every single one of them.

Q. And Exhibit 510 also makes comparison, does it not, between the schools which have been designated by the Court and these target schools? A. Yes, it does.

Q. Now, what is the comparison with regard to the teacher experience information? A. In the case of the Court schools, the percentage of new teachers for the twelve Court schools is 23 percent. In the case of the ten target schools the percentage is 20.

Q. What is it for probationary teachers? A. For probationary teachers for the Court schools, 48 percent, and for the target schools, 42 percent.

Q. And is the city average also given? A. It is.

Q. What is the city average of the probationary teachers? A. Thirty-seven percent.

[138] Q. What about the median years' experience? A. In the case of Court schools, 3.5 years. In the case of the target schools, 3.7 years, and in the case of all schools in the city, all elementary schools, 5.6.

Q. What is the comparison between the achievement levels of the target schools and the Court schools? A. For the twelve Court schools, 21 percent percentile at Grade 5 and for the ten target schools, 20 percentile.

Q. And again, achievement at the 20th percentile means

what? A. It means that throughout the United States 80 percent of the children at the Grade 5 on this test are performing above that particular level.

Mr. Ris: If the Court please. Excuse me. When I said no objection to this, I have no question as to its authenticity or correctness of the figures. I do object to what's being done with it now and with the questions now being asked Mr. Bardwell to inject these other target schools into this particular hearing and, as I said, as I said in my opening statement, it was our position this was going only to the Court-designated schools. I just want to make my record on that, please.

The Court: You're not asking me to retry the issues that have already been tried?

Mr. Greiner: No, Your Honor. The Court has made [139] a distinction which the Court in its opinion designated as being tentative in nature. We're taking the Court at its word and we are introducing evidence to show that there really is no logical basis for distinguishing between the schools which you have already selected and these remaining target schools. That's certainly the purpose of this proof.

The Court: Well, we will permit you to make your record, anyway.

Q. First of all, Dr. Bardwell, you will recall that in the opinion of March 21, the Court used a rule of thumb of between 70 to 75 percent composition of one minority group. Do you recall that? A. I do.

Q. Now, referring to Exhibit 510, are there any schools

among plaintiffs' target schools that meets that criteria? A. Yes, there are.

Q. What is the racial composition of Smedley Elementary School? A. Seventy-seven percent Hispano.

Q. And what is the racial composition of Elyria Elementary School? A. Seventy-three percent Hispano.

Q. Are these both low-achieving schools, also? A. They are.

Q. And what is the achievement level at Smedley? [140] A. Nineteen percent.

Q. And what is it at Elyria? A. Twenty-three percent.

Q. And what is the Anglo population as shown by Exhibit 510 of Gilpin School? A. Gilpin, seven percent.

Q. Gilpin? A. Excuse me. Three percent.

Q. Crofton? A. Seven percent.

Q. Ebert? A. Eleven percent.

Q. Wyatt? A. Two percent.

Q. Boulevard? A. Thirty percent.

Q. Garden Place? A. Seventeen percent.

Q. Wyman? A. Twenty-eight percent.

Q. Have you given it for Smedley and Elyria? A. A. Twenty percent for Smedley and twenty-seven percent for Elyria.

The Court: What are you reading from?

Mr. Greiner: Exhibit 510, Your Honor.

[141] Q. So all of these target schools—have you combined the Negro and Hispano enrollments? What is the percentage composition of the combined enrollment? A. All of these would have 70 percent or the greater minority enrollment.

Q. Now, you have what's already in evidence as Exhibit

883 in front of you. Now, I'd like to direct your attention, Dr. Bardwell, to the tables in back of Exhibit 883 that contain socioeconomic data.

The Court: What exhibit is this now?

Mr. Greiner: 883, Your Honor.

Q. Now, the tables in Exhibit 883—do they give socioeconomic data by school? A. They give mean family income from the 1960 census.

Q. And that is by school? A. It is by school.

Q. Can you find the data there for Gilpin School? A. Yes.

Q .What is the mean family income of Gilpin? A. $3,680.

Mr. Ris: If the Court please, this is all ten years ago, the 1960 census. We don't think that's relevant with the changes that have happened since then.

The Court: It has very little probative value.

Mr. Greiner: Well, Your Honor, it gives us a starting [142] point and then we're going to try to update it to the best of our ability based on other data.

The Court: Are you going to go through all these schools with this?

Mr. Greiner: Just ten of them. It won't take long

Q. What is the city median family income? Do you have that, Dr. Bardwell? At that time? A. $6,400.

Q. And what was the family income at Crofton? A. $3,630.

Q. At Ebert? A. $3,608.

Q. Wyatt? A. $4,050.

Q. Boulevard? A. $5,355.

Q. Garden Place? A. $4,830.

Q. Wyman? A. $4,606.

Q. Smedley? A. $5,008.

Q. Elyria? A. $4,500.

Q. And Swansea? [143] A. $5,590.

Q. Were any of these schools of this socioeconomic of family income—were any of these schools up to the city-wide average? A. No, they were not.

Q. Now, I wonder if you could step to the board here and direct your attention to the map that's been placed there.

Mr. Greiner: This would be Exhibit 514.

Q. What is Exhibit 514? A. It's a map of the junior high school boundaries in September of 1967, as shown by this map by the blue dots—these are the Court-designated schools.

The Court: Who prepared this plan that you are offering? Or are you just trying to refute what was in my opinion? Of offer some rebuttal or something of that sort?

You make an offer of proof. I mean, just for the record.

Mr. Greiner: I'll be happy to, Your Honor.

The Court: We will not have any of this. There's no point in retrying the case. I'm not going to do it. We spent all those weeks, you know, trying the lawsuit. And you had full opportunity and, too, I don't want any more testimony based upon the testimony received this morning, you know, that would supplement the main case. You follow me, don't you?

I mean, that would support the position taken by Dr. Coleman [144] or by Dr. Sullivan. Because, really, it goes to the basic issues that we tried, this material.

Mr. Greiner: Well, perhaps I misread Your Honor's opinion of March.

The Court: I didn't think we were going to go over all that material again, you know. We developed a tremendous record of factual material that you can refer to if you like. But I didn't—the purpose of the hearing now is for the most part to receive any suggested remedies that you wish to offer, you know, so that we can enter a final judgment in this case. It won't be too final, I don't think. I think it's going to be temporary final. But, I mean, it doesn't look to me like we're going to wrap up this in one fell swoop. We do the best we can.

Mr. Greiner: Your Honor, the major thrust of the plaintiffs' evidence at this hearing is going to be directed toward remedies. But, as we said on April 16th in our first preliminary memorandum, we did feel that in the Court's opinion of March 21 that the Court had indicated that it had tentatively selected a criteria of racial composition and the Court at least in my mind indicated that it had not closed its mind to this question.

The Court: Well, I just don't feel that we should reopen the whole case. Do you follow me? Do you know what I'm talking about?

[145] Mr. Greiner: We are not reopening the whole case. We're only talking about these ten additional schools, Your Honor.

The Court: Well, I say to you that—you make your offer of proof and maybe we can get some enlightenment from that as to what you have in mind.

Mr. Greiner: What we have in mind is, Your Honor,—in our offer, is as follows: that the evidence which is already in the record in this case regarding the achievement in these target schools, regarding the racial composition of these target schools, regarding the teacher experience of these target schools, all shows that the educational situation in these ten additional target schools is exactly as bad as—

The Court: Oh, I agree with that, but the record shows that. If you will remember in my finding I said that we were limited under the pleadings and the issues developed to attack racial segregation. Isn't that right?

Mr. Greiner: That's right.

The Court: In other words, what Dr. Coleman said today, namely, that desegregation of poor people and deprived people creates this problem. Well, this is a problem that I cannot deal with. It's not a Fourteenth Amendment problem, you know. I don't think I can. If it doesn't deal with discrimination based upon race or national origin or creed. But, if it is discrimination based upon poverty, this is not [146] open to me. I mean, in and of itself. That's what Coleman said.

Mr. Greiner: I believe what Dr. Coleman said, Your Honor, is that—

The Court: Am I wrong about that?

Mr. Ris: No. Counsel, in his proposed—

Mr. Greiner: I'd like to be able to finish my offer of proof.

The Court: That's what I thought he said.

Mr. Ris: That's what he said. He is merely arguing now; not even suggesting additional proof. It's not even an offer of proof.

The Court: Well, we will see what he's got.

Mr. Greiner: What Coleman said this morning, Your Honor, was that the factor in school which contributed most to the inequality of educational opportunity was the homogeneous peer group. We asked Dr. Coleman if there is any difference in the kind of peer group environment created by Negroes as compared with Hispanos. He said no. If there is a racial basis for saying that a school that is 75 percent of one ethnic minority is a segregated school, that same basis obtains if it's 35 percent of one minority group and 40 of another. We can see very clearly that the effects are exactly the same. Those children got in those schools—

The Court: All right. That is all argument based [147] upon the evidence that is in the record now, I suppose. I mean, you introduced evidence at length and in depth concerning the conditions in these schools, all of them.

Mr. Greiner: That's correct. We haven't correlated the socioeconomic data which is already in the record and that was the purport of my last question to Dr. Bardwell. In words, there is a very strong correlation in this city between socioeconomic status and race and ethnicity. You can talk about the upper-middle-class black school but when we look at the schools that are the subject of this presentation, there are no such schools. They don't exist.

The Court: Well, I suppose that you might classify the Northeast Denver schools along this line, some of them.

Mr. Greiner: Well, but we look at the achievement level of those schools—we see then that there is no good achievement in those schools.

The Court: Well, then, Dr. Coleman's testimony doesn't come out. That's the only thing I can say.

Mr. Greiner: Perhaps it doesn't on that one point.

The Court: What do you propose to have Dr. Bardwell testify to?

Mr. Greiner: Well, we will get to the 1960 census data in the record. Dr. Bardwell has also conducted a study, I believe in 1967, dealing with the socioeconomic conditions of this north central portion of the school district and in [148] this portion many of these target schools to which we're having reference. We do have some updated socioeconomic data. That was all I was seeking to put through this—

The Court: Do you have an exhibit on that that he has prepared?

Mr. Greiner: We're going to make one, Your Honor, right here by just labeling the schools for which we have this additional data.

The Court: What is the story? What's he going to say?

Mr. Greiner: That the socioeconomic status of this neighborhood is still very, very low in terms of the rest of Denver. These are still low socioeconomic schools, just as they were in 1960.

The Court: That the condition is the same as that which he has read from Exhibit 883?

Mr. Greiner: That's correct.

The Court: Substantially?

Mr. Greiner: Relatively, yes.

The Court: It hasn't changed on any of these schools that you have just mentioned?

The Witness: Schools we're talking about here and the area that comprises a good portion of the target schools that we have in mind, that this is in the area that is precisely in the middle of the so-called census poverty area [149] of the city in which I was consultant to the mayor's office on the survey of that particular area to determine certain socioeconomic characteristics, educational characteristics of these residences. This is the so-called poverty area of the city. And it is in that area—The results of the study are published on poverty and jobs in Denver through the mayor's office and I just simply wanted to point to the fact that half of the target schools that we're talking about here are located precisely in the middle of this poverty area.

The Court: Okay.

Mr. Greiner: May we proceed with that, Your Honor?

The Court: Well, doesn't that pretty well wrap it up? What you're saying is that there is no substantial change relatively.

The Witness: What I'm saying, Your Honor, is that it is peculiar in a way that, if one were to look—if one were to lay the red dots on the northern area of the city here, which is called the poverty pocket of the city, that one would find five of the target schools in that area and that the schools that we have designated here as Court schools, while lying also in that poverty area, that these lie in the middle of the worst of it.

The Court: What do you want him to do? Mark up the map now?

Mr. Greiner: Yes, just to indicate these other [150] target schools and their locations.

The Court: All right. One more map isn't going to kill us.

Mr. Ris: I'm not sure, Your Honor.

By Mr. Greiner:

Q. Would you identify, please, the schools that you are marking? A. This is Garden Place and—

The Court: I'll take judicial notice of the fact that it is the poverty area.

A. This is Boulevard, and this is Crofton. This is Gilpin and this one is Wyatt. This one is Swansea. This one is Elyria. This one is Wyman and this one is Ebert.

Q. Thank you, Doctor.

Dr. Bardwell, did you participate in the drawing of the plans of the plaintiffs relating to the desegregation of the Court-designated elementary schools? A. I did.

Q. Turning you attention next to Plaintiffs' Exhibit 501, which is before you, would you describe for us what Exhibit 501 pertains to? A. Yes. It is a proposed plan which we have designated Plan 1 for desegregating the Court's elementary schools.

Q. Would you advise us, please, of the general concept of Plan 1? What is the basic premise? A. This plan is based—

[151] Mr. Greiner: The corrections were in the defendants' plan, Your Honor.

This begins at Page 12 of our memorandum.

Q. Do you have the question in mind, Doctor? A. Yes, I do. This plan desegregates the twelve designated Court schools by use of exchange transportation with seventeen other elementary predominantly Anglo schools. By retaining each of the Court schools as well as the seventeen Anglo schools as Grades K through 6— The way in which this plan was constructed is roughly as follows: Anglo schools were selected which had approximately 85 percent Anglo enrollment and over in 1969, and a second criteria, those schools whose capacity could accommodate the exchange transportation with the Court-designated schools, and, three, the Anglo schools were selected such that the racial composition of the schools, once the exchange transportation was finished, would not depart by more than one standard deviation from the city average. In addition to that, the plan incorporates the feature that, after the exchange transportation is completed, that the capacity of the 29 schools that are involved would not depart by more than ten percent of full utilization of the plan. The next step was to compute mileages from each of these schools to every other school and construct tables that were useful then for the computer. This information was transferred to punched cards and a rather complex computer [152] program was written and developed for the solution of what is called a linear program transportation solution for these 29 schools. The solution is given in Exhibit 501-C.

Q. Now, the results of this linear program and the transportation plan—how does this plan affect the distance traveled by children under the transportation plan? A. No other conceivable plan of transportation would have less transportation than what this plan has. It minimizes the total amount of transportation and hence inconveniences of all students.

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Q. What about the effect of the cost of transportation? A. It minimizes the total cost.

Q. What criteria was used in terms of the composition of the school population resulting from the cross transportation? A. The criterion was adopted that no school after the proposed plan had been effected would depart from this city average by more than one standard deviation.

Mr. Greiner: Your Honor, at this time we'd like to offer Plaintiffs' Exhibit 501, which is really just a narrative description of this first alternate plan.

The Court: Very well. Do you have any objection?

Mr. Ris: No, sir.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 501 was received in evidence.)

[153] Q. Now, again, with respect to this first plan, Exhibit 501, looking at Exhibit 501, what is the range of Anglo composition which will result from the implementation of this plan at the affected schools? A. This shows that the minimum percent Anglo composition at any one of the affected schools is 54 percent.

Q. What is the maximum Anglo composition? A. Sixty percent.

Q. Now, how many schools are going to be affected should Plan 1 be adopted? A. Twenty-nine.

Q. And of those 29, there are 17 Anglo schools? A. That's right.

Q. And the 12 Court-designated schools? A. That's right.

Q. How many students will have to be transported under Plan 1? A. 8,380 students.

Q. And do you know how many of those will be Anglo? A. Yes, 4,284.

Q. Do you also have a breakdown of Negro and Hispano? A. Not separately, but as combined, 4,900.

Q. So roughly the same number of minority students and Anglo students? A. That's right.

[154] Q. Now, what effect would the implementation of this plan have upon the twelve mobile units now located at Smith Elementary School? A. The plan contemplates that the capacity utilization of Smith Elementary School would be 106 percent, and of the permanent facilities, and the mobile units would be withdrawn.

Q. There were mobile units at others of these minority schools affected by this plan—does the plan contemplate their removal, also? A. They would be removed as well

Q. Now, does the plan address itself to overcrowding which exists in some of these schools? A. It does.

Q. And would you describe that, please? A. Yes. Of the Court's elementary schools which were overcapacity in 1969, Bryant, Webster, at 112 percent; Fairmount, 131 percent; and Greenlee at 116 percent, all utilized to within ten percent of the rated capacity. In fact, in those schools it would be less than that: 105 percent and 106 percent and 105 percent respectively.

Q. Now, those percentages which you have just given are shown on Plaintiffs' Exhibit 501-A, are they not? A. They are.

Q. And how is Exhibit 501-A—how was it developed? A. This is one of the solutions of the linear program [155] and just merely a summary of the characteristics of the schools after Plan 1 had been implemented.

Mr. Greiner: Your Honor, we offer 501-A at this time.

Mr. Ris: We have no objection.
The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 501-A was received in evidence.)

Q. Now, we have talked about the remedying of overcrowded schools. What, if anything, did the plan consider with respect to the underutilization of certain of the schools? A. Of the twelve elementary schools which were designated by the Court, in 1969 Columbine was 80 percent. Elmwood realized its capacity at 87 percent. In each of these cases implementation of this plan in these schools would be utilized to the extent of 94 percent in each case. Now, these other schools—

Q. Now, next calling your attention to 501-C, would you describe for us what 501-C is? A. 501-C is a detailed transportation schedule for the sending and receiving Anglo students and the sending and receiving of minority students. It depicts the number of students to be transported from each of the schools, each of the Anglo schools, and indicates how many of those students are to be received at each of the minority schools.

[156] Mr. Greiner: Your Honor, we offer 501-C.
Mr. Ris: No objection.
The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 501-C was received in evidence.)

Q. Now, have you also prepared an estimate on the operational costs? A. I have.

Q. And this is the transportation program? A. Yes.

Q. Is that shown on what has been designated Exhibit 511? A. Yes.

Q. Would you tell us, please, what the source of the data in 511 is? A. For proposed Plan 1, the estimated maximum cost—

Q. Pardon me. What is the source of the data? A. Excuse me. The source of the data is based upon a memorandum dated April 10, 1968, to the Superintendent, Dr. Gilberts, from Howard L. Johnson entitled Daily Average Number of Pupils to be Transported . . . in the 1968-69 school year. The second source is the volume, Transportation in Denver Public Schools, dated April 1968, in particular Pages 2 through 6.

Mr. Greiner: Your Honor, we offer Exhibit 511 at [157] this point.

Mr. Ris: We don't challenge the source. We don't challenge the arithmetic as made, but we do challenge the ultimate figures. We will have some evidence—

The Court: Very well. It will be received subject, of course, to the right to refute it.

(Whereupon, Plaintiffs' Exhibit 511 was received in evidence.)

Q. Referring you then to Exhibit 511, Doctor, have you made an estimate of the operational costs—or the maximum operational costs of Plan 1? A. Yes.

Q. What is that cost? A. $623,600.

Q. Now, can you explain to us how you developed this cost per student/mile figure of 3.23 cents per student/mile? That's reflected on Exhibit 511. A. Yes, from the memorandum that was just cited as one of the sources of this exhibit, the total number of route miles per day were developed from the figures supplied by Mr. Johnson to Superintendent Gilberts. These figures show that for the ele-

mentary schools 18,928 miles, and for the junior high schools, 13,972, making a total of 32,900 miles per day one way. Now, by dividing that by the number of students that were involved in this figure, 8,744, which was [158] the number of students being transported at that time, we come up with an average number of miles per student of 3.8 miles now being transported, using, of course, 1968 information. By examining the transportation in the Denver Public Schools report, the administrative services, the budgeted 1968 transportation cost for regular transportation for junior high school students and elementary school students was $382,740. By dividing that dollar figure by the total number of miles just calculated by 181, which is the number of school days in the year, by two, for one way, gave us cost per mile of 3.23 cents per student/mile per day one way.

Q. Now, 511 also contains a resume does it not, of the average miles which a student would be transported one way under this Plan 1? A. It does.

Q. What is that distance? A. For the Anglo students the average student/mile would be six and one-half miles. For the minority student the average student/mile would be 6.3.

Q. And the overall average? A. Overall, 6.4.

Q. And what costs are included, Dr. Bardwell, in the costs per student/mile figure shown on Exhibit 511? A. These include the salaries of supervisors, bus drivers, bus mechanics, equipment repair, contracted services, [159] replacement of buses, pupil transportation insurance, gasoline, lubricants, tires, tools, repair parts, supplies and other expenses; garage repairs and maintenance by private garages.

Q. Now, do these costs include the capital cost of acquiring additional school buses? A. They do not.

Q. Why not? A. In order to do that, it would require a detailed examination of the bus routes to be taken, the number of students that would be picked up at each school in each bus, and it is very difficult to determine this figure because at the present time the school district utilizes its buses to the extent of about 70 percent of their rated capacity and this means that, if more students were to be transported, it is likely that the percent utilization of the capacity of the buses would be increased and so therefore that is an unknown factor. In addition to that, there is likely to be some rerouting of students that are now on buses. This contributes to uncertainty. And in addition to that, one would just simply have to get a detailed schedule of the buses before one would be able to—

The Court: What exhibit are you reading from? What exhibit do you have in front of you right now?

The Witness: I don't have any now, sir.

The Court: Well, I thought he had.

[160] Mr. Ris: 511 he has been referring to.

The Court: Yes. That's right. That has not been received yet, has it, Mr. Greiner?

Mr. Greiner: I believe it has, Your Honor.

The Clerk: Yes, Your Honor.

The Court: All right.

Q. Now, are there other alternatives in devising the actual transportation schedule or transportation of these students? Are there other thing that can be done to increase the utilization of both existing equipment and new equipment? A. Yes. I mentioned that, to take advantage of some of the students that are not now being transported

among the various schools, some utilization of facilities might be had by rerouting some of these students, making that ride a bit shorter. In addition to that, it would be worthwhile to institute linear programming in the use of transportation schedules in the district, and this would then minimize the total amount of transportation for the district.

Q. What about the time of day at which different schools are open? A. It's possible, as is being done now, to stagger the starting time of schools so that one bus could serve for two.

Q. Now, what impact, if any, Dr. Bardwell, does Plan 1 have automatically upon teacher assignments in these Court-designated schools? [161] A. Well, automatically it doesn't have any effect on teacher assignments simply because each of these schools will be designated K through 6 schools and therefore some conceivable arrangement in order to equalize the teacher talents would be necessary if such a plan were to be implemented.

Q. Now, Doctor, I'd like to call your attention to what's been marked for identification Plaintiffs' Exhibit 502, which purports to describe the second alternative plan for desegregating the Court-designated schools. Would you please compare or contrast Plan 2 with Plan 1? A. Plan 2 again directs itself to the twelve Court schools. This plan envisages that a Court school would be only a 4 through 6 school. And that, paired with each one of these Court schools, or perhaps more than one, would be a group of predominantly Anglo schools which would enroll only Grades K through 3, and thus the Court schools would exchange K through 3 students with 4 through 6 pupils from the Anglo schools.

Q. Now, in terms of the number of students to be transported under the second alternative plan, Doctor, how does the transportation requirements compare? A. In the case of Plan 2, it would require the transportation of approximately 11,109 students.

Q. So that's approximately 3,000 additional students? A. Yes.

[162] Q. And increased transportation requirements in a pairing concept? A. Because, under Plan 2, it would mean that roughly half of the students—not quite that many, but let's say roughly half of the students would be transported because those students that are now going to a school and, let's say kindergarten through 3, would have to be transported to a school that would be designated kindergarten through 3 if their school was not.

Q. Do you have more children being transported because —There are whole classes of children being transported, is that correct? A. That's correct.

Q. Now, what impact does the second alternate plan have upon the overall underutilization of the schools that you mentioned? A. In the case of Smith Elementary School, for example, the mobile units that would be involved at that school would be removed and the utilization of that capacity would be at 114 percent. Other mobile units throughout the district that would be involved in this plan would also be eliminated.

Q. How does this plan affect the overcrowding that now exists at Montbello Elementary School? A. Well, it is proposed under this plan that Montbello, being a severely overcrowded school at this time—

[163] Q. What is the current capacity utilization? A. 173 percent.

Q. What grade levels does it encompass? A. K through 6.

Q. What will this plan do for Montbello? A. It is proposed that Grades 4 through 6 at Montbello at the current time will be transported to Columbine, which is a 4 through 6 school. That would result in a capacity utilization at Montbello from 173 percent to 118 percent and would convert the Montbello into a K through 3 school only.

Q. Now, will any minority students be bused into Montbello under this proposal? A. No.

Q. And what would be the racial composition of Columbine, the receiving school of these Montbello children? A. The racial composition at Columbine after the transportation would be—

The Court: Before you leave that, you would be using Montbello then, just its school population to integrate Columbine? And Montbello would remain a white school? Do I understand you correctly?

The Witness: Columbine would be paired with Bradley, Ellsworth and Montbello; all three schools. Columbine has a good deal of unused capacity at this particular time, and at the same time Montbello is overcapacity. In order to [164] utilize that, it is proposed here that this particular arrangement with Montbello students would be effected.

The Court: You wouldn't have any Negro students into Montbello?

The Witness: No.

The Court: Are there any there now?

The Witness: Yes, the racial composition is about 85 percent Anglo.

The Court: And it would remain about that percentage?

The Witness: After the plan is implemented, the

racial composition at Columbine would be 59 percent Anglo.

The Court: I mean Montbello.

The Witness: Montbello would be—and I am assuming here that the same portion exists for the K through 3; that it would be around 85 percent.

By Mr. Greiner:

Q. How would the second plan affect the capacity utilization of Bryant-Webster, Fairmount and Greenlee? A. In the case of Bryant-Webster, we remind ourselves again that there is 112 percent capacity. Fairmount is at 131 percent and Greenlee is at 116 percent, and these are utilized as capacity utilizations below these particular schools.

Q. Then what about the capacity utilization of such [165] schools at Coulmbine, Elmwood, Fairview, Mitchell and Whittier? A. All of these schools are underutilized by as much as 20 percent and under the proposed plan these schools would be utilized more heavily than they are now. For example, in the case of Columbine the percent capacity would be 101 percent.

Q. Now, directing your attention to what's been marked as Exhibit 502-A, Doctor, would you please just briefly describe for us the data reflected on that exhibit? A. Yes, this table shows the effect of the pairing plan proposed here and shows the Court schools and those schools that are suggested as pairing schools for each of the Court schools. The enrollment in 1969 for kindergarten through Grade 3 and for Grades 4 through 6 are shown on that table and also the percent capacity after the implementation of the plan, the resulting percentage Anglo at each of those schools, and the number of students transported for kindergarten through Grade 3 and Grades 4 through 6, the total

number of students that are transported one way each and every day and the average miles of students one way.

Q. Now, can you summarize for us the source of the data shown on Exhibit 502-A? A. Yes. In the case of the enrollments for kindergarten through Grade 6, this is the September 26, 1969, report of [166] the pupil membership by the office of planning, research and budgeting in the Denver Public Schools. In the case of mileage calculations, these were taken from the data indicated in Plan 1.

Q. These are the distances involved? A. These are the distances between the various schools.

Q. And that is also the source of the average miles per student one way? A. A calculation resulting from that.

Mr. Greiner: Your Honor, we would offer 502-A at this time.

Mr. Ris: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 502-A was received in evidence.)

Q. Then calling your attention to 502-B, what is that exhibit, Doctor? A. This is a table capsulizing the characteristics of the Court schools, their racial and ethnic compositions, and the enrollments in Grade K through 3 and Grades 4 through 6; the number in special education; and their capacity.

Q. Is this then just a summary of data that are in evidence from other sources in this case? A. Yes, it's for the Court's convenience.

Mr. Greiner: We offer 502-B, Your Honor.

[167] Mr. Ris: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 502-B was received in evidence.)

Q. Then, with regard to Plan 1—I think I forgot to offer 501-B, which is also—is it not a resume of the statistical data on the schools to be affected by Plan 1? A. That's correct.

Q. Prior to implementation of the plan? A. That's correct.

Mr. Greiner: We would offer 501-B.

Mr. Ris: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 501-B was received in evidence.)

Q. Now, under the pairing plan in the second alternative, what will the range of racial compositions at the affected schools be in terms of Anglo composition, Doctor? A. In every case the schools will have 51 percent Anglo enrollment or better. These remain at a low range of from—a low of 54.1 percent to a high of 67.5 percent and, in contrast, for example, Columbine having six-tenths of one percent of Anglo students to 97 at—97 Anglo at Bradley.

Q. Now, how are students to be selected for participation in this plan at the selected schools? [168] A. There would be no problem of choice here simply because those kindergarten through Grade 3 pupils, for example, the one—at one of the Court-designated schools, would be automatically selected for transportation to one of the pairing schools. Similarly, those students in Grade 4 through 6 at one of the predominantly Anglo schools would be auto-

matically transported to one of the receiving Court schools. So there would be no problem of selection of students.

Q. Eventually all students at the selected schools would participate in this plan? A. That's correct, if they remained in that school.

Q. Now, what does the second plan do with respect to the assignment of teachers? A. Here again, it would suggest that the assignment of teachers would be automatic as well, because those teachers that specialized in Grades K through 3 obviously couldn't very well stay at a school in which only Grades 4 through 6 were held, and therefore the assignment of teachers to a kindergarten through Grade 3 would be automatic as well as the students.

Q. In other words, the teachers would follow the students? A. That's correct.

Q. Now, referring back to Exhibit 511, the cost [169] estimate under Plan 2, how many students would be transported at the elementary level? A. 11,109.

Q. And what would be the average miles trip per student one way? A. 6.3 miles.

Q. And you have used the same cost per student/mile? A. I have.

Q. And then what would be the total maximum operating cost of Plan 2? A. It is estimated to be 813,800.

Q. Next I'd like to call your attention, Doctor, to Exhibit 503. Would you please identify for us Exhibit 503.

Mr. Ris: If the Court please, we're now getting into Part 3 or proposed Plan 3 and, we assume, proposed Plan 4, which gets into the target elementary schools, the plaintiffs-designated schools rather than the Court-designated schools, so I would object to any testimony as to Plan 3 or Plan 4 as being beyond the scope of this hearing.

The Court: Well, before we reach that point, have you prepared a narrative summary of Plan 2?

The Witness: Yes, sir.

The Court: Has that been received?

Mr. Greiner: That's Exhibit 502, Your Honor. I don't know if we have offered that. I thought we had.

[170] The Court: I don't recall either. I don't have any record of it.

Mr. Greiner: Here it is, Your Honor. We offer 502.

Mr. Ris: No objection.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 502 was received in evidence.)

The Court: Well, it's at least within the area of the plans and he is going to argue that there is no rational basis for omitting at least some of these schools, so I suspect that this is sufficiently relevant to receive it.

We are now embarking on Plan 3?

Mr. Greiner: Yes, Your Honor, Exhibit 503.

By Mr. Greiner:

Q. Would you describe for the Court, Dr. Bardwell, the relationship between Plan 3, the narrative statement for which is Exhibit 503, and Plan 1? What is the relationship between the concepts involved? A. The concepts here are identical. That is, Plan 3 is identical to Plan 1 except that it incorporates the additional ten target schools and additional number of predominantly Anglo schools, making a total of 50 schools altogether.

Q. So, whereas Plan 1 affected some 29 schools, as I recall it, Plan 3 would affect 50 elementary schools? A. That's right.

[171] Q. And how many of those would have been previously predominantly minority schools? A. You mean of the 50?

Q. Yes. A. Excuse me. Twenty-two.

Q. How many of them would have been previously predominantly Anglo schools? A. Twenty-eight.

Q. Now, what was the bases used for selection of the Anglo schools with which we preface Plan 3? A. The criteria for selection of Anglo schools in this plan was identical to that used in Plan 1 except that the racial composition of the particular school, in order to be included, was 80 percent or more.

Q. Eighty percent Anglo or more? A. That's right.

Q. How many students would have to be transported if Plan 3 were to be implemented? A. 11, 471.

Q. Now, how does that compare with, for example, the amount of students—the number of students that would be transported under the pairing plan, the second plan? A. It would be only 362 students more under Plan 3.

Q. Now, what about the average miles traveled per student one way under Plan 3? [172] A. In Plan 3, six and a half miles. Plan 2, 6.3.

Q. And Plan 1 was 6.4? A. Plan 1, 6.4.

Q. What is the average range of Anglo enrollment which would be achieved under Plan 3 if it were implemented? A. In Plan 3 the average enrollment in any school would be 51 percent.

Q. And the maximum? A. The maximum would be 61 percent.

Q. Then have you also prepared an estimate reflected on Exhibit 511 of the total cost of the transportation under the third plan? A. Yes, $867,000.

Q. So that's about 50,000 more than the pairing which the Court just designates? A. That's correct.

Q. Now, calling your attention to Exhibit 503-A, 503-A simply shows the results of implementation of Plan 3, is that correct? A. That's correct.

Q. And 503-B is a compilation of what, Doctor? A. 503-B is merely a capsule summary of the racial and ethnic distribution of students for the schools, both the Anglo schools and the Court and target schools that are involved in this plan, together with a summary of the numbers [173] of students to be sent and received under this Plan—under this transportation plan at each one of these schools.

Q. And then 503-C depicts what? A. This is a detailed transportation schedule for each one of the 50 schools involved, which shows the number of students to be transported from each school to every one of the other schools in order to achieve the objectives of that plan.

Mr. Greiner: Your Honor, we offer 503-A, -B and -C at this time.

Mr. Ris: Objection on the grounds it's beyond the scope of this hearing.

The Court: Overruled. It will be received.

(Whereupon, Plaintiffs' Exhibits 503-A, 503-B and 503-C were received in evidence.)

Mr. Greiner: We are also offering 503, Your Honor, which is a narrative description of the plan.

The Court: Very well.

Mr. Ris: Same objection.

(Whereupon, Plaintiffs' Exhibit 503 was received in evidence.)

By Mr. Greiner:

Q. Now, Doctor, finally, with regard to a plan for the desegregation of both the target schools and the Court schools, I call your attention now to Exhibit 504. Would you explain to the Court the relationship between the [174] fourth plan and Plan 2? Both plans still utilize a pairing concept, do they not? A. They do. Plan 4 is identical in its conceptualization to Plan 2.

Q. Except there are more minority schools selected? A. In this case there are, of course, the twelve Court schools as well as the ten target schools. Together then this would be 22 minority schools which would be involved in the pairing plan.

The Court: Identical with Plan which now?

The Witness: Identical to Plan 2 in concept. That's the pairing plan. Except here we are involved with ten target schools in addition to the twelve Court schools.

Q. So that each of the current minority schools would become Grades 4 through 6, is that correct? A. That's correct.

Q. And each of the affected Anglo schools would be K through 3, is that right? A. That's correct.

Q. Now, have you prepared an exhibit—and I will now refer you to Exhibit 504-A—showing the proposed pairings of the target schools? A. That's correct.

Q. And then the pairings of the Court-designated schools would remain the same as under Plan 2, is that correct? [175] A. That's correct.

Q. And then 504-B depicts what? A. Merely a summary table showing the characteristics of these target schools

with regard to the enrollments and the membership composition so far as grade level is concerned in 1969.

Mr. Greiner: Your Honor, at this time we would offer Exhibit 504, 504-A and 504-B.

Mr. Ris: Same objection as to the 503 series.

The Court: Overruled.

(Whereupon, Plaintiffs' Exhibits 504, 504-A and 504-B were received in evidence.)

Q. Now, Doctor, with regard to this fourth alternative plan for desegregating both the target schools and the Court-designated elementary schools, how many schools will be affected in this plan? A. In this plan there would be 53 schools.

Q. And what would be the total number of students that would have to be transported under this plan? A. 16,845.

Q. And what about the average length of the bus ride? A. 6.6.

Q. And what would be the maximum annual operating cost of such a program as you estimate it? A. In this case we have estimated $1,292,800.

[176] Q. Now, would this plan also have the same effect upon the—for example, the location or the elimination of mobile units at Smith and so on? A. It would.

Q. And the overcrowding at Montbello, the same concept is included? A. (Nods affirmatively.)

Q. Now, what about elementary schools which are overcapacity? Would their—would this utilization be reduced there? A. The utilization would be reduced.

Q. What about the range of Anglo composition at the paired schools if this plan were implemented? A. The

range of Anglo compositions would be from 50.3 percent Anglo to a high of 63.8.

Q. How are students selected for transportation in this plan? Is it just the same as Plan 2? A. Here again, the selection would be automatic.

Q. Would it have any effect on teacher assignment? A. In the same way as Plan 2.

Q. Now, that Plan 4 would cost an estimated $1,292,000? A. That's right.

Q. But you also prepared an estimate of what it would take to desegregate all of the elementary schools in the district? [177] A. I have.

Q. And is that estimate reflected on Exhibit 511? A. It is.

Q. And how many students would be required for transporting under the citywide plan? A. In this case, for the entire 91 schools, 14,364 students.

Q. What would be the total cost of that plan? A. The maximum cost of $904,000.

Q. The average miles of students one way is almost a mile less than any of the other plans. What's the reason for that? A. Well, when you give yourself the flexibility of desegregating all the schools in the city, you can do that much more efficiently than by picking out certain schools, because your transportation routes become much more efficient.

Q. Now, have you also prepared a proposed plan with respect to the junior high schools? A. We have.

Q. Now, one of the junior high schools that was designated by the Court for relief was Cole Junior High School. Before we get to the details of this plan I wonder if you could describe for us the general condition in terms of

capacity utilization that we now find in the junior high [178] schools in the district? A. Yes, we have a situation here in the case of the 18 junior high schools—In 1969 the enrollment was around 23,440 students. Excuse me. The capacity, 23,440. And yet, the enrollment was 22,419, which means that the junior high schools as a total are underutilized to the extent of about 1,021, and this means that the building of Place School, due to open in 1971, and assuming it will have a capacity of 1,200, this means we will have an unused junior high school capacity in 1971 of approximately 2,200 students. But, in addition to that, there are certain schools within the district in which Jefferson is one and John F. Kennedy is another in which the capacity utilization of these schools is more than 100 percent, and yet a very large part of their enrollment was bused in in 1968.

Q. How many students were bused into Thomas Jefferson? A. The best figure that I have here is for 1968 and at that time 1,284 students were bused in.

Q. What was the other school? A. Excuse me?

Q. What was the other school? A. John F. Kennedy.

Q. And how many students were being bused into Kennedy? A. 533.

Q. Now, these are students—Anglo students who are [179] already on buses, is that correct? A. That's correct.

Q. Now, is there a relationship, Doctor, between the overcrowded junior high schools today and the racial composition? A. Well, generally, one finds that except for the two schools that were affected by the Court's order, Hill and Smiley, that the more heavily utilized the school is, then the higher its racial composition in terms of Anglo percent.

Q. The minority high schools are less utilized? A. Than when it happened to be underutilized school.

Q. Would you explain for us, Doctor, the first alternative being proposed by the plaintiffs as it affects Cole Junior High School? A. In order to desegregate and improve the conditions that we have referred to earlier with regard to Cole, it is proposed that we can increase the Anglo percentage of students at Cole from 1.4 percent, the percentage in 1969, to 66 percent by implementing this particular plan, while at the same time relieving the overcrowding at Thomas Jefferson and John F. Kennedy without requiring any new transportation of students in the district. This could be accomplished by simply transporting those students, 1,038 of them that are now on a bus going to Thomas Jefferson or John F. Kennedy, and simply have their designations to be Cole Junior High School [180] instead of Thomas Jefferson or Kennedy.

Q. Now, do spaces have to be created for those Anglo students if they are to be received at a school? A. No.

Q. Why not? A. Because Cole at the present time has 989 students, but the capacity for 1,725. In other words, the percent capacity in 1969 was 58 percent.

Q. So then the first alternative simply contemplates a diversion of Anglos already being bused? A. I might add —excuse me—that there is the additional proviso here that the few students, about a hundred, a hundred and twenty, would be transferred from Cole to either one of the two schools—they happen to be bused into Cole at the present time—just north of Vasquez Boulevard, which is over the two-mile limit under the transportation arrangement with the school district. It's across a heavily-traveled highway and so they are transporting to Cole now.

Q. So these students would not be bused into Cole any longer but could be sent to either John F. Kennedy or T.J., is that right? A. Or one of the other schools that happens to have available space.

Q. Now, have you also prepared a second alternative [181] plan dealing with junior high schools?

The Court: Are these special education groups that are now being bused at schools?

The Witness: Excuse me?

The Court: Are there special education groups that are now being bused to this school, to Cole?

The Witness: No.

The Court: I had thought that there was some evidence on that at the trial. These are regular students?

The Witness: These are regular students and it is my understanding that these students are now two miles away from Cole and they happen to be in an area just north of Vasquez Boulevard.

The Court: You mean out toward Commerce City, that area?

The Witness: That's right, that being beyond the two-mile limit. Then they are entitled to transportation.

The Court: How many of them are there?

The Witness: About 124.

The Court: And you propose to send them where?

The Witness: It wouldn't make too much difference, I suppose, given the shortest bus ride, probably to Thomas Jefferson—this would take advantage of the use of Valley Highway, which would be very quick transportation.

The Court: It's a pretty long ride, though, isn't [182] it, the north end of town to the south end?

By Mr. Greiner:

Q. Now, have you also developed a plan, Doctor, that would be broader in scope than just Cole Junior High School? A. Yes, the second alternative for the junior high schools would be to correct the segregated status of Horace Mann, Lake Morey and Baker, in addition to the secondary status of Cole.

Q. Baker is also a Court-designated school, is it not? A. That's correct.

Q. What is the racial composition of minorities at Morey? A. 26.8 percent Anglo.

Q. How would this second alternative plan with regard to the junior high schools—

The Witness: It is proposed here that—

The Court: Have you completed Cole?

Mr. Greiner: Yes, the first alternative as to Cole, Your Honor.

The Court: Have you got a narrative on that one?

Mr. Greiner: Yes, we do. It has been marked for identification as Exhibit 505 and we offer it at this time.

The Court: It will be received.

(Whereupon, Plaintiffs' Exhibit 505 was received in evidence.)

[183] The Court: Do you have an alternative plan on Cole?

Mr. Greiner: Yes, they are both contained in Exhibit 505, Your Honor.

Q. Would you describe then this second alternative? A. It is proposed under this alternative that again the transportation that is now being undertaken in the district with regard to certain schools, particularly Anglo transportation, that this transportation be rerouted to Cole, Horace Mann, Lake, Morey and Baker, and this would mean rerouting of approximately 2,278 Anglo students that are now on a bus, but it would in addition require that 1,900 approximately minority students from these five junior high schools be transported out of these schools in order to have an effective racial composition after the implementation of the plan of approximately 70 percent Anglo.

Q. So that the new transportation required would be 1,900 minority students? A. That's correct.

Q. And the other transportation would be that of—which really already exists except the designation would be changed? A. That's exactly right.

Q. What would be the racial composition resulting at these five schools? A. It would be approximately 70 percent Anglo in each [184] case.

Q. Now, how would this plan affect the overcrowding at certain of these junior high schools? A. The transportation could be arranged in such a manner that John F. Kennedy, Thomas Jefferson, whose capacities are now utilized fairly heavily, would be relieved by the transfer or rerouting of students that are now being transported into those two schools. Additional relief might be given to some of those schools also whose capacity is somewhat overutilized if we consider that overutilized is above, let's say, 100 percent.

Q. Are any of these schools on double sessions? Or do you know? A. It is my understanding that one of them is but I'm not certain of that.

Q. Now, how would this proposed second alternative relate to the superintendent's general proposal of a model school complex? A. It would seem to us that, if these five schools were desegregated according to this alternative, then the racial composition of the entire junior high school picture for the city would look very good and then the superintendent's model school complex could be given a great deal more flexibility because each one of these junior high schools then would be approximately equal in racial composition. And so [185] the problem of what might be called exchanges for this—for integration purposes wouldn't have to be undertaken.

Q. Now, how do these plans relate to the relief which has been granted by the Court under Part 1 of the reinstatement of the resolutions? Doesn't the injunction—won't it call for certain transportation for students out of Cole, for example? A. Oh, yes, yes. That's incorporated under both of these alternatives. That is, the number of students that were assigned out of Cole under the resolutions will be carried through, and that was implicit when these plans were drawn up.

Q. So that, as I recall, some 200 would be transported out of Cole under Part 1 of the Court's decision? A. That's correct.

Q. And you are proposing that some 1,900 additional be transported out of both Cole and other minority schools? A. That's right.

Q. Now, have the plaintiffs also prepared a plan as to the only senior high school in the district which has been designated by the Court for relief? A. Yes, we have.

Q. And that is the plan for Manual High School? A. That's correct.

Q. And this plan is reflected in Plaintiffs' Exhibit 506?
[186] A. It is.

Mr. Greiner: Your Honor, we offer 506 at this time.

The Court: Very well.

(Whereupon, Plaintiffs' Exhibit 506 was received in evidence.)

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By Mr. Greiner:

Q. Dr. Bardwell, calling your attention to where we were at the close of court yesterday, you recall that we were discussing the Manual plan which is contained in a narrative statement which has been marked for identification as Exhibit 506, and there are two alternatives in the courses of action proposed in Exhibit 506. A. Yes, there are.

Q. Now, what is the first alternative course of action with respect to Manual High School? A. Well, as the Court will recall, in Resolution 1520 and 1524 there were certain boundary changes for George Washington and East and South, and consistent with the philosophy that is expressed in those two resolutions, the plaintiffs have suggested that the high school boundaries of the city be redesigned consistent with the redistricting that [194] was effected by Resolution 1520 and 1524. Thus, for example, under those resolutions the students in certain Park Hill areas were assigned to George Washington and under our plan of redistricting these students would continue to go to East as they were reassigned under those resolutions. Students assigned to East from George Washington around the Ellsworth Elementary area—these would continue to go to

East. Students assigned now to South from south of Cherry Creek area would instead go to East—that would go to East, would now be assigned to Manual. Students now assigned to East under the resolution around the Harrington area would remain at East. In addition to that, Montbello area would be assigned to George Washington rather than East.

Q. Have you prepared a map which reflects these suggestions, Doctor? A. We have.

Q. And that's Exhibit 507? A. It is.

Mr. Greiner: Your Honor, we introduce 507.

The Court: Now, this is all geared to next fall?

The Witness: Yes, sir.

The Court: This would take effect regardless of the year the student was in high school?

The Witness: I suppose it would be conceivable, for example, to continue those students now attending those high [195] schools—to allow the effect of the plan to take place. It would be an optional feature to it.

By Mr. Greiner:

Q. In other words, it would be done in stages? A. Yes.

Q. Has the introduction of the effectiveness of boundary changes in stages by the child entering a certain grade level—has that been a device employed by the school district in the past? A. It has in the past.

Q. And Exhibit 507, which has just been introduced—that purports to depict at least our rough suggestions as to how those boundaries could be redrawn, is that correct? A. Yes, and the net effect of this would show that consistent with the philosophy of those two resolutions that the

boundary lines for George Washington High School have effectively been moved north; that the boundaries for East High School have been moved south; and Manual High School have been moved south, and in order to accommodate those changes then certain other adjustments in the boundary lines for other high schools in the city had to be made as well.

Q. And those are shown on this exhibit. Now, if you were to ignore for the time being the feeder relationship into these senior high schools from the junior high schools and simply send students out on the basis of geography as [196] depicted in Exhibit 507, do we have sufficient data at this point to know what the—what exactly—where exactly these boundaries would have to be drawn? A. No.

Q. What would be necessary before we could predict where the boundaries would have to be drawn in order to achieve, say, a racial balance at Manual? A. Additional information in the form of what kind of desegregation plan would be adopted so that one would know the racial composition of the various elementary schools.

Q. Well, let's leave that aside. Let's say just on the basis of geography and feeder relationship. A. We would not.

Q. Would you have to have a block count then? A. You would have to know block statistics with regard to number of students in these areas. Certain projections of school population over a period of time in order to find out whether or not these boundary lines are practical or realistic.

Q. Now, this is the same kind of information that was necessitated in the formulation of Resolutions 1520 and 1524, for example, when the boundary lines were redrawn? A. That's correct, the sort of information that was gathered on behalf of Barrett in order to find out—excuse me—

under the resolution in order to find out what children— [197] how many children were in various blocks of the areas that were actually involved in those resolutions.

Q. So this again is a procedure which has been formally employed by the District? A. It is.

Q. Now, what about—

The Court: Before you get to that, could you tell me—just describe generally where the new boundaries of Manual would be?

The Witness: There's been no attempt, Your Honor, to draw those boundaries along certain street paths but rather to indicate as best we could—the best we know at this point an approximation of what elementary schools would be included within that particular high school district. And the attempt has been made here to try to keep the number of students about the same in order to utilize effectively the capacity of the high school as we have now; thus, for example, when a particular area has been assigned to Manual, let's say from the now South High School area, certain additional areas would have to be assigned to South in order to effectively utilize the capacity of South.

And a similar philosophy has been used in the redesign and construction of the other high school areas as well. Notice that the net addition and the net subtraction from each of those areas is about the same after the [198] redistricting has been done.

The Court: What I think you're doing is maintaining the east and west boundaries and greatly extending the north-south boundaries and—at East

and Manual, is that correct? Generally, is that what your scheme is?

The Witness: Excuse me, Your Honor?

The Court: Greatly extending the north-south boundaries?

The Witness: That's right.

The Court: In other words, in effect to narrow the corridors?

The Witness: In effect, they become strips, thinking in terms of providing access for the predominantly Anglo population in the south and southeast, to be incorporated with Manual, East and George Washington.

The Court: Thus, you take Manual's—you take Manual's south boundary all the way to Washington Park?

The Witness: It's conceivable. That's right.

The Court: And redistrict it on the east to York Street or something of that sort?

The Witness: You will recall, Your Honor, that Manual is a smaller school than some of the other schools in the area so that its attendance areas can be somewhat smaller than some of the other high schools.

The Court: You'd do about the same thing to East?

[199] The Witness: That's correct, but it is somewhat larger.

The Court: From York to beyond Colorado Boulevard?

The Witness: Well, excuse me. On the east, the boundaries are considerably east of Colorado Boulevard.

The Court: Yes, I said beyond Colorado Boulevard.

The Witness: Yes.

The Court: From York Street eastward beyond Colorado Boulevard, and then it wouldn't go all the way to the city limits, I take it?

The Witness: That's right.

The Court: And East High and Washington would take up where Manual leaves off, is that correct?

The Witness: That's correct.

The Court: When you say you would send Montbello on to—

The Witness: Yes, that would include Montbello. At the present time Montbello has been assigned to East and even in terms of distance there isn't too much choice between East and Washington.

The Court: And Washington's south—its south boundary would be right near Washington?

The Witness: That's correct.

The Court: And would project north?

The Witness: (Nods affirmatively.)

[200] The Court: Okay. Go ahead.

By Mr. Greiner:

Q. Turning your attention next then, Doctor, to the second alternative for Manual, would you describe, please, for the Court, what the concept is of the second alternative, the first concept being the integration matter. A. We have been impressed with the possibility of using Manual as an open school and effecting some of the innovative programs at Manual.

The Court: Well, you say "we." Whom do you mean?

The Witness: The plaintiffs.

The Court: Your whole staff?

The Witness: That's right.

The Court: You can only speak for yourself here.

Mr. Ris: I object to any testimony from this witness—by his own testimony, his previous qualifications as a mathematician and statistician—Now, when he gets into other fields and we would object to any testimony at all from him expressing opinions on—

The Court: Well, I agree that his last statement —that "We have been impressed with the idea that Manual become a special school" is perhaps not within the field of his expertise.

Mr. Greiner: Your Honor, I think this becomes apparent from the questions and responses in this area—[201] Dr. Bardwell is really talking about what the Board itself has proposed.

Mr. Ris: Well, I will object to that. It's not within his specialty.

The Court: Quite true. I'm grateful, of course, for any help I can get from anybody, you know. I need it badly. At the same time, I'm not going to be greatly impressed with—I mean, I just feel that the last statement ought to be stricken.

Let's start all over again. I mean, undoubtedly he has been impressed. And also, he can't testify for any group, I don't believe. I'm sure you've got a staff of people working but I don't think it's permissible for him to express the summary of the thinking of the group. I'm sure you see what I mean.

Mr. Greiner: I think we can overcome this, Your Honor.

The Court: Very well.

By Mr. Greiner:

Q. Dr. Bardwell, with respect to the second alternative for Manual, what is the philosophy depicted by this alternative? What are we going to do with Manual? A. The intent here is to consider Manual an open school.

Q. Now, what does that mean? A. It effectively means opening Manual to attendance by any high school student in the city to participate in some of the special programs that would be available at Manual.

[202] Q. Now, where does the idea of these special programs come from? What is the source of them? A. It comes from the School Board's response contained in the Board Resolution 1562.

Q. Can you specifically identify the reference that you have? A. Yes, this is a report to the Board of Education, a plan developed in accordance with Resolution 1562 supplied by Superintendent Gilberts in May, 1970, and I have reference in this regard to Manual as an open school, Pages 125 to 135, approximately.

Q. This is part of the defendants' plan, is that correct? A. It is.

Q. So, essentially, what the plaintiffs are suggesting here —suggesting that the defendants' plan be adopted and applied to Manual? A. As one alternative.

Q. Now, under this alternative, what children would be able to attend Manual? A. Any high school student in the District.

Q. Now, under the Board's proposal, what types of programs would be foreseen at that open school? A. There are a number of programs that have been detailed in the response to the Board Resolution 1562, which [203] is the Board's plan, and I might indicate as an illustration on

Page 127 some of the program activities that the Board has in mind. For example, building trades; cosmetology; power and transportation; metals and metal fabrication; machine metals; home economics related occupantions. In addition to that, certain professional programs: those that would be in premedicine, prelaw, preeducation; the area of data processing; communications; preengineering.

Q. Now, as I understand what the Board has described on those pages, Doctor—these are programs which are already in existence at Manual, is that correct? A. That's correct, or intended.

Q. Or in the planning stages? A. Or in the planning stages.

Q. Now, where would the formal students who are now attending Manual—what alternative would they be given? A. It is our proposal that those students be given the option of continuing at Manual or attending any other high school in the area—in the District.

Q. Now, do you have any kind of an estimate of—

The Court: That's what the School Board recommended, too?

The Witness: No, I don't think that aspect of the optional attendance of Manual students is a part of the Board's plan.

[204] Mr. Greiner: I think this is one question, Your Honor, as to whether the Board's proposal—new proposal for voluntary enrollment would be applicable to Manual students. I believe that it would be. That's my initial understanding.

The Court: So then it would be just exactly what you're proposing here? Right?

Mr. Greiner: Yes, in essence, that's right.

Q. Now, do you have any estimate as to what the maximum amount of additional transportation might be that would be required to effectuate an open school at Manual? For example, what if everybody at Manual open to transfer—how many students would we be talking about? A. The present time, if we considered all the Manual students, transporting them out, this would mean about 990 students. Let's say, to utilize the capacity of Manual which would be about 1,500 students, that we're talking about a maximum of about 2,500 that would require transportation.

Q. So that is outside transportation? A. Yes.

The Court: How many is that?

The Witness: Twenty-five hundred.

The Court: Would be transferred?

The Witness: Altogether.

The Court: What's the total enrollment at Manual [205] now?

The Witness: Nine hundred ninety, sir.

The Court: What's the capacity?

The Witness: About fifteen hundred.

The Court: But this plan, I supose, would use the facilities to a greater extent?

The Witness: That's true.

The Court: Night classes and other things.

The Witness: Right. So there—this would mean, of course—the Manual capacity would be 1,600 students transferred in at the high school and all the other students being transported out.

The Court: Twenty-five hundred?

The Witness: Yes.

The Court: But it is unlikely that nine hundred would be transferred on an open enrollment basis. Very remote, I suppose.

The Witness: That's right.

The Court: If half of them applied it would be pretty—a pretty high number, I suppose; at first, at least. Maybe later when they got accustomed to the program—

The Witness: Quite conceivable.

By Mr. Greiner:

Q. Doctor, I have had a chance to consult with one of the staff and I believe the number of students at Manual is 1,500, not 900. [206] A. You're correct. Yes.

Q. Is that right? A. Yes.

Q. And the capacity is 1,800? A. That's right.

Q. So then the maximum amount of transportation, rather than being 2,500, would be about 3,300, if you had an absolute turnover? A. That's about right; about 3,100.

Q. Eighteen and fifteen?

Mr. Ris: He doesn't have his computer.

A. I messed up on that.

Q. That's New Math.

Now, I would next like to call your attention, Doctor, to the area of the second major component of the plaintiffs' proposed plan, namely, the integration component, and would you first of all describe what the common premise of this integration component is?

Mr. Ris: If the Court please, again I think this is beyond the scope of this man's expertise, and we object to it.

The Court: Well, he is just describing it now, I take it.

Mr. Greiner: That's correct.

The Court: Proceed. Overruled.

[207] I don't know what it is either, but we will find out, I expect here. What is the component?

Mr. Greiner: The integration component, Your Honor. You recall, Your Honor, that we've got desegregation, integration and compensation as elements of our overall plan. Now we're talking about integration.

The Court: You mean the Manual program alone?

Mr. Greiner: No, all of the programs at each level.

A. The proviso is that one of the desegregation plans have been accepted by this Court—it is proposed that certain plans be implemented to ease the transportation from a desegregated status to a—an integrated status for the plans that are being proposed here in which certain components of integration regarding students parents, faculty and staff are being proposed.

Q. Now, has the Board in its proposal—

The Court: What page are you on now?

Mr. Greiner: I'm in the memorandum, Your Honor.

The Witness: 49.

The Court: Okay. That would be of some help to me to understand what he is—

Q. Now, Dr. Bardwell, I believe the first component of the integration aspect is that the plaintiffs are suggesting in-service training programs for faculty and staff. Is the concept of in-service training programs also reflected in the [208] Board's proposal? A. Yes, sir, it is.

Q. And does the Board indicate what the function is of their in-service training program? A. (Nods affirmatively.)

Q. Now, would you describe those for us? A. Yes, they are essentially to instruct the faculty and staff in various teaching techniques for dealing with the disadvantaged and minority students; the cultural understanding and to improve attitudes and expectancies of teachers with regard to minority children and perhaps, most important of all are certain programs to help us recognize our own biases; our own prejudices. So these would be the purposes of the program of the faculty and staff in-service training.

Q. Now, has the Board also proposed the next component—their faculty and staff orientation program? A. They have.

Q. And what is involved there? A. These are orientation programs, faculty and staff orientation programs, are designed to familiarize the faculty with the buildings and facilities of the schools to which they would be assigned, certain special programs that are available at those schools, the materials, the resources, other facets of the building facilities and the programs at those schools. And, in addition, to familiarize the [209] faculty and staff with certain components of the community which that school would serve.

Q. Doctor, if I can return your attention to the in-service training program that you first described—in the past has the School District employed such in-service training? A. It's my understanding they have.

Mr. Ris: Just a moment. This is getting way beyond this man's competency in describing what the Board's plan is. And it's wholly improper—a wholly improper approach, and I object to it.

The Court: Well, he's not describing the Board's plan now, is he?

Mr. Ris: Well, I think that's the only justification. That's the tenor of his testimony; that he was familiar with the Board's plan as contained in the exhibit, which has been offered, and this is all that he has been asked. Now he has been asked to go beyond that.

The Court: Now he is describing the detail of the plaintiffs' integration plan.

Mr. Ris: Well, he was just now asked, what have they been doing in the past.

The Court: Well, he wants to know if they—if the Board has any experience in this.

Mr. Greiner: I can make the question more—

[210] The Court: I mean, in this kind of in-service training.

Mr. Ris: This man doesn't know. He hasn't been in—

The Court: Well, he can say he doesn't know.

Mr. Ris: But he's testifying from hearsay, is what he's doing.

The Court: Well, don't you think they have any experience along this line?

Mr. Ris: Well, I think any member of the public knows generally about it but I object to this man. It's beyond the question; beyond his knowledge; he's now just sounding out on various things that have been told to him or that he thinks he knows.

Mr. Greiner: I can withdraw the question and frame one that won't trouble him so much.

The Court: Well, it's not really a question of troubling counsel, although of course I think we ought to avoid anything that is going to raise the boiling point of anybody here too much.

Mr. Ris: Well, if he approves of certain portions of the Board's plan, although he has—all he has to do is say so. But now he's going into describing the next step here of how it compares with the past and so forth. And this was not a part of the plaintiffs' case. If they want to [211] propose any plan, why, all they have to do is—

The Court: That is an integral part of their plan, isn't it, this training program?

Mr. Ris: It may very well be for a proper person, but this man is not that expert.

Mr. Greiner: I'm sorry. Has the Court ruled on the objection? I'm willing to withdraw the question.

The Court: I think he can go ahead and describe what the plan is, at least. We're entitled to know that. I could read it, I suppose. But it might be of some help to have him outline it now and I don't see where that is any great amount of prejudice. Surely there would have to be a lot of preparation in anything as momentous as this in terms of training and personnel involved and preparation of the parents and the students as well. I mean, what you propose is a momentous program. So I think—I expect it would be proper to hear what's involved. That's all I'm doing.

Q. Doctor, do you have the question in mind?

The Court: What knowledge do you have as to what the Board has done on previous occasions in regard to training the personnel involved or the community?

The Witness: I'm aware from certain publications that they—the School Board has presented to the public and to ourselves certain in-service programs that have been instituted in the past. Our program here is merely what you [212] have before you—merely a conceptualization of—

The Court: What you're saying then is that the school administration is certainly competent to devise the details of a program of this kind to carry it out, is that right?

The Witness: I'm withholding judgment on that, sir. What I'm saying is that these are some of the ingredients we feel are necessary if the plan of integration is to be installed. And we have merely outlined this on Page 49.

The Court: Well, then, the objection was to what extent has the school administration done this in the past. Isn't that right?

Mr. Greiner: That's correct.

The Court: What's the object of it? Trying to show they will do it in the future if they did it in the past?

Mr. Greiner: Yes, and that—

The Court: And he says he is withholding judgment on that. So I guess we'll have to take him at his word. That kind of ends that question—that line of questioning. He still is doubtful.

Q. Dr. Bardwell, in connection with the Board's proposal for its implementation of Resolution 1520, 1524 and 1531, did those proposals contain a facet of faculty and staff in-service training and preparation? A. They did.

[213] Q. What work—were workshops held last summer for that purpose? A. They were.

Q. Now, do you know whether or not in the past, for example, in connection with the implementation of the resolutions, the attendance at those in-service programs was mandatory or voluntary? A. My understanding is that they were voluntary.

Mr. Ris: If the Court please, I move that be stricken.

The Court: Granted.

Mr. Ris: He obviously doesn't know.

Q. Do the plaintiffs proposals propose that these programs be voluntary or mandatory? A. Mandatory.

Q. Now, we've already covered the faculty and staff orientation program and—is that also a part of the Board's proposal directed to the Court? A. It is.

Q. Now, the next major facet regarding community involvement—again, what is the basic premise with respect to community involvement? A. The basic premise is that, in order to have an effective plan of desegregation, integration, that community involvement is an ingredient for the three-part phase of [214] this integration of the School District.

Q. Now, what types of programs do we propose to achieve in this community involvement? A. We are proposing that school and staff assignments be made quickly.

Mr. Ris: If the Court please, I'm going to again object to this. Because he is now going into planning, the administrative level of which he is not competent to do.

The Court: I wasn't paying any attention. I was reading the next section. But, proceed.

Mr. Greiner: Well, I can restate the question.

The Court: I can't rule on it if I don't know what it is. But I suppose it's of the same nature as the rest of them.

Mr. Ris: Well, he was now going into what the administration should do in the very near future and so forth. He's now asking about—going into detailed planning, you see, on community involvement.

The Court: Well, I don't suppose it will hurt us to hear what he has to say.

Q. What's one of the facets, Dr. Bardwell, which we propose for this community involvement? A. One of them is that the staff assignments, faculty assignments, be made quickly so that the persons involved will be in a position to know what those assignments are and—[215] at an early time so that planning can appropriately take place.

Q. So that teachers are—will know what schools they're going to be teaching? A. That's correct.

Q. Do teachers have some responsibility in the development of programs at the schools, curricula and so forth? A. It certainly should.

Q. So that this gives the most possible time for planning? A. It does.

Q. And what other types of community involvement programs are part of the plaintiffs' proposal? What about communications to the students and parents? A. It's important that parents and students be advised quickly and as early as possible what their assignments will be so the programs might be set up to acquaint the students, as well as the parents, as well as the various programs that are

going to be instituted in that school. To get familiar with certain of the resources at the school facilities. In other words, to make this transition as comfortable and as pleasant as possible.

The Court: Is it your assumption that there would be a final judgment here?

The Witness: Would be a what?

[216] The Court: A final judgment that everybody abide by and they could start their program—instruction and planning at once so as to be ready by September?

The Witness: That would be great, sir.

The Court: Well, that's a dream.

The Witness: It may be.

The Court: Because I anticipate that one or both litigants here will appeal this to the Supreme Court. If they get any kind of a ruling by September 1st, why, it would be pretty miraculous, I would think; a final ruling. But, anyway, the essence and thrust of what you're suggesting is the program, perhaps, and not the timetable, is that correct?

Mr. Greiner: That's correct, Your Honor. That is a problem we have faced ever since we instituted this action.

Q. Now, what about the use of volunteer or parent aides with respect to the integration program? A. We are proposing that paraprofessionals be used extensively and teacher aides and business aides and other ways in which professional people whose energies and talents can be taken advantage of by the School District itself. We are proposing that recruitment of people themselves be under-

taken and recognition given to some of the services that they can perform.

Q. Now, what about programs directed toward easing the tensions, the rumors that go around when you have this first [217] mixing of children in these schools? How do we propose that that be handled? A. We are suggesting that programs be sponsored to inform parents of the necessity for integrated education, to increase the understanding between parents who might have some misgivings about a program of integrated education. The same thing would apply to students, as well. We are suggesting also that a kind of ombudsman relationship be set up by the School District to receive complaints, a clearinghouse for problems that might arise in the process of such plans for it.

Q. Are we proposing that the currently existing school community relations office handle that job? A. Well, something that functions.

Q. Now, Doctor, I'd like to next call your attention to the general area of compensatory education programs. What, again, is the major premise of such compensatory education programs as proposed by the plaintiffs? A. Again, we feel that an important ingredient of desegregating the schools, and then integrating will require a substantial input of compensatory education as a package for successfully integrating the schools that are involved in this suit.

Q. Now, does that contemplate compensatory education in an integrated setting? [218] A. Yes, it does.

Q. Now, would these compensatory programs apply in general regardless of the plan of desegregation which might be adopted by the Court? In other words, is there

a general component? A. Yes, they would apply in general to all the plans.

Q. Now, what is the basis for these suggestions which we are putting forth with regard to these compensatory programs? Where do they come from? A. Most of these came from the School Board's suggestions in Plan—and in response to the Board Resolution 1562.

Q. Whereas, the Board's suggestions are not premised on first segregating, ours are, is that correct? A. That's correct.

Q. Now, what considerations have been given to availability of funds for the types of programs which the plaintiffs are contemplating proposing? A. The Board's plan —their plans have been analyzed with regard to the expenditure and—or allocation of various funds or various programs that have been proposed and we have taken those funds and have indicated and have concluded that the funds that the Board is willing to spend upon compensatory education alone would be quite sufficient for the plans that are proposed here.

Q. What are some of the items? What is the source of [219] these dollar amounts? A. These dollar amounts are taken directly from the plan developed in accordance with Resolution 1562 submitted by Superintendent Gilberts in his report to the Board of Education.

Q. So we are reallocating these amounts which the defendants have identified, is that correct? A. We are.

Q. Now, would you please identify for us some of these specific amounts? A. Yes, there are funds that have been allocated by the Board to the outdoor education in the amount of about $247,000. Cultural arts, $165,000, to illustrate. In addition to that, we find that certain moneys that are earmarked in the 1970 school year would be available

for implementing our program. For example, $160,000 for Complex 1. And $167,000 for Complex 2. And in-service training would be $201,000. These moneys would be available for our program. And, in fact, some of the special programs that have been proposed by the Board, moneys that have been allocated for that, would be available for our plan simply because the necessity for implementing some of these programs would no longer be required.

Q. Why not? A. Because we would be desegregating the schools.

[220] Q. In other words, some of these plans proposed by the defendants are for giving some sort of integrating experience to children, is that correct? A. I suppose you could say that.

Q. For example, that's one of the things that is talked about in the Ballerette program, is it not? A. That's right.

Q. And if the plaintiffs' plans are adopted, Dr. Bardwell, where will the child get his integrating experience? A. He would have to have it on a day-to-day basis, so this would be—there would be no way of him getting away from this whole business here of a paternalistic kind of desegregation which really doesn't exist under these plans.

Q. Now, then, Dr. Bardwell, what procedures have been suggested by the plaintiffs for measuring the efficacy of whatever plan is adopted by the Court?

The Court: What is paternalistic kind of desegregation?

The Witness: Oh, I suppose it's a nice word for simply saying tokenism.

The Court: Where does the paternalistic come in?

The Witness: Well, paternalistic in the sense of a generic term for simply saying one is skirting the issue.

The Court: I don't see that at all. I suppose there is a certain amount of paternalism in all of these [221] efforts in the sense that the family turns over the children to the school administration for the day. Isn't that right?

The Witness: You mean under our plan?

The Court: Under any plan. I mean, they relinquish a certain control when the child leaves the neighborhood, I suppose. Isn't that right?

The Witness: Right.

The Court: And there is a substitution, I expect, of official paternalism in any of these plans, isn't there?

The Witness: Well, I use this in the sense—

The Court: I think you used it in the sense that—in a critical sense.

The Witness: Yes, I did.

The Court: This is the type of word that defines something you don't like, I'm sure.

The Witness: Yes. I'm simply saying that the plans that we are proposing here face up to the problem of desegregated education.

The Court: Thus, this is not paternalism.

The Witness: Right.

The Court: Go ahead.

Q. Calling your attention, Doctor, then to the procedures which we are recommending for analysis of the efficacy of these programs, would you please just briefly describe the types of procedures and the reasons for them? [222] A. Yes. In order to make sure that the plaintiffs' desegrega-

tion programs are being effective and to provide for modification of these programs, a series of procedures are being suggested for evaluating that effectiveness. One of these being that the racial and ethnic composition of any school affected by the Court's order should not be allowed to depart from the city average by more than one standard deviation. There are other suggestions here for measuring the performance of students on standardized tests, and we are suggesting certain quality control programs and certain statistical programs to measure the effectiveness of the desegregation plans that are being proposed. We are also suggesting that the transportation patterns that are being effected under these plans be efficient and effective by suggesting the use of linear programming and other—certain other—a certain system analysis technique. We are suggesting, also, the use of costing principles and modern accounting be used to measure the effectiveness and to provide for modification of the compensatory programs that would be put in operation. These are detailed on 57 and 58.

Mr. Greiner: We have no further questions of Dr. Bardwell.

Cross-Examination by Mr. Ris:

Q. Dr. Bardwell, you have been referring to the [223] plaintiffs' memorandum for hearing on relief, at least paraphrasing certain portions of it, particularly to the latter part of your testimony. You actually prepared this memorandum, did you? A. Excuse me, sir?

Q. Did you prepare this memorandum? A. You mean this memorandum?

Q. Plaintiffs' memorandum for the hearing on relief to which you have been referring throughout your testimony. A. No, I prepared a substantial part of it.

Q. Who else prepared it? A. Dr. Klite.

Q. Who prepared the portion on community involvement, for example? A. I think it was Dr. Klite that prepared part of it and I prepared part of it.

Q. Who prepared the part on plaintiffs' plans for equalizing educational opportunity at Manual? A. What are you referring to? What page?

Q. Page 46, Plaintiffs' Exhibit 506. A. Oh, Manual High School?

Q. Yes, sir. A. Dr. Klite prepared that.

Q. Who prepared the other part? A. I did.

[224] Q. And then all of these plans are basically the product of you and Dr. Klite? A. Correct.

Q. And that is true for the entire memorandum filed with the Court; plaintiffs' memorandum for hearing on relief? A. Yes. That's not entirely true because—

Q. Well, you tell me what's true. That's why I'm asking. A. Well, it's a joint effort by us and if there—there might have been a first drafting or something and we would bounce certain ideas off the other members and—

Q. Other members of what? A. Other members.

Q. Of what? A. Mr. Barnes, Mr. Greiner, Dr. Klite and myself.

Q. The four of you then prepared this plan? A. That's correct.

Q. And so the four of you are the authors of this plan in this case? A. That's correct.

Q. Throughout your figures you have been referring to school capacity, and those—the rated capacity on the basis that we discussed rated capacity at the February hearing; generally 30 people per room? A. That's correct. And these capacities were figured [225] under the same capacities that were used in the report of pupil membership of

September, 1969, less the possible units or the temporary structures at those particular schools.

Q. And the figures did not take into consideration—the computer programming did not include any input with respect to actually the rated capacity along the lines Dr. Oberholtzer testified concerning? A. The standard that was used was that, if the capacity that is stated by the School Board published by the School Board of a certain amount, then that capacity in the linear program was within ten percent of that capacity.

Q. But you were present when Dr. Oberholtzer testified, were you not? A. I was.

Q. And you recall that there was testimony with respect to certain schools wherein they had a lower pupil-teacher ratio so that there was a lower number of students per room for specific education rooms, that in certain instances a school is fully utilized so far as the base is concerned but with a number substantially less than its rated capacity? Do you recall that testimony? A. Yes, but you're forgetting—

Q. You recall that testimony? A. I do.

Q. Now, did you, in your input computer programming [226] consider any such deviations in the actual use as compared to rated use? A. Yes, we did.

Q. What schools did you do that on? A. The rules that we used—because these schools would be desegregated—there would be no reason to consider one seat in a school any different than any other seat simply because the utilization capacity under the segregation of that would equate one—

Q. Dr. Bardwell, you have evaded my question. My question is, did you in the input consider any actual utili-

zation less than the rated capacity as presently exists? A. It was not necessary to do so.

Q. You didn't do it? A. Absolutely not.

Q. Now, if you would just listen to the question. Just don't argue with me and you can bring all your own theories forward. All I'm trying to get are facts as to what you did. Now, in connection with your transportation and the distances involved, did you consider the distances between one school, say the sending school, and the distance to the receiving school? A. That's correct.

Q. And if a child in the sending school was already living some miles further away from the sending school and in [227] a direction opposite that of the receiving school—that was not put in your input at all? A. No, it was not necessary to do that because the transportation plans that are now within the District in which I have indicated the average distance that the students that are now being transported to get to school itself—we have not put into the computer program the requirement or transportation schedules necessary to bring those students from outlying areas into these schools. This would be in addition to the mileages and costs of the existing program. But I might add—and I think it's worthwhile to add here that the schedule of transportation taking account of those students that are not now being transferred in, could be utilized more effectively, and the distances themselves would be somewhat shorter than simply adding the average number of miles under our plan, plus the average number of miles under the existing plan.

Q. In other words, you are saying there could be some judgments made? A. There certainly could.

Q. But your exhibits do not make those adjustments? A. They do not.

Q. That's all I trying to get at, Doctor. Also, in your pairing plan, you are considering that there are substantially the same number of students in [228] K-3 as in 4 through 6, is that correct? Do you have a breakdown on that? A. We did. We used your report of pupil membership giving the breakdown of the number of students in kindergarten through Grade 3 and 4 through 6, and very carefully calculated the necessary capacities to accommodate K through 3 and 4 through 6.

Q. I don't know whether that was in or not. Now, the exhibits pertaining to the actual transportation—how many would go from each school and so forth—are all those numbers of students practical in your opinion, Doctor, to send those as shown on the print-outs? A. Can you repeat your question?

Q. Is it practical to send the children in each and every instance as shown on your print-outs from one school to another? I'm not speaking theoretically. I'm talking about practically. Or, do you know? A. May I ask you to clarify what you mean by practical?

Q. For example, the program on Exhibit 501-C, transportation schedule for receiving Anglo students, you would send from Bradley, for example, 373 students. Now, you would only send one student to Mitchell. Is that practical? A. I see what you mean. Yes.

Q. So would you transport just one student from Bradley to Mitchell? [229] A. No.

Q. Isn't that what this says? A. Yes. The program itself and the transportation schedule comes out with raw information and then this is then—If one wanted to be exact, the transportation schedule that is involved, obviously certain adjustments which are practical ought to

be made in the plan of this sort so that if one, two, three and perhaps five students are to be sent from one school to another, it wouldn't make much sense to the expense of—

Q. That was the gist of my question. Now, also further look at Exhibit 501-C, which is the transportation schedule for sending and receiving minority students. Now, the very first item there—Bryant—it will send 262 students to the following—and there are two schools, is that correct?

The Court: What page are you on now?

Mr. Ris: This is Exhibit 501-C, Page 18.

Q. Do you have that, Doctor? A. I do.

Q. So you would transport out from Bryant these students? A. I think the same suggestion that was made before with regard to numbers, that there would have to be, I think, an adjustment here as to a minimum number to be transported [230] from any school. And actually, according to your Exhibit 501-B, on Page 15, there are only four Negroes in Bryant School at all, isn't that correct? A. 501-D?

Q. 501-B, as in baker. Page 15. A. I'm sorry.

The Court: Well, it only shows four Negroes, is that right?

Q. Is there any purpose—segregation purpose in sending Negroes from Bryant-Webster? A. No.

Q. Now, Fairmount, Exhibit 501-C, shows you would send out two. A. Right.

Q. And there are no Negroes in Fairmount according to 501-B. How does that happen? A. Well, in putting in the—putting this in the computer, there are certain round

values for the percentages and a tenth of a percent or something of that sort that you would put into the computer, certain kinds of—what might be called spurious, very small values, which you might attribute to School 1, while a white person or two white people, where those white children might not be there in the first place.

Q. And this is inherent in the computer programming? [231] A. No, it's not inherent in computer programming. If you say there are a hundred students at a school and you have 70.4 percent or 120 students in a school and you have 70.4 percent of one racial group, if you calculate those out you oftentimes get 32 and a half students. Well, there are no such things. They have to be rounded to the nearest number. Well, when certain figures like that are put into a computer, on a percentage basis, then the rounding out will oftentimes attribute to a school one person here, one person there, or it may be that the figure for the total number of Negro students at a school might be one, two, or three, and conceivably four students less than the enrollment at that school. This is part and parcel of the—

Q. Here at Fairmount there are no Negroes, though, according to your white chart, is that right? A. That's right. So, in other words, for example at Fairmount when the figures were put in the computer it actually rounds the figures off so the rounding percentage may come up to 99-percent Hispano or Anglo and the remaining number would be Negro. This is by subtraction.

Q. Are you suggesting that there are some Negro students at Fairmount that are not shown on 501-B? A. No. These print-outs—they reflect the—mainly the—

Q. The geographic proximity, is that right? [232] A. well, sir, these I think at best are approximations.

The Court: He means, what goes into the decision?

A. I think that would go into the decision, if this plan were adopted for example, would be a transportation schedule much like you have right before you, with practical adjustments to that plan for, let's say, sending only students whose total number exceeded five of a particular kind. So that, if transportation schedules called for, for example, receiving at Mitchell one student from Bradley, it wouldn't make much sense to stop a bus for one student to be dropped off at Mitchell.

The Court: Well, what are the ingredients of the computer decision? That's what I'm trying to get at. Do you understand this?

Mr. Ris: From a negative standpoint, I was trying to find out what it wasn't doing or what it was doing incorrectly since there are some figures here that are obviously ridiculous. You can't transport two Negro students out of Fairmount when there aren't any there.

The Court: Well, that's fairly obvious.

I would like to cut a little deeper here and find out what the computer is thinking about. That's all; I mean, when it yields these results.

The Witness: Information that was put in, Your Honor, indicated—

[233] The Court: Does it ever give a capricious or malicious decision?

The Witness: Sometimes it does. That's right. Hopefully we can control that.

The Court: Okay. What are the elements that it is seeking? Its first mission, of course, is, I take it, desegregation of a school.

The Witness: That's correct.

The Court: And then, secondly, integration.

The Witness: That's right.

The Court: Does it accomplish this task upon the basis of geographic—a basis of geographic proximity or expediency?

The Witness: It does.

The Court: Primarily?

The Witness: No, there are a number of ingredients here which I think are important.

The Court: That's what I want.

The Witness: And one is that into this program one of the inputs is that no school that would be involved in the program itself would have an Anglo composition that would depart from the city average by more than one standard deviation. That means that the lowest Anglo proportion in any one of the schools affected in this plan would be no less than 54 percent. The highest being 60 percent. In addition to that, [234] the capacity of each one of the schools that is involved in the plan would be utilized to within ten percent of its rated capacity. This means that no school would be utilized to less than 94 percent capacity and none of them would be utilized to more than 106 percent capacity.

The Court: Well, tell me this. Are you seeking in your desegregation effort and integration effort to get the middle-class students into these inferior schools?

The Witness: I'm glad you raised that question, sir.

The Court: In other words, I see that you are sending Traylor students to Elmwood, which is the worst building in the city, and to Fairview. I mean, is Traylor—Traylor, as I understand it, is probably the best facility in the whole city. What is the computer doing there?

The Witness: I wonder then if you would take a look at Exhibit 501-A. That gives us an idea of what would happen to the average achievement at each one of these schools if the transportation schedule that we have just indicated were put into effect.

And what it does here—the program did not take into account some of the aspects of increasing in achievement coming about simply from desegregation, but simply was a linear combination of the achievement scores of the students that would be transported, for example, when the various—[235] from the various schools into the various receiving schools for those students, and I think what is remarkable about this is that average achievement is rather uniform for all of the schools that would be involved in this plan which suggests that not only desegregation takes place on a racial basis, but desegregation also takes place on an equivalent basis, and the relationship between those factors is very highly correlated with the socioeconomic class. Thus, for example, in this particular exhibit we find that no school would have an average achievement even at its worst of less than 31 percent and this is in considerable contrast to what we now have of achievement scores varying all the way from 15

percent in the school program to some of the schools involved all the way to 73 percent, 75 percent, 80 percent.

Q. Dr. Bardwell, on this point, all you're doing is taking some low achievers from one school and putting them into these high-achiever schools and vice versa, right? A. Effectively, yes.

Q. And so that when you say you're making these schools more equal in achievement, percentages, average—whichever those may be—and the chart does not know what you're doing—is just moving people around so that the averages in each school is different not because of anybody having increased this achievement, but merely by getting new averages with pupils there, isn't that right? [236] A. By no means.

Q. Then what is this last column in 501? A. It essentially is what exists now without taking account of the increase in achievement coming about by desegregating the students into the schools that are indicated on this exhibit.

Q. That is your hypothesis as a result of this; that there is going to be an increase in all these schools? A. I think it is supported throughout the country.

The Court: But as of now, the average is just a result of mixing the low achievers with the high achievers?

The Witness: That's right.

By Mr. Ris:

Q. And that's all you show in any of your charts? A. We're preparing our case in the worst light.

Q. So you do not have any figures here to show what these achievers will be in, in say three years, five years or ten years? A. No.

Q. In fact, you don't have any figures—Your computer print-outs—do you have print-outs that would show that? A. Right.

Q. Now, I would refer you, please, Dr. Bardwell, expressly to the Manual plan, Exhibit 506. As I gather from [237] your testimony, your first alternative—what you're really seeking and asking the Court to do is to modify what the Court has already indicated is going to be a part of the permanent injunction? Correct? A. This would be one modification.

Q. Under Resolution 1520 and 1524? So you say the Court should not only reinstate as the Court has stated the permanent injunction on Part 1, but go beyond that? That, in essence, is your plan, is that correct? A. It would be.

Q. Now, have you considered the transportation problems for students at the high school level under your first alternative for Manual? A. No, we have not calculated any precise transportation schedules or any transportation distances that would be involved.

Q. Would your plans contemplate transporting senior high school students say from Fairmont Subdistrict to South High? A. We have no plans for transporting high school students.

Q. Now, as I look at your Exhibit 507, the map, is it correct that Washington High would have the one feeder junior high? And that would be Smiley? A. There would be one feeder junior high in that [238] particular high school district.

Q. And for Kennedy there would be none? A. Well,

that doesn't necessarily mean that there are the junior high school districts.

Q. This is under your plan, is what I'm asking? A. Yes.

Q. A junior high district—these are presently set out? A. That is right.

Q. At least no junior high located in the Kennedy area? A. That's right.

Q. And you would have three junior highs located in the Manual area; Cole, Morey and Byers, is that correct? A. Yes.

Q. And three junior highs in the North High area? A. Right.

Q. So either North or West—they would have one—One would have three junior highs and the other would have two junior highs, is that correct? A. Included in the geographical area, that's right.

Q. Again, may I go back just to the elementary school busing once more and our computer figures—is it possible from an economical and practical standpoint to set that up on the basis of bus capacity so that you wouldn't have maybe [239] eight kinds in one bus time and time again and— A. This information would have to be put into the computer and it would be so extensive so as to make it not practical to do so, and I think any kind of transportation plan we'd devise, based upon the outline we have prepared here, it would be a detailed analysis indicating whether or not—indicating an efficient way to do this would be to pick up, let's say a certain number of students at this school and at the same time going by another school in order to make effective use of a bus in order to get those students at the receiving school.

Q. Now, may I ask you this—

The Court: Are you talking about high schools now?

The Witness: No.

Q. So at the present time it would not be practical to computerize it on a busload basis, is that correct? A. Well, it's not practical for us. We don't have the manpower.

Q. But you understand what I'm asking? With the school reserves available to you? A. It is quite easy to do this.

Q. Could this also take into consideration under your theory, Dr. Bardwell, that the children who are beyond the walking distance to an elementary school and who are now bused because of that distance? [240] A. By all means.

Q. And they would be bused to that elementary school and another bus picks them up there? A. By no means. For example, some of the students that are bused into the outlying areas—we indicate a student is to be transferred from University to Park Hill—I don't know whether they are—but the transportation schedule would call for him to be put into the program when it's finalized that the students are bused into the University Park, they would then be put on the bus going to Park Hill.

Q. So from Southeast Denver it would take normally 26 minutes to get to University Park and you would just bus them further north for the additional time and distances involved? A. That's correct, and the total mileages involved would be considerably less than certain mileages now, yes. Some of them would be less.

Q. Would you give us an illustration? A. Yes. There are some students that are actually transferred from Sted-

man and Smith in which the transportation route is almost 12.4 miles.

Q. How would that lessen? A. Well, I illustrated—

Q. Wouldn't this still be in existence? A. Not necessarily, no.

[24] Q. You don't know that it wouldn't be in existence? It's a possibility under this arranging that some of it might be adjusted out? A. That's correct.

Q. Now, with respect to your boundary changes at the high school level—you said a block count would be required?

The Court: I think we'll take a recess now.

(Whereupon, the trial recessed at 11:00 a.m. and resumed at 11:15 a.m.)

By Mr. Ris:

Q. Dr. Bardwell, you referred to the necessity for block counts on redistricting the senior high schools. If you were going to do that that would require a block count throughout the city? A. Yes, that's right.

Q. Now, with regard to the—

The Court: You are now talking about Plan 1 of the senior high school redistricting?

Mr. Ris: Under Alternate 1 of the high school plan, yes, sir.

Q. And then after those block counts you would also have to make projections as to what movement there might be—there would be in the pupil population that— A. Yes, but I would suspect that one would not have to be that precise about the block counts to get an approximation [242] of

what the utilization of the capacity of each of these high schools would be. But, to be entirely precise about it, one would have to do that.

Q. Are there any other ways of doing it? A. Oh, yes. I think that there are attendance records, let's say, at the school that could be used and at the same time the 1960 census information which would give a rough indication of what kinds of population densities you would have in various parts of the city. But this would be at best a rough approximation.

Q. Now, with regard to the budgetary matters, you did not attempt to go back and go over the entire school budgeting to see what your proposed changes, what effect it would have, did you? You didn't go back to the proposed budget for 1970, or '71, for example, or the existing budget for 1969 and 1967 and go through it to determine what changes would be required in the budgets to effectuate your programs? A. We did not.

Q. So that the availablity or priority of funds shown on Pages 55 and 56 of the plan, the plaintiffs' plan, entitled Part 7, availability and priority of funds—that is just some rough figures you put together? A. They are merely a reflection of what you people had considered or the School Board had considered was to be feasible to allocate there.

[243] Q. You didn't go back and figure out what the full budgetary effect would be? A. We did not.

Q. Now, the outdoor education item, you show on Page 55 under this part of your plan you would just do away with that? A. Well, we feel that that has a lower priority than some of the other items within the budget for desegregating the schools and integrating them and we felt that that amount of money would be available for planning the more important purpose.

Q. But in 1970—the 1970 budget—there is $247,000 allocated for that and that would just—you would just withdraw that complete allocation?

The Court: Some of these are earmarked federal grants, aren't they? That couldn't be used for anything else.

The Witness: That may be true. Which of those funds are earmarked, I do not know.

The Court: Well, I don't know either, but I know at Manual and Cole they have special programs, so I have been told, and the sources of these funds are federal funds, as I understand it. Of course, these funds wouldn't be available for other uses, I assume. They wouldn't go back into the general fund.

The Witness: No, but there is the question of [244] whether or not, under a desegregation plan, whether or not the reason for the use of the funds under that kind of a plan makes just as much sense, let's say, within a desegregated setting than in the given setting where it is segregated. Whether or not the funds would still be applicable in that case perhaps is a question, but, it seems reasonable to suspect that those funds would be available under those circumstances as well.

The Court: Well, I don't think reason has anything to do with it. When you're dealing with the Health, Education and Welfare Department, I think they work in categories, probably. I mean, I have been given to understand that.

The Witness: Something that would have to be investigated, yes.

By Mr. Ris:

Q. Also, did you take into consideration to what extent this $247,000 budget for Ballerette in the outdoor education has already been committed? A. We have not.

Q. You did determine the cost for busing under your Exhibit 511, is that right? A. That's correct.

Q. Have you determined the cost for the in-service training that you recommended? A. No, we have not.

Q. Did you determine the cost for the staff and [245] faculty orientation you recommended? A. No, we have not.

Q. Do your figures consider the cost for compensatory education, as you recommended in the integrated setting? A. No, we have not.

Q. Did it consider the cost for the special programs at Manual and Cole? Or, would you just do away with all these special programs? A. We have not considered those costs there.

Q. Did you consider the cost of testing all pupils three times a year as you recommended in one portion of your plan? A. We have not.

Q. Did you consider the cost of a block count for redistricting the high schools? A. We have not.

Q. Did you consider the cost for the public relations for community acceptance? A. We have not.

Q. Did you consider the cost for capital expenditures for buses or for changes made in the—changes made necessary in the high school, particularly under your Plans 2 and 4? A. We have not.

Q. Did you consider whether the changes in the physical schools would be necessary; the size of the desks and seating [246] and the heights of the blackboards and so forth under Plan 2 and Plan 4? A. Would there be a change?

Q. You don't know that there would be a change? A. As far as we're concerned, we feel there would be no change.

Q. You think that the desks and seats for a first-grader are the same as those for a fourth-grader? A. Yes, sir.

Q. And for a sixth-grader? A. Yes, sir.

Q. And the height of the blackboard—they are all the same whether they are first-graders or sixth-graders? A. Yes. In fact, many of those rooms are already—are kindergarten through Grade 3.

Q. You don't know what changes would be necessary? A. No.

Q. You don't know that any such changes would be necessary? A. No.

Q. Well, then, your conclusion that you stated before that sufficient funds are available within the current budget to implement the plaintiffs' plans— that's not a correct statement? A. I wouldn't go so far as to say that because—

[247] Q. You told us about all these costs that you haven't even considered. How can you make that statement, Dr. Bardwell? A. That's correct, we have not considered the costs in detail, but we have nevertheless modeled those programs very much after the plan that has been presented by the School Board and we are merely contending that the funds that are made available under the proposed plans to implement Resolution 1562 would be also available for the plan that is being proposed here.

Q. But, nevertheless, despite the fact that you have not considered all of these, you will stand on your statement that all this could be done within the current budgetary items? A. That's correct.

Mr. Ris: That's all.

Redirect Examination by Mr. Greiner:

Q. Dr. Bardwell, you were asked a question about the source of some of the components of the plan and you identified for us the authors of the plan. But the sources were not limited to the authors. For example, one of the sources is the Board's own plan, is it not? A. By all means.

Q. Now, do you know whether or not under the Board's [248] current proposal as implemented for voluntary open enrollment, that some of the transportation under voluntary open enrollment requires less than, let's say, the best utilization in terms of the numbers of students being picked up and deposited at various schools? A. Well, any plan that is developed on an essentially haphazard or nonrandom basis—or a random basis like voluntary open enrollment, the chances are almost certain that it is not an optimum kind of transportation plan.

Q. Now, you mentioned that we didn't have the manpower to develop the detailed transportation schedule that would be involved. Does the School District have the transportation department? A. It does.

Q. And it is Dr. Olander's department, is that right? A. Yes.

Q. And do you have any idea of how long it would take his department to prepare the detailed plan of transportation, the actual bus schedules, if he worked hard? A. I don't know how long it would require.

Q. Are we talking about a couple of years? A. Well, I know that, for example, to develop the kinds of linear programming that was developed for our plans here, it is essentially my own work and the work of some students

that helped me write some of the programs, and this [249] effectively saved about three or four men working a couple of years by the use of the computer. Well the same kind of efficient use of manpower can be used by the School District itself and with appropriate input of information like that, allow the computer to take advantage of efficient use of manpower, and I suspect it might take—it's purely a guess on my part—a couple of men, oh, three or four men, four or five weeks.

Q. I suppose we can ask Mr. Olander about that. Now, Exhibit 507, which shows the general geographic outlines of the proposed redistricting of the senior high school areas, does Exhibit 507 purport to show anything about junior high school feeder relationships into those senior high schools? A. It does not.

Q. Now, Doctor, in the District today are there some junior high schools which in fact feed more than one senior high school? A. Yes, sir.

Q. So that is not a different concept? A. No problem at all.

Mr. Greiner: No further questions.

Mr. Ris: That's all.

The Court: I assume—I gather from what you said that on the elementary-high school program that you have advanced that you think that the Plan 2 is much preferable to [250] Plan 1, is that correct?

The Witness: Well, Your Honor, it depends upon one's point of view. In Plan 1, for example, and I think this is in response to an earlier question you made of me, that that plan minimizes the total amount of transportation for all students that would be involved.

The Court: This is the one in which you transported classes, complete classes and changed the character of the schools?

The Witness: That's right. Now, it minimizes the total transportation. And you see that there are about 8,000 students that are to be transported under that arrangement. In Plan 2 it increases the transportation that is involved and hence the cost, but it has some other advantages, Plan 2, because the assignment of students is automatic. The assignment of teachers would be automatic. And one would avoid the agonizing problem that would be presented in Plan 1 by what students are to be involved in the program. So, there are advantages.

The Court: Well, the plan wouldn't give you complete integration, anyway, would it?

The Witness: It would certainly give you complete integration for the 29 schools that are involved, yes, sir. And, in fact, the most efficient way that it could be done.

The Court: Let me see if I understand it. Doesn't [251] this contemplate moving, say kindergarten through the third grade to an Anglo school and vice versa? Or, moving the fourth, fifth and sixth grades of the receiving school to the sending school?

The Witness: That would be Plan 2. And that would of course, involve more students.

The Court: Then once they arrive where they would be, why, this would complete integration within each classroom, is that correct?

The Witness: That's right.

The Court: I mean, that's what you have contemplated?

The Witness: That's correct.

The Court: Turning to the high school proposition that you have submitted, I assume that from what you say that your alternative plan for making Manual a specialized school is not one you think is as good as the desegregation plan?

The Witness: No, it would not.

The Court: Well, of course, it would achieve integration, wouldn't it?

The Witness: The concept there would be to change the community image of Manual itself by turning it into a specialized school with attributes that would provide that school with a symbol of excellence, of the kind of education that all students would look to that school for the various kinds of programs.

[252] The Court: But you would still retain its general program as well?

The Witness: No, I would not.

The Court: Well, then, it would have to achieve integration then because those who wish to take a general high school course would have to go to another school—

The Witness: To the extent that that would take place, it's true. And to the extent that the students at Manual chose other schools for their high school education, to that extent the integration would be achieved.

The Court: Well, if they stayed at Manual they would have to take a particular course that would be offered there?

The Witness: That's right.

The Court: To be sure, they could take pre-professional courses, but the great emphasis would be on practical trades, wouldn't it?

The Witness: No, there would be some emphasis upon that, of course, but we would conceive that to change the image of Manual would be to implement certain programs that would be visionary. Would be innovative. And advanced training in engineering.

The Court: Well, what—in what respects does your program differ from that of the School Board?

The Witness: None at all, sir, except to provide [253] the option for those students that are at Manual to stay at Manual or to transfer to any other high school in the city.

The Court: Well, doesn't the School Board program contemplate that?

The Witness: I'm not certain that it does. I don't know.

The Court: But yours would be an absolute right to transfer?

The Witness: That's right. We want to guarantee that right.

The Court: Well, I suppose there are variations of that concept that could be applied here. I suppose that Cole could be utilized for example as a specialty school as well, couldn't it?

The Witness: It could.

The Court: A specialized school for the whole city?

The Witness: It could.

The Court: Those two schools are sort of symbols, it seems to me, of segregation. I mean, they seem to, for some reason to—to have that character.

The Witness: That's true.

* * * * *

[254] * * *

WILLIAM SMITH, a witness called by and on behalf of plaintiffs, having first been duly sworn, was examined and testfied as follows:

The Court: Please give us your name and address and occupation.

The Witness: William Smith, 3401 East 26th Avenue, Principal, Barrett Elementary School.

Direct Examination by Mr. Barnes:

Q. Mr. Smith, how long have you held this position? A. About eight and a half months.

Q. How long have you been employed by the Denver Public Schools? A. Fourteen years.

Q. What was your position immediately previous to your present position? A. I was the Assistant Principal at Gilpin School.

Q. What was the racial composition approximately of that school? A. Approximately 54 percent Hispano, 50—well, let's say 50/50 black and Hispano at Gilpin.

Q. In what other schools have you held positions in the Denver Public School system? [255] A. Well, I worked prior to going to Gilpin—I worked at Hallett two years; Barrett five years; Fairview three years.

Q. When were you notified that you would become principal of Barrett School? A. June of 1969.

Q. Did you know what the racial composition of the school was at that time? A. Yes, I did.

Q. What was it? A. Approximately 95 percent black.

Q. What steps did you take during the summer of 1969 to prepare new programs for Barrett School to begin in September? A. I went on vaction first of all and then I came back in July and I did talk to Dr. Gilberts about the second week of July and asked him if I might take over the building before the principals normally take the building, and he said yes, so I did officially take possession of the building and I did go into the building and start looking at records, pupil records and so forth.

Q. Did you design some new programs to be implemented in the fall? A. Yes, I did.

Q. Were these programs designed for an integrated [256] school? A. No, they were not.

Q. Did you request any additional funds for these programs? A. Other than just one set of books—I did ask for a set of books into new words, and that was granted.

Q. Before discussing the details of these programs with you, Mr. Smith, would you tell us how many children are being bused into Barrett this year as the result of this Court order? A. Approximately 300 youngsters, Anglo and black.

Q. Three hundred—315? Somewhere in that area? A. In that neighborhood, yes.

Q. How many children are within walking distance of Barrett this year? A. Approximately 98.

Q. What race are they? A. Predominantly black, Hispano, and that's about it. Black and Hispano.

Q. And the total number then is about 415? A. Four hundred fifteen, right.

Q. Do you know what the pupil population of Barrett

was the preceding year, 1968-69? A. Yes, from the semi-annual report, the pupil population, this was June of 1969, was 383 pupils at Barrett.

[257] Q. You have increased in size this year? A. That's right.

Q. How many teachers do you have at Barrett this year? A. Sixteen and a half.

Q. How does that compare with the previous year? A. We had nineteen.

Q. So you have more pupils and fewer teachers? A. That's right.

Q. The racial composition of Barrett this year under this Court order is what? A. Seventy-five percent Anglo, twenty percent black, five percent Hispano and Oriental.

Q. Is the racial composition, Anglo and non-Anglo, generally reflected in all of the classes of Barrett this year? A. Yes.

Q. When a new child comes to Barrett during the middle of the year or has come to Barrett this year, on what basis has that child been assigned? A. Well, in the office I have —let's call it a book, a register for each youngster of each classroom racially balanced. So that, if I receive an Anglo youngster, a boy, in the fourth grade, I know exactly what room he goes in. And that way you don't have a segregated classroom within an integrated school.

[258] Q. Does this result in the exact same pupil/teacher ratio in each class? A. You mean class size?

Q. Yes. A. The same class size. In our classes—the class sizes are different. One fourth-grade class may have 34, the other may have 28. The important thing is to have racially-balanced classrooms.

Q. Have you received complaints from teachers concerning the disproportionate size which you maintain in order to have racial balance? A. No.

Q. How many of your present teachers have requested transfer for next year? A. One, so far.

Q. What was the basis of that request? A. Well, the teacher was assigned as a music teacher and she knew very little about music so I made the transfer within the building and took a second-grade teacher and she agreed to teach the music and the new teacher taught second grade. And we made the transfer within the building.

Q. Is one teacher leaving the building, however? A. That would be the teacher that is leaving, yes, because the teacher that has the—that agreed to that—the fifth-grade music, she would like to have her room back. [259] And since she has seniority, she gets it back.

Q. Are these the same teachers who were teaching at Barrett in 1968-69 before you arrived? A. Yes.

Q. And— A. Except for the new ones that I received this year.

Q. Mr. Smith, you stated that you developed during the last summer some special programs. Are those programs now in effect? A. Yes, they are.

Q. Would you describe the high potential lab briefly? A. The high potential lab is a lab that we have set up for youngsters that have ability above that of the normal classroom work that is required. These labs are ungraded. We have fourth, fifth and sixth-graders working in the labs and they work in various areas—extended areas in the curriculum.

Q. How many children are in the high potential labs? A. Approximately 60.

Q. About how many hours a day do they spend in these classes? A. Well, it depends. A youngster may go in the high potential lab for one hour in the morning or maybe one hour in the morning and one hour in the afternoon.

Or the youngster may in two days a week, and we have some youngsters that may [260] go in three days a week. They don't go in there all the time. We have different programs set up in the high potential labs and it depends on the times that they require to go in.

Q. How do the children make up the time that they lose from the regular classes? A. Well, my philosophy is that if a child is truly high potential, then the things that they miss in the regular classroom, they can do at home for homework. And consequently they are excused from high potential lab five minues early and go to the regular classrooms and pick up the assignments that they miss and do it for their homework.

Q. Can you give us an example—one example of the curricula that might be offered, say, a fourth-grader in the mathematics class? A. All right. You mean, what we're offering now in the high potential labs?

Q. Just a quick example. A. All right. We offer creative writing, reading and geometry.

Q. Geometry that might be for what grade student? A. Well, it's ungraded, fourth, fifth and sixth. However, we have one third-grader in geometry now.

Q. Did you have to take over any new space in order to create these high potential labs? A. No.

[261] Q. Did you have to obtain any new materials in order to outfit these labs? A. Yes, we had to get a few books, and that's about it. It wasn't any big thing.

Q. Where did you get the teacher? A. The teacher was assigned. One of the teachers that we had assigned to the building.

Q. As part of the staff assignment to Barrett? A. Yes.

Q. How did you obtain her time? A. Well, if you want to call it differentiating staffing, scheduling—whenever the

IMC center—and the youngster—this is the library, and when the youngsters go into the library instead of having two teachers in there, then the teachers—the teacher that is relieved can be doing something else.

Q. So it was just more or less by making more efficient utilization of the staff you already have? A. Of staffing, right.

Q. Are the high potential labs integrated, Mr. Smith? A. Yes, they are.

Q. Have you received any favorable comments from parents concerning them? A. Yes, I have.

Q. Now, do you also have a program of learning labs? [262] A. Yes, we do.

Q. Can you describe them briefly? A. The learning lab—we have two, and these are for the—the word I like to use is inexperienced youngsters. Some people prefer to call them slow. I don't like the word slow. So I use inexperienced. These labs are set up for the youngster that is behind in reading or math programs.

Q. Approximately how many children participate in these? A. Eighty.

Q. Are they integrated as well? A. Those are integrated, yes.

Q. Where did you find the space for these? A. Well, we had a teachers' room upstairs that wasn't being used and so we put one lab in there. And, as I said, we only have sixteen teachers there and the teachers agreed that one faculty room was enough instead of two. So we have a lab in one teachers' room upstairs and then in the kindergarten room we partitioned the back part of it off and we have the other learning lab in that area.

Q. Does each teacher in each one of these labs have her own deck and blackboard and materials, et cetera? A. Yes.

Q. Where were you able to find those materials? A. Well, we had them around the building. We have the [263] portable blackboards similar to this one right over here, so we used them as a partition and set it off and made a classroom out of it.

Q. It's a question of efficient use of existing materials? A. We had the materials there, yes.

Q. What is the actual number of hours a child might spend in this learning lab? A. Now, this depends. It's based upon needs. If a youngster goes into a learning lab he may go in there two days a week, three days a week; maybe an hour a day, maybe an hour in the morning, maybe an hour in the afternoon. We have—we teach two different things, as I said, in the learning lab. We have reading and math and a youngster, may go in the morning for reading or he may have—we may have a youngster in in the afternoon for math, and it kind of depends.

Q. Is there any case in which a youngster might spend the whole day in such a lab? A. No.

Q. What might be the maximum? A couple of hours? A. I would say an hour a day, maybe three days a week.

Q. And the rest of his time is in the normal classes? A. In his regular classroom, right.

Q. What kinds of approval have you obtained from the school administration concerning these modifications of the [264] program? A. Well, I have the wholehearted approval from the administration and they said, go right ahead, and I wrote this thing up and in an instructional study and it was approved. A program modification.

Q. Have you been authorized to continue these programs next year? A. Yes.

Q. Have you had to request any additional money? A. No.

Q. Have you received any parents' comments about the learning lab kinds of program in addition to the high potential lab? A. The parents are very enthusiastic about both. The parents that I talked to are very happy with the situation and I haven't received any adverse comments about the labs.

Q. Have you received any requests from parents requesting to withdraw a child from either one of these labs? A. No.

Q. Or any requests from parents to reorganize the classes because they are integrated or not integrated? A. No.

Q. Mr. Smith, how do you organize the loading of the school buses after school? A. I have three teachers on duty at 3:20 and we line [265] the youngsters up at the doors and the buses are there and then they are ready to board the buses and leave.

Q. How long does it take? A. Five minutes.

Q. Did your teachers administer achievement tests throughout the school at the beginning of this year—the 1969 school year? A. Yes.

Q. Were the same tests administered in January, 1970? A. Yes.

Q. Have you had an opportunity to review the reports of the school scores on these two sets of tests? A. Yes, I have.

Q. Was a composite score for the whole school at each grade level reached after each battery of tests? A. Yes.

Q. How did the January tests compare with the September tests at each grade level? A. There was improvement in all areas. Not all, most areas. Improvement.

Q. Was it improvement that was equal to the three months they had been in the school? Or was it more than the three months that they had been in school? A. Well,

I would say it was generally three months' improvement. The average.

[266] Q. There was no evidence of retrogression? A. No.

Q. Of the tests that were given in January, it was the same test that was given in December, was it not? A. Yes.

Q. So the second test was a completely reliable indicator of your progress at Barrett? A. Not necessarily, if you use the same test twice. It could be.

Q. Children do become testwise? A. Yes.

Q. So the test is not completely a reliable indicator of what's going on? A. No.

Q. Have you administered any tests subsequent to January, 1970? A. Yes, the regular testing program that we have—we have the test in by April 17th this year.

Q. Have you received the results of those tests? A. No.

Q. Are they expected momentarily? A. I think so. Usually we get them in—

Q. Do you have any other better evidence that performance of children at Barrett is declined or improved? Teacher comments, or any kind of reliable evidence? [267] A. Now, will you rephrase that. Academically? Socially? What do you mean?

Q. Are we overlooking any other source of reliable evidence about the progress of Barrett pupils? A. I don't think so.

Q. Mr. Smith, do you have any evidence that forced busing has created hostility in the Barrett classrooms? A. In the classrooms?

Q. Yes. A. No.

Q. Do you have any evidence that forced busing has impeded achievements in any way in the Barrett classrooms? A. In the classrooms, no.

Q. Is there a Barrett PTA? A. Yes.

Q. Has the PTA made any formal expression of opinion about forced busing either to you or to the School Board? A. They have to me. They have been concerned about the busing.

Q. Have you planned any social functions through the PTA? A. Other than the executive board meetings, and I wouldn't call that a social function—the executive board meetings, we met one time and we met in the Barrett area zone and the next time we met at the Lowry zone area.

[268] Q. Are these meetings attended by both Anglos and Negroes? A. Yes.

Q. On the first day of school in September of 1969, when Barrett opened, was there any evidence of parental hostility about the busing expressed to you? A. Not hostility. Concern, I would say.

Q. Did you then meet with those parents? A. Yes, I did.

Q. And discuss the general situation of Barrett? A. Yes.

Q. Was there any incident of any significance, educationally, that occurred after that meeting that upset the program? A. No.

Q. What steps did you take during that few days preceding the opening of school and immediately thereafter to ease the transition? A. Sunday before Labor Day I went to the school and opened the building. This was so the parents could come over and look at the building and on Labor Day we were there all day to make sure that people wanting to see where the kids were going to school and see—and then we wanted to be there, too, and we did have—people would come in—parents would come in and we would take them through the [269] building on a tour of the gym and of the lunchroom and so forth.

Q. Was that program effective so far as you could tell? A. I thought it was.

Q. What did you do on the opening day of school? A. Other than registering kids, that was about the biggest thing.

Q. Did you have a coffee and doughnut program? A. Oh, yes, we did. We had coffee and doughnuts out in the hall so that when parents came in they could feel at ease, and this was rather difficult in that the school was integrated four days before we opened and we worked those four days trying to set up classes and all this stuff and it took a while, but we did get all the kids registered by 9:15—9:30 that morning. And I think it makes a—makes it a lot easier if the parents can come into a building and if there is a big long waiting line, they can have a cup of coffee and a doughnut while they're waiting.

Q. Who helped you put on the coffee and doughnuts? A. The former Barrett PTA came over and assisted.

Mr. Barnes: That's all we have.

Cross-Examination by Mr. Jackson:

Q. Mr. Smith, these programs that you have just been discussing regarding the coffee and doughnuts and the opening [270] of school—was this necessitated in your opinion solely because the school was to be integrated? Or was this your general approach for the opening of a new school for which you were a principal? A. I think this was my general approach. This was my first principalship and I would have done it.

Q. And it was really unrelated to the question of integration? A. Right.

Q. The programs which you have established at Barrett

—as I understand your testimony these are programs which you designed and developed almost simultaneously with your appointment at Barrett as principal, is that correct, or within a period of time after that? A. That's true.

Q. And I believe you testified that these programs were designed not for an integrated school but were designed for the school as you then knew it, is that correct? A. That's true.

Q. Is it fair to summarize these programs, Mr. Smith, as one principal's innovative approach to the problem of education today? A. Would you restate that?

Q. I say, is it fair to characterize these programs as one principal's innovative approach to the problems of [271] education today? A. I might say so, yes.

Q. As a matter of fact, the length of time that you have had to evaluate these programs is really insufficient to give you any definite guidelines as to their effectiveness, is this correct? A. That's true, yes.

Q. Now you mentioned the testing of the students and I believe you indicated that tests were given in September of 1969 and then in January of 1970? A. That's true.

Q. And were the children who were tested the same children in each case? A. We have such a large turnover in that many of the youngsters that attended Barrett are transients in nature by the fact that they are military, so that reason that I test in September is to find out exactly where the youngsters were as far as academics. Then, we knew who could go into the high potential labs and learning labs and so forth. We wanted to find out exactly where we were before we started. Three hundred brand-new children—it's kind of difficult to just start teaching. And I think the teachers realized this, too.

Q. So then I take it from your answer that the group then that was tested in January was not the same group

that [272] was tested in September? A. We had the same—basically, the same group but we had a lot of movement, too; people that had transferred out, not to other schools, but had received military transfers to other parts of the world.

Q. And these students had come from various backgrounds, from various school systems? A. Right.

Q. Some from Denver, I would imagine? A. And some from Denver.

Q. And some from out of state? A. Right.

Q. What was the nature of this test? Is this what we have variously referred to as the standardized test, or was that a teacher-made test? A. This was the Stanford Achievement Test.

Q. Which grade were you testing? A. Second through sixth.

Q. You tested four grades? A. Right.

Q. Did you test them in all of the standard subjects for the Stanford Achievement Test? A. Yes, we did.

Q. Did you have any opportunity to compare the level of a student's achievement as indicated by the September test [273] with any prior test of that student? A. For a few—it's one that had been tested in April of 1969 at other schools in Denver, but we received many youngsters from out of state and we didn't have the records.

Q. This movement that you just mentioned—does this create problems in terms of achievements of students in the schools? A. I don't think it creates a problem so far as achievement is concerned. It creates problems as far as getting a group of kids together and following them through. For example, if a youngster is in the building four months and then all of a sudden his father is trans-

ferred to Vietnam or someplace, it's very hard to do. It's very difficult. But, with the youngsters that have been in school at Montclair, Whiteman and Moore, you can kind of follow this along. This is much easier. But we have a great mobility.

Q. But don't you think it means any particular problems as far as the child—that child's achievement is concerned? A. No.

Q. Well, what generally speaking, Mr. Smith, is the experience level of your teaching staff? A. The average experience?

Q. Do you know? A. I would say eight years, the average.

[274] Q. Now, do you have any new teachers? A. Yes, we have four.

Q. By teacher, are you talking about new teachers in the Denver Public School system? A. Right.

Q. Based on your experience as a principal in Denver Public Schools system, do these teachers appear to be capable and competent as those with more experience? A. Yes.

Q. Are any of these new teachers presently engaged in either your high potential lab or your learning lab? A. Yes.

Q. And do you feel that they do an adequate job in those positions? A. Yes, especially the high potential lab, teacher experience is excellent.

Q. How do you select a child for entry into the high potential lab? A. This is done mainly by the teachers, the teachers in the regular classroom. You will have a youngster—for example, we have several that they can read a book so much faster than the other kids and they get bored so we take them and give them a trial basis in the high potential lab and usually they work out all right. We try

to stay away from test scores if we can. And in some cases we have— [275] well, in one case we have one youngster in the high potential lab and the same youngster is in the learning lab. He goes to high potential in math and then he is in the learning lab in reading.

Q. Do I understand that the high potential lab from your testimony is for fourth, fifth and sixth-grade students? A. Yes.

Q. And I believe I heard you testify, and I may be in error—but it caused me some concern that you had one third-grader student taking geometry in the high potential lab? A. That's right.

Q. How did he get it if it was for fourth, fifth and sixth-graders? A. Because it was on a basis of—this kid is so brilliant. He hasn't any business sitting in a third-grade class wasting his time, so we tried him in the high potential lab. So he does there a very good job.

Q. So then you consider your high potential lab at least theoretically speaking would be open to all student grades so that, if there were a case for it, your high potential lab as is presently constituted could function in this manner, is that correct? A. Right.

Q. Now, when a child goes into the high potential lab [276] he misses some courses that he would otherwise have in the—normally, let's say, if a fourth-grader goes in, he misses some courses he would normally have in the fourth grade curriculum, as I understand it? A. That's true.

Q. You mentioned specifically social studies, I believe and indicated that that child would be given homework assignments which he would then have to turn back in to his social studies teacher, is that correct? A. That's right.

Q. Is it always social studies that the child would miss

to go into the high potential lab? Or might it be various courses? A. No, because the high potential lab—it's set up in the afternoon. And the fourth, fifth and sixth-graders generally have social studies and science and art in the afternoon.

Q. What about the learning lab? Does the same thing obtain there, that a child going into the learning lab must miss some part of his regular classroom curriculum? A. That's true.

Q. And is there any uniformity again with the learning lab as there is with the high potential lab in terms of the class the child would miss? A. Well, generally the youngster going into the [277] learning lab will miss probably reading or math. And the philosophy is or the theory is that if he is behind in reading why, then why have him sit in the reading classroom and just sit there. It's better to pull him out of that classroom and put him in the learning lab until he is barely able to hold on to a regular classroom situation, and then we take him out of the learning lab and put him back into the regular classroom.

Q. How many students might be in any one of these learning labs at one—at any one time? A. I would say eight to fourteen.

Q. And this is one teacher for that? A. One teacher.

Q. I understand from your testimony that you have in the high potential labs, writing—creative writing, reading and geometry? A. That's true.

Q. Do you have any other courses? A. Not now, no.

Q. And in your learning lab you have reading and math? A. Reading and math.

Q. You also have a free period, do you not? A. We have a basic-choice period.

Q. And this is a period where you give each child [278]

in the school the opportunity to select one course that he can take during that period of time? A. Not each child. Each fourth, fifth and sixth-grader is given a choice of one subject that they would like to take from 12:45 until 1:30 each day.

Q. And this choice is made entirely by the student himself? A. By the students themselves. The parents have nothing to do with this.

Q. The parents don't get into the business at all? A. No.

Q. Now, have you made any specific requests to the administration for any increase in terms of teachers for the next school year in order to continue your program in this fashion? A. No, but I did make a request to the administration—if I could keep the teacher ratio I would be willing to take an additional 50 youngsters at Barrett School. Rather than lose teachers, I would rather have more kids. And we could handle it.

Q. You have, in effect, requested from the administration that they assign more students to your school, even though — A. Right.

Q. Do you know what the rated capacity of your school [279] is, Mr. Smith? A. I've got a sneaking suspicion and I'm going to guess. I'm going to say around 450.

Q. Now, at the present time you have somewhat less than 450 students, do you not? A. That's right.

Q. Are you utilizing all of the space at Barrett School at the present time and then some? A. In the rooms?

Q. Yes. A. Yes, we are using all of the space, all of the rooms.

Q. Would you say that you are underutilized? A. I don't think so.

Q. Even though you're not up to rated capacity? A. Yes.

Q. Just one other question. Mr. Smith, since this is an

innovative program, if you determined at the end of say two years that your program was not achieving those results that you hoped it would, I would assume you as an educator and principal would want complete freedom then to introduce new programs into school at that time, is that correct? A. I think that, if I found that it wasn't working, I would probably drop it, and this is one of the reasons I did write it up as a program modification, because I can't [280] prove it. There are a lot of—there are not a lot, but some people wanted to tailgate this program and I said I think it's educationally sound but I want to make sure before anybody else grabs part of the program because it might not be. And if I find that it's not a good educational program, then I will drop it and try something else.

Q. I'm going to have to retract my statement and ask you one other question. Did you mention that, so far as the loading of the buses, that you have them ready at 3:20 and that they are loaded then? Of course, if the bus doesn't happen to be there, then you can't do that, is that right? A. Then we've got a problem.

Mr. Jackson: No further questions.

The Court: The achievement levels of the minority children are substantially the same as—

The Witness: Your Honor, I can't say yes or no at this point. I don't have the test scores back yet. We did test the youngsters in September and I haven't received the final test scores back. I don't know. But, based upon the two tests that we gave, the same form test, in September and January, there was progress on both parts; both Anglo and blacks.

The Court: You said that the two special programs are fully integrated. I would assume from

that that the same percentages that are persuasive in the school are present [281] in the special programs?

The Witness: Yes, except in the high potential lab. We did not purposely balance the labs because we feel that the labs—that should be based upon need instead of color. But it so happens that in the learning labs they are fairly well racially balanced. In the high potential lab, I think we have, so far as black youngsters, two or three in the high potential lab. But we took it strictly on need and not on race. On just these two programs.

The Court: Thank you very much. You may be excused.

(Witness excused.)

Mr. Greiner: Your Honor, at this point, other than Dr. O'Reilly, who we plan to put on after the presentation of the Board's plans, the plaintiffs have nothing further to offer at this time.

* * * * *

[282] ROBERT D. GILBERTS, a witness called by and on behalf of defendants, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ris:

Q. State your name and address, please. A. My name is Robert D. Gilberts, 3921 South Hillcrest Drive, Denver, Colorado.

Q. And your occupation and profession? A. Superintendent of Schools, Denver Public Schools.

Q. You have previously testified in this case last August? A. Yes.

Q. And your qualifications at that time have been adequately stated? A. I think so.

Q. And you have continued to be Superintendent of Schools since that date? A. Yes, sir.

Q. Have you since submitted your resignation to the Denver School Board? A. I have.

Q. Effective as of what date? A. September 1st, 1970.

Q. And at that time what new position will you assume? [283] A. Dean of the College of Education, University of Oregon.

Q. You also have a faculty rank of Professor of Education? A. Right.

Q. Dr. Gilberts, shortly after March 21, 1970, were you furnished with a full copy of the Court's memorandum opinion and order of that date? A. Yes, sir.

Q. Have you given much thought and study to the memorandum opinion and order? A. Yes, sir.

Q. And have you given particular study to that part of the memorandum and opinion and order that pertained to improving equality of education in certain desegregated schools? A. I have.

Q. In addition to your own personal study, have you also called on members of your staff? A. Yes, sir, I have; both central staff and the principals in the schools involved.

Q. Do you have certain staff members at the next echelon below you who have particularly given this substantial consideration? A. Yes, all of the affected departments in the central [284] offce staff have been involved one way or another.

Q. And those principal staff members—have they been in court during this entire hearing yesterday and today

pertaining to remedy? A. Most of them. Not all of them.

Q. Will you state who is here and their positions on your staff? A. Mr. Howard Johnson, the Deputy Superintendent. Dr. Armstrong, Assistant Superintendent for Planning. Mr. Olander, an Assistant Superintendent for Business Services; Dr. Keppe; Dr. Quincy, Director of Research, Planning and Budgeting. Mr. Harold Spetzler of the Personnel. Jerry Elledge was here some time ago. Dr. Beal in Research. There may be—they may have been other members here from time to time.

Q. All of these individuals have studied the particular problem at hand? A. Yes, sir.

Q. Have you conferred with all of these various individuals in—pertaining to the benefits of their advice and thinking as well? A. Yes, sir.

Q. With respect to the principals of the fifteen schools designated by the Court in its opinion and order of March 21, 1970, did you have occasion to confer with those individuals? [285] A. Yes, sir. My staff did it at greater length. As soon as the order was given to us by the Board to meet this plan, all of these principals were brought in, a review was made of what our objectives were. They were asked to submit their proposals, their suggestions. These were considered in conjunction with other suggestions from other staff and they were involved.

Q. Now, with respect to the initial meeting of these principals, each of them were furnished with appropriate portions of Part 3 of the Court's memorandum and order? A. Yes, sir.

Q. Were they asked to give this some thought and at a later date submit their own recommendations and suggestions? A. Yes, sir.

Q. Did these principals proceed accordingly? A. Yes, they did.

Q. Did you get a substantial amount of information back from these individuals on recommendations? A. Yes, sir.

Q. Subsequent to what you have just described with your own staff members and with the principals of the fifteen schools involved, did you then proceed to put together a proposed plan to be submitted to the Court in this case? A. Yes, sir, we did.

Q. Was that plan submitted to the Board of Education? [286] A. Yes, sir.

Q. And were some modifications or changes—was the plan approved by the Board? A. Yes, sir, it was.

Q. Were the attorneys directed to submit that to the Court? A. Yes, sir.

Q. The plan itself on the Court's bench has been marked as Exhibit B-A. Is that the plan which you then prepared, Dr. Gilberts? A. Yes, sir.

Q. I hand you what's been marked as Exhibit B-B. Is that a copy of the resolution of the Board of Education of Denver School District No. 1 to which we have previously referred? A. Yes, it is.

Q. Was that resolution adopted on May 6, 1970? A. Yes, sir.

Mr. Ris: We offer in evidence Exhibits B-A and B-B.

Mr. Greiner: No objection, Your Honor.

The Court: It will be received.

(Whereupon, Defendants' Exhibits B-A and B-B were received in evidence.)

Q. Dr. Gilberts, were you subsequently—I believe on Friday last week, which would have been May 9th, I believe [287] —furnished with a copy of the document entitled

Plaintiffs' Memorandum for the Hearing on Relief? A. Yes, I was.

Q. And within the limited time available, have you studied that as well? A. Yes, I have.

Q. Have you—have you had members of your administrative staff also review that particular document? And particularly the portions thereof within their respective specialties? A. Yes, I have.

Q. Have you been furnished their suggestions and advice? A. Yes, sir.

Q. Now, with respect to the plans in this particular case, whether it be Board plans or plaintiffs' plan, are there certain matters of rationale that you yourself think are of substantial importance that have to be considered as a basic foundation in evaluating or formulating such a plan? A. Yes, there are.

Q. With respect to the problem of low achievers among a group of students, children generally and particularly from the lower socioeconomic environment, concerning which there has been considerable testimony here, is that a problem that is peculiar to Denver? A. No, sir, it is not.

[288] Q. Is it a problem from your own reading, research experience in attending meetings and so forth, that is a very common problem in school districts, particularly of the larger sizes such as Denver? A. Yes, sir, it is, a very common problem.

Q. Is it a complex problem? A. Very complex problem.

Q. Can you state some of the causative factors that enter into this problem of low achievers, particularly on the basis of the disadvantaged children? A. Well, there are—

Mr. Greiner: Well, Your Honor, I object. It seems like that's a question which the Court has already

determined. I don't think the purpose of this hearing is to relitigate those questions.

Mr. Ris: I'm not attempting to relitigate, Your Honor. We are trying to get a basic rationale and foundation, the factors that Dr. Gilberts believes are of consequence in connection with a case in which there is a basis for the plan that he has proposed.

The Court: Overruled. He may answer.

A. Well, there are many different factors that are involved in the lack of achievement of these youngsters. There are factors related to causal background, certainly, of influence on which youngsters relate themselves to the kinds [289] of formal instructional process as conventionally offered in our schools. The problem of communication. A good many of these youngsters come from homes that are not verbal. The kinds of opportunities they have to prepare themselves to move into a verbally word-oriented instructed program is certainly a factor. The kinds of experience that these youngsters are provided with would have a great deal of influence in terms with their readiness to recognize some of the formal reading aspects. The matter of discipline—self-discipline in the classroom and in that kind of instructional setting is a major problem. There is the problem of health in some cases; youngsters not having had adequate nutrition over long periods of time which certainly has a great deal of influence over an individual's ability to learn. Dietary problems. Just generally health problems. Broken homes. Lack of parental interest. All of these factors certainly contribute to the problem. These are reinforced in many cases, not only by the home but by the community as well.

Q. Are you aware of the fact that there have been many

studies made of this particular problem? A. Yes, there have.

Q. And the thousands of people that have participated in these studies? A. Yes.

[290] Q. By whom have these studies been carried out over a period of time? A. Well, there certainly has been many, many studies carried out by colleges; universities; regional laboratories established by federal offices; other studies sponsored by the U.S. Office of Education; foundations; local school systems. I happen to belong to one of the larger cities of the country, the Great Cities Research Council. There have been many, many articles written and many, many research studies reported by them.

Q. Has any one person or any one group of persons or any one institution come up with a single answer to this complex problem? A. I'm not aware of any single answer to the problem that has been accepted widely in the field. There are those who feel very strongly that they have, as individuals, but as far as the field is concerned and I meet with superintendents from larger urban cities at least twice a year, and I'm not aware of any.

Q. Doctor, you heard the testimony today and yesterday concerning the plaintiffs' plan for proposed desegregation by mandatory cross-transportation as the first step. Now, based upon your study of that plan and the evidence you have heard here and based upon your own education and your own experience and your own knowledge of the Denver Public School [291] system, its pupils, its teachers, its staff, and all of the factors that must be taken into consideration here, do you have an opinion as to whether desegregation as proposed by the plaintiffs is an absolute and necessary first step? A. I see no evidence that would lead me to believe that this is an absolute truth. The fact is, if this is a

truth, then all the major cities in this country are beyond help. Certainly there have to be other ways of approaching the problems of educational deficiencies, because it is going to be a long time before integration as such can be applied in most of the major cities of this country. New York, Philadelphia, and other cities such as this.

Q. Are there other cities that are worse off educationally than Denver? A. I believe so.

Mr. Greiner: Objection, Your Honor. I believe we are concerned with the problems of Denver; not the problems of New York City.

The Court: Well, he is simply saying that—he's talking about the magnitude of the problem. He's just using it in that context. Clearly, we're not going to try to solve the problems of Philadelphia and New York.

Mr. Ris: I don't intend to.

The Court: Probably not solve the problems of Denver, either, but we're going to do our best.

[292] Q. Based upon your general background and education and experience and your knowledge of the Denver situation, including its local economy, the sociological factors present here in the schools, political and educational background of the pupils, what is the first and foremost change which might be made, in your opinion? A. I agree with Dr. Sullivan's comments that, if a—that some massive changes are necessary in an—in the entire form of education. I don't know if I would agree in terms of types of changes that he suggested, such as educational parks, but it seems to me, as I have looked at this city as a large institution, one of the first and foremost changes to recon-

struct the educational climate which is not going to be an easy task because this involves changing of attitudes and values and practices on the part of professional staff—certainly on the part of our students, on the part of the community, parents, and all of those who have some input into the educational process. Now, I think it's absolutely essential, changing this kind of climate at this time and I'm talking about those inputs, parents, community, et cetera, a positive kind of supported influence and supported posture with respect to the changes that are going on in the schools. In addition, of course, to changing that climate, which is, in and of itself, a very complex thing, and I'll talk about some of the things later on as I talk about the plan that I [293] think will go together to assist in that process.

It is necessary, of course, for us to look at new ways of approaching program differences; new ways of motivating youngsters in terms of the curricula itself. Again, we will talk about some of those changes. And I know that two of the principals here who have made some of these kinds of changes in the schools will talk about them, as well.

Q. Basically, so far as changing understandings and attitudes, is that more qualitative rather than quantitative? A. Yes, it is predominantly a qualitative change. However, I think it can be influenced significantly by some quantitative changes in which we operate.

Q. Can you break this change in attitudes down, item by item? You mentioned pupils; faculty; and community generally; parents and other members of the community. Will you give us just briefly what you have in mind with respect to pupils? A. Well, I think that probably the most significant factor in terms of pupils' attitudes are going to be —to get at first as early as possible the kinds of motivations that are provided by the home, the family. We have begun

working on preschool programs, educational programs designed for youngsters prior to the common age of entrance in our kindergartens. These programs are designed to work with parents in helping those parents assume a more positive role in terms of their youngsters' education. So this is one [294] element of changing the pupils' attitudes.

Q. Does your plan—part of your plan—is it intended to effectuate such changes? A. Yes.

Q. At pupil level? A. Yes, I didn't quite finish.

Q. Beg your pardon. Go ahead. A. It seems to me that another very important element is the format of the educational process itself. The question of relevancy of course is being raised by youth all across this country, at the college level recently, of course, in a very obvious way. The same thing occurs throughout our schools—throughout the entire City of Denver, as well. And I believe that there are some significant changes in the kinds of option that youngsters should be provided once the formal educational process begins, and we have in this plan, I think, identified some of the elements that should make a difference over a time in this direction.

Q. Now, can you proceed on, and in terms at this point discuss the matter of changes and changing of attitudes, understanding, as to staff and faculty? A. Well, this is going to be probably just as difficult a task in that professional educators have a great deal invested in current practice, and it's going to involve some rather substantial changes in the way in which we organize and [295] operate our schools; the roles that the professionals play in that process. It will have to be supported by some extremely well-defined in-service education programs which will allow those individuals to modify their behavior in these new

kinds of roles and new kinds of situations. I think that the entire matter of government, however, how decisions are made—the kinds of opportunities that the professional has to input at the local level where the problem is extremely important and in living, and that solution can be implemented and ultimately will effect a change in the way in which the institution relates to children.

Q. With respect to teachers, is there any objective—

The Court: I'd like to clarify something. I'm not sure that I understand what he's saying. When he talks about the kinds of opportunities—I suppose you mean the administrator has in carrying out a program? Is that what you're saying?

The Witness: I'm talking about the opportunity of the entire professional team—the opportunity that it has which includes the teachers as well as the administrators. I see the need for sufficient differentiation in the process of education so that the professional is being used as a professional. Let me give you an example, Your Honor, to make it a little more clearer.

In the process of reading we assume that the—that [296] most of the activities that are necessary for a child to read are to be conducted by a professional teacher. One of those activities is certainly the reading to a youngster to motivate that youngster to become interested in the process of reading. Also, to give him experience with words, with somebody else using the words. I believe that that process does not necessarily require the talents of a college graduate. I think designing a program certainly does; that some element of that may be there. But that

might very well be handled by somebody with less than professional training. An education by and large—we have used up a good bit of the professional talents of our teachers in some rather mundane functions in education, as I see it, leaving very little time for the professional planning and evaluation. The opportunity for professional teachers to deal individually with the youngsters, looking at their difficulties and trying to tailormake a program for them. So what I'm talking about is—it's creating an attitude change by allowing the professional to function more professionally in the setting.

Q. Now, as to the teachers themselves, are there any reorganization or any changes of planning and so forth—are there any problems that exist in the Denver Public Schools system that would have to be anticipated and considered? I'm thinking of seniority and so forth. A. Yes, we do have a relationship with our teachers in [297] which we are hopefully beginning at least to share some of the decision-making in our school system. We have negotiated with our teachers, making some decisions through that process. We also have a professional counsel in which we talk about any subject in our school system that is of interest to each of us. And certainly the teachers as a professional organization have a role to play in that process.

Q. And as a matter of fact, even though the Court may note the record—the DCTA is the Denver Classroom Teacher Association? A. Yes.

Q. And that is an independent organization? A. Yes, and it is the elected representative organization of the Denver teachers.

Q. In fact, during this present school year they went on strike for the first time in Denver Public Schools, is that correct? A. Yes, sir.

Q. Now, with regard to community acceptance, we have already had considerable testimony here, particularly by Dr. Sullivan, the community acceptance, change of attitudes and understanding of the community is important. Can you elaborate on this as that applies to the Denver Public Schools system? One, as to parents who are being affected by any changes and, two, by the community in general; non-parents. [298] A. I believe I mentioned the necessity of the support of the parents in order to assist youngsters to be receptive of the educational process. Throughout my twenty years of experience as a superintendent it has become pretty obvious that, without the support of the community parents involved, it's very difficult to make programs function well, whatever that program. Consequently, that understanding and that support is necessary, no matter what the change necessary is in terms of operation of our schools. A second very critical error is the need for understanding and supporting the fact that we rely upon the community's acceptance of what we do and how we function, and the financing of our schools. Without funds there is very little that we can do. Consequently, we are heavily dependent in this area in terms of bringing people along so they accept the kind of programs that we propose and are willing to support them financially.

Q. And is it this type of support that is very often referred to as political considerations in the operation of an administration of the school district? A. Yes.

Q. We have had several definitions during the course of this trial as to desegregation, particularly as compared to integration. Are you aware of that differentiation? A. Yes.

Q. Just so that there is no misunderstanding, we have [299] been referring to desegregation as a mere transfer of students; integration being psychological, emotional, philosophical acceptance. Now, keeping those two things in mind, insofar as attempting to desegregate or attempting to integrate, is there a substantial difference in what can be forced or not, in your opinion? A. Yes, certainly. Desegregation can be accomplished by fiat.

Q. What about integration? A. I think integration is a voluntary process of change in which—one, in which people reserve unto themselves—and I don't know how anyone can accomplish this except through the process of convincing people of its importance; of the necessity of their accepting this as a goal.

Q. Do you know of any plan that has been created by anyone in the country that can be used to be brought into a system such as Denver and put into operation on a mechanical basis that would take care of any of the equality of education of the achievement results that exist in some of our schools? A. Each city and each school system has a personality with individual characteristics of its own, and these have got to be considered on that basis.

Q. And have you considered the Denver situation expressly in arriving at your proposed solution? A. Yes, we have.

[300] Q. Now, your particular plan has been broken up into several parts, is that correct, Dr. Gilberts? A. Yes, it has.

Q. The introduction is more or less a summary, is it not? A. Yes.

Q. And the first major item is that of voluntary open enrollment, is that correct? A. Right.

Q. Now, during the previous hearing we have had con-

siderable testimony concerning the VOE, so we don't have to go into the details of it except that I wish you would summarize what is proposed in this particular plan with respect to voluntary open enrollment, which is an extension of what has been done in the past and how you think it will affect the situation generally, particularly with the educational opportunity. A. Well, it is really an extension of the previous plan which is the current voluntary open enrollment plan with the further provision of this element of it, that we would effectively guarantee space for any youngster who would like to attend school somewhere else in the city where the racial composition would be improved. We have, of course, before provided transportation for those youngsters under the other plan but substantially—the substantial difference [301] here is that we are guaranteeing space for these youngsters.

Q. And again, is the integrating effect of the VOE a continuing qualification of the plan? A. Yes, sir.

Q. And that is one of the intents of the plan? A. Yes.

Q. Again, without going into all of the detail, do the matters contained in Exhibit V-A under the caption of Plan for Raising Educational Achievements—is this substantially set forth, do you think, in planning in that regard? A. I'm sorry. I'm not sure I understand.

Q. Does that part of Exhibit V-A under the caption of Plan for Raising Educational Achievements substantially set forth the overall plan for the voluntary open enrollment and the expansion of it as you just detailed? A. Yes, it does.

Q. Is the guarantee of space, so far as the plan has been projected to this date, is that related to the fifteen schools designated in the school designations by the Court? A. Yes.

Q. Now, the next major item that you have taken up in the plan—that is a differential staffing and we have not had a great deal of testimony on it, but I wish you would describe what is meant in this context by the phrase differential staffing. [302] A. It's difficult to talk about differentiated staffing without really examining at the same time the kinds of modifications that would occur in the program which would be reflected in differentiated staffing. You cannot talk about differentiated staffing in a vacuum. It is merely a reflection of how one best deals with the educational task; defined by a given educational program, utilizing the concepts that I just discussed with the judge. It seems to me that an education—we have done a very poor job of examining carefully the elements of the educational task. Recently some new approaches to this particular problem have been taken in terms of planning, and budgeting systems and systems analysis and I'm sure there are other approaches to the problem as well, where we very carefully —as carefully as possible define what our behavior and the other objectives might be in our educational program and then very carefully look at what kinds of steps need to be designed to see that those goals are achieved and then break those steps down in some way of distributing the responsibility based upon the kinds of competencies that are necessary. Now, there are a number of differentiative staff plans around the city. By and large, they have not been developed on this basis. There are some that have been. But I think, as we develop our skill in examining the educational task and as we look at how we might redistribute the talents, the abilities, the competencies, we [303] will be able to identify effective systems of differentiating our staff. I think the differentiated staff has a major implication for both the instructional process, that is, what we teach kids

and how we teach them, as well as providing an extremely important motivational influence and opportunity for promotion and opportunity for input at a higher professional level for our teachers. We have an example of this—By the way, back in 159, where there is a field-tested differentiated staff program which has been operating I think about three or four or five years in Wisconsin—it began when I was there at Madison. The program was operated at Jamesville, Beloit. I was familiar with the Madison problems and personally familiar with the Jamesville plan, which is the beginning of looking at the problem of differentiated staffing.

Q. So this innovation of differentiated staffing or examination, I should say, is not peculiar to Denver? A. No.

Q. And is it being generally accepted in other school districts? A. Two weeks ago at the largest superintendents' meet in Vancouver, we were looking at the major trends in terms of educational change today and differentiated staffing was one of the early major ones. Early childhood changes as the second one. This is one of the major topics at least among those superintendents that were there.

[304] Q. Is there contemplated that this will have an effect on increasing the achievement levels of children, particularly in disadvantaged areas? A. We believe so.

Q. Now, continuing on with this portion of the plan pertaining to staffing, could you tell what you contemplate the plan to provide with respect to personnel assignment procedures? A. Well, you're talking about Page 6 now,—is this the item you're talking about?

Q. Page 53. A. In this section of the plan we discuss a number of activities that we think will be important in identifying people to teach in schools in the areas that are affected by this plan. We talk about elements of an in-

service program that we feel will be important in preparing them for service in this area of the city. And essentially limited to that.

Q. Is it part of the plan, also—does it also include assignment of teachers to bring about significantly more integration throughout the system? A. We have been moving on the process of increasing integration through our staff throughout the city—the entire city.

Q. And this is nothing new? I mean, this is a continuation [305] of what you have been doing? A. Yes, sir.

Q. Now, with respect to increasing experience of teachers in the disadvantaged schools and to provide for more stability of—the less mobility of those teachers, what is your plan? A. I feel that the concept of differentiated staffing has some implications if we begin to process in these schools in terms of attracting people with ability, and talent. I believe also that providing the necessary planning time for those kinds of programs and paying teachers for the time will also have an effect on that process. Under the staff stabilization part of the plan we talk about incentives that really provide as much—much more for the necessity of planning educational programs as attracting teachers. Both of these are important elements. But we feel that, given the opportunity to use these teachers who would have an interest in working in this kind of setting, and allowing for the changes that we describe in other parts of this plan, we will be able to attract the most competent teachers that we have into these programs.

Q. And for the additional planning time that would be required for these teachers, you tell us you do provide for additional compensation? A. Yes, sir.

[306] Q. How is that contemplated to be handled? A. On a pro rata basis, on the regular salary for an extended four weeks, I believe it was.

Q. Would that be four weeks during the summer? A. Four weeks during probably the month of August prior to the opening of school.

Q. Now, again, there is substantially more detail in that portion of your plan under general—the general designation of staffing that goes in more detail, is that correct? A. Yes, sir.

Q. Now, the next portion or the next section of the plan pertains to improved in-service training for staff and—Would you please elaborate on that, if you will? A. Well, if we're going to make some of the changes that are necessary in education that I have alluded to previously, it's going to be necessary to help teachers make the kind of accommodations that are necessary to these changes in educational programs. We have listed on Page 169 a number of activities that have already been conducted in the schools. Some fourteen different kinds of in-service training programs that are indicated there. We talk about the extension of these kinds of programs, plus the identity of other in-service programs relevant to the instructional process; relevant to attitudes and values held by our teachers and their ability [307] to relate to their students. We have talked about the utilization of the black educators and the Hispano educators to assist us in this process. We feel that the fifteen schools have problems which can be best ameliorated by the principal and staffing planning and that action at the local level, we intend to allocate moneys in our budgets for this process, and that in-service planning is really a part of the in-service process.

Q. An illustration of individual school planning such as Mr. Smith testified to today at Barrett? A. Yes, but extended much beyond what he was able to do with the resources we gave him.

Q. But you have a planning on a local level with respect to the fifteen schools? A. Right.

Q. And which would be geared to their particular problems in this subdistrict? A. Yes.

Q. And you contemplate increasing budgets toward those schools and for that purpose? A. Yes, sir.

Q. Is there anything else now on this in-service program that you would like to highlight? A. I think the planning element is probably one of the most significant, and into that planning process obviously [308] there would have to be input, the special knowledge and special talents for the preparation of these teachers.

Q. Dr. Gilberts, if you were to go into the entire detailed planning for in-service training, would it be practicable to do so and put it in this particular plan you submit to the Court? A. Yes, sir, because a good bit of what will probably be necessary in this area is in the process of development in a number of places in the country. There is a great deal of local planning involving people who are going to be affected by it that will be necessary. And this is something that will need to be worked out by not only other experts in the area but our own staff who will be involved in the process.

Q. And this takes time? A. Yes, sir.

Q. And development as it goes along? A. Right.

Q. So could it be spelled out by book, chapter and page insofar as this present plan is concerned, in detail, item by item? A. Certainly not in the time limits we have.

Q. Now, with respect to the next portion, the school complex concept—

The Court: Before we come to that, I think it might be well to elaborate on the actual curriculum or

changes [309] that are contemplated. I'm sure that you couldn't delineate all of them but what do you know now about possible programs? You said you were going to extend the length of service for the teachers involved. Would you also, for example, extend the school year for some students?

The Witness: Yes, sir. We do propose in here the extension of our summer school programs offering that opportunity to the students.

The Court: That would be a thirty-day period before school starts?

The Witness: Not necessarily. The summer school program for youngsters might be a later June through early August program. The timing has not been decided. This is our conventional summer school period. And I would assume that it might fall in that time, but it might not. It might be found advisable by the staffs to have this immediately preceding school. That's not been decided.

The Court: What kind of special courses are prescribed in connection with this kind of problem? What is the thinking of educators on this?

The Witness: At the present moment I think that probably one of the most significant areas in which we can proscribe some educational opportunities would probably exist at the preschool area. I was just—I have just received this week a communication here which is an educators' dispatch [310] to administrators in which they review a number of ideas that are presently relevant, I think, on education. For example, it says if you are wondering what preschool children are teaching cognizant psychologists today, you might find the following items interesting:

"One, the children of the poor often fail to succeed in school not because of genetic . . . but because they lack the right kinds of sensory stimulation in the early years.

"Two, traditional tests . . ."

Well, in the area of developing programs for preschool youngsters involving parents and so on, I think this is probably a very significant area in getting at some of the early deficiencies of these youngsters. Precisely how those would be designed and how they would be operating, I really don't know. I don't consider myself an expert as such in that area, but we do have and have had for the last year and a half or so people who have been working on programs in that area and we have begun to pilot test those programs.

The Court: These then would work on the basis of the Head Start programs, only they would be more elaborate, I suppose?

The Witness: Well, I think they would probably be somewhat different than the Head Start programs in that we would be organized for a much more specific objective and at [311] least what I observed in Head Start programs having been organized for—

The Court: Well, I suppose they would seek, however, to compensate for the lack of innate knowledge, so to speak, that the child has?

The Witness: Yes, sir. Now, then, I could go on through the entire curriculum and talk about all kinds of specific innovative programs, but I think you will hear Mr. Ward later talk about some things I consider to be particularly exciting in that school. I believe that the programs that he and his staff have

designed in that school to be some of the most exciting, disregarding the fact that the school is black; exciting ideas in education that I have seen anywhere in this country. I think they have tremendous potential for Manual and for other schools, as well, probably. I think that you heard Mr. Smith, of course, talk about some of the ideas he has. Mr. Morrison will talk about some things that are being done at the junior high school level. The whole area of educational program modification in the elementary schools is a very complex one. We have some programs identified in here that deal with bilingual education, which we are having some very good results with.

The people, the staff, are quite enthusiastic about the results. Mrs. Polvida (phonetic spelling), who is in one of our elementary schools, has an approach to teaching [312] youngsters coming from Hispano backgrounds, which was reported to the Board a week or two ago, and again, it's difficult to describe these programs without being there and feeling and seeing what goes on, but all of these kinds of ideas I believe have some tremendous implications for really substantive changes in the process of education. By and large, as one looks around the country and reads reviews of what has been conventionally identified as compensatory education programs, I call them coping programs. They really have not gotten at some of the fundamental issues that are obvious in dealing with members of some of our minority groups.

Today there are some new programs that are coming about that I think are a good deal more imaginative and really deal more precisely with the problem.

The old compensatory programs were largely more of the same. We just did more of our reading program; more of our mathematics. But the format in which this is presented, the climate that is created in the instructional setting was not effectively changed, and I think that climate is a tremendously important factor in learning, obviously.

By Mr. Ris:

Q. Well, skipping over to the section of early childhood, is it more detailed as to what has been done and what it proposes with respect to the youngsters at the elementary disadvantaged schools? A. Yes.

[313] Q. Is there anything more you wish to add to that particular section at this point, Dr. Gilberts? A. I don't really think so. I think I presented some of the things we would like to do in these programs that are in the process of development. I think they are going to have to have significant contributions to be made.

Q. Now, going then to the school complex concept, would you state what you contemplate in that and what effect it would have on the particular disadvantaged youngsters? A. Well, the idea of the complex has very broad implications, I believe. I have been superintendent of schools now in the school system with some 32 teachers, one with some 1,500 teachers, and a corresponding number of youngsters, and it has become quite apparent to me that the larger the institution becomes the more inflexible and immobile it is, that I believe from an operational or a government point of view in terms of both the way in which it affects the educational program and the way in which it relates to the community which will have to support new forms, new systems of organization and operation that have to be iden-

tified. There have been a number of them proposed around the country. The complex idea has been tried in slightly different forms in different school systems. But, basically what we're trying to do through the complex is, first of all, decentralize the decision-making process so that the [314] principals and teachers and community that are affected by those programs have some immediate and direct input into that process which I think is going to be very important in terms of the kinds of qualitative—again, interrelationships—that occur in that setting. The second portion or—another portion of this is how do we identify in addition to having to decentralize decision-making regulations with professional staff, and how do we involve them more effectively and how do we involve the community, and I mentioned, in addition—in the process of relating to the schools and institutions, hopefully improved communications between home and the school. This is certainly one of the major problems, especially in a large school system.

A third thing that we are trying to do within the complex is to find new ways of organizing and supporting services and special education programs for the youngsters that are contained within those complexes and this, of course, could cover an extremely wide range of programs from diagnostic services for youngsters with learning difficulties to cultural arts programs to student exchange programs. Well, we have not defined precisely the entire range of potential in this area. We have been planning during this year and before the year is out we hope to have identified through that planning process precisely what will be done in the complex. It does indicate where we are at this particular time. We hope to [315] involve effectively—more effectively the agencies that have input into the learn-

ing process, into the families that live in these areas where the complexes exist. Somehow to coordinate the services provided by welfare agencies and other agencies that presently are not coordinated in any effective way. I think that in the description of this portion of the plan it talks about other things which I don't know if you want me to go through point by point or—

Q. Well, if you have the basic portions, in the interest of time, I think we'll move on to the next portion.

The Court: I think what we ought to hear from you as to what you would contemplate that the local school would contribute and what this complex would contribute, in general at least.

The Witness: I think that, in a general way—I am not proposing that the complex remove from the local school the opportunity of program changes such as will be reported later here today. I think that sort of opportunity for internal changes within the local schools is certainly—certainly still has to exist. The complex does not replace that function. But in the complex there are a number of things, some of which I did allude to, and on Page 67 there are listed some advantages of the complex that we think can supplement what can be done in the local schools.

Q. What page, Dr. Gilberts? [316] A. Page 76. The first of these is that there are obviously potential patterns of pupil assignment for the total complex and to encourage multiethnic education within the expanded school neighborhood. The utilization of present school facilities in such a manner as to provide maximum educational benefits with

minimum cost. Unlike the educational park concept which would require the abandonment of the present school plan —and effectively utilizes most existing facilities in which the taxpayers have a large investment. Decentralization again of the administrative organization involvement— outstanding opportunities for economically providing supporting services to the individual schools.

Increased availability of staff and service personnel by minimizing the—

Q. Now, this particular concept then—the children would spend some portion of their time in the neighborhood school and some time in the complex? A. Yes, sir.

Q. And in a complex, of course, they would then meet in classes and other activities with children from other schools that were also in the complex? A. Those are possibilities, yes.

Q. When you refer to multiethnic education, there would be at least a mixing that would lead to some change in understanding and attitudes, as you discussed previously? [317] A. Yes, I would certainly hope that opportunity would be provided.

The Court: I still don't know what they will be studying in this center. Are they going to study science? Are they going to study art, music? We have been given to understand that these are going to be cultural expeditions which don't have any substance, and I think you ought to clarify that; if it does mean more than that. I mean, are they just going to take a trek out to look at some paintings, you know? Is that one thing? If you have science laboratories or something of that sort, where they can take chemistry or biology or physics, why, that would be another thing.

The Witness: These are all possibilities, Your Honor, but they have not been decided specifically for each of these. One of, we think, the important elements of the development of the complex is the involvement of the professional staff and the community in that process and they have not quite reached the point where they have identified the specific kinds of activities that will occur in these complexes. It could include all of the things that you mentioned. It could include things that may be —that maybe neither of us have even conceived at this particular time.

The Court: Well, then, I take it that this is sort of an untried method?

The Witness: Yes, sir. I think that it is.

[318] The Court: It's just not had very much experience.

The Witness: That's true. There has not. There are a number of school systems that are taking this concept, applying it slightly different, and Minneapolis is using it, a proposal was made in San Francisco for the use of it, and this is a—there is a complex in operation at the present moment differently conceived in Chicago. There is a complex or two in Los Angeles. Now, each of these has slightly different elements. But the basic purposes of the complex are the same. Oklahoma City, I think, has at least—I think temporarily adopted a desegregation plan which embodies this approach and this objective.

By Mr. Ris:

Q. Now, in this complex, Doctor, just to expand a bit more, each of your neighborhood schools would have its

own staff, its own principals and so forth, is that correct? A. Yes, sir.

Q. And then would there be a so-called super-principal or whatever you designate him to be or a senior principal over the entire complex? A. I think at the present moment the proposal—or at least what their thinking is about a coordinating principal would have the responsibility for coordinating the—certain elements of the program in the complex. That has not been decided, but there would be somebody with that responsibility.

[319] Q. Well, this program is probably set out more in detail in your large document, planning equality education, is it not? A. Yes, I think it was in a little more detail.

Mr. Greiner: Well, I object, Your Honor. Pardon me, Dr. Gilberts. I object. I don't believe the Board is saying that they are presenting Defendants' Exhibit—I think it's Exhibit E, Planning Equality Education, as a portion of their plan. I think that's Plan B-A as instituted.

Mr. Ris: That wasn't the question.

The Court: He says that some particular matter here has presented some detail in Exhibit D. That was the question.

Mr. Ris: That was the question. That's the whole point, Your Honor. Being that, if each one of these subsections was elaborated with every bit of detail, why, we would have volume after volume and not merely one volume that has been filed with the Court; just as a practical matter, you can't have every bit of detail—

The Court: I have no doubt that it is in more detail, Exhibit D. That's all he asks.

Q. So then, with respect to this decentralized planning that you have previously mentioned, you're not speaking of decentralizing—a decentralized plan such as—or, local boards of education such as in New York City and Brooklyn and so forth, are you? [320] A. No, sir.

Q. And decentralized planning in your complex and the various principals and your super-principal or whatever you're going to call him, and the teachers there, and to evaluate what is necessary or desirable for this particular community? A. Yes, together with community representation from each of the schools in the complex as well.

Q. By community representation, you mean parents or other members of the community? A. Yes.

Q. So, rather than bureaucratic directives from Washington, that you shall do this and do that, you have the availability of the complex and the general plan and the details implemented by the local individuals to satisfy the local needs? A. Yes, sir.

The Court: Now, what's the main objective here? To have more economic use of central facilities and central equipment? I mean, that you can't afford to duplicate in every school?

The Witness: I wouldn't say that's the main purpose, sir, but that's one of the purposes that will provide that. So far as I'm concerned, the main purpose is to get the schools in the local areas actively engaged in the process of evaluating their educational needs and designing programs that [321] they feel will meet these needs. I feel that process needs to involve the teachers and the principals in the communities within smaller areas than a total city. There are tremendous differences in a city this size to try to deal on some grand scale with

all of the difficulties in the large city that we have—that it has led us inevitably to the bureaucratic approach, standard applications of solutions. And that is not going to solve our problems.

The Court: Nor is its objective to bring about integration. Right?

The Witness: I believe that it will contribute to that.

The Court: Well, it's a by-product.

The Witness: Yes, sir, that's a part of it. That's another one of the elements. But it's not the element, it's one of the elements.

The Court: But I think that its real value is that it furnishes a local administrative—

The Witness: I think that's probably—

The Court: —influence.

The Witness: —in my mind, the primary importance of it. And I feel that, coming out of that kind of a setting we're going to have better decisions with respect to educational programming.

By Mr. Ris:

Q. With respect to that part of the [322] plan pertaining to special programs at Cole or Manual, do you care to discuss that or yield to the principals? A. I would prefer to have them do it.

Q. Now, with regard to special programs available under the Educational Achievement Act of Colorado, Senate Bill 174, can you tell us generally what that is all about? A. A year ago the State Legislature passed a bill, No. 174, which provided additional funds for schools in the state to develop exemplary programs for the improvement of education. The programs that are listed in this document are those programs that have been approved under that

bill. These programs are also programs that were presented to the Senate by our staff in support of continuing the provision of those funds, and I think were largely responsible for the continuance of that support. These programs are Fairview Elementary School, Baker, Cole Junior High School. At Cole, at least, I assume that Mr. Morrison will talk about that. Here at Fairview School in conjunction with personnel of the Elementary Department, they have developed a reading program that has been designed to capitalize in on the talents of both the teachers and pupils in the fields of science, arts, mechanics, sewing, Spanish language, cultural and oral communication. The program is an interest-motivated approach to improvement of educational achievement and assistance for youngsters in Grades 2 through 6, with emphasis on individualized [323] reading instruction. Now, the program sets aside ten classrooms as resource rooms or learning—with a wide variety of supplementary materials and equipment available for teacher and pupil use. It goes on to describe this program which meets in the morning for all pupils and Grades 2—

It is too early as yet to judge what the results are going to be but those who are involved in the program are quite enthusiastic. At Baker the bilingual program is involving the youngsters that—well, 85 percent of the Baker pupils are Hispano and 15 percent of these are bilingual. Sixty-seven percent read two or more years below their expectancy and this program is capitalizing upon the bilingual aspects of the backgrounds of these youngsters to again motivate them for better learning in their schools. These programs again are reported by those schools, the teachers, as being quite successful in motivating youngsters and a report was made to the Board here a week or two ago in which all the teachers were involved.

Robert D. Gilberts—for Defendants—Direct

Q. Do these results—are they used in connection with the other schools where similar problems exist? A. Yes. We will build into each of these programs an evaluation system which in time certainly will help us identify whether or not they have implications for better education. As we learn whether they do or not, we either will be dropping them or expanding them into other schools [324] where we think they have some relevancy.

Q. So it is at Fairview, for example—is that a test site then for good reading at the elementary level? A. Yes, sir.

Q. A pilot plan, so to speak? A. Yes, sir.

Q. And of which the favorable aspects of it then will be used elsewhere? A. Right.

Q. Is this a constant thing that is going on in the school system such as Denver? A. Yes, sir. There are many, many programs going on that are being evaluated and; if they appear to have value, they will be expanded or recommended for expansion in other schools.

Q. Is there anything else now under the Senate Bill 174 that you would like to emphasize? A. Well, the Baker and Cole program, assisting disadvantaged youths to improve their educational achievement, is a program which is again individualized working very closely with youngsters who have problems of accommodating to the school, the way in which it functions. We provide what is called crisis rooms where youngsters that have difficulties in school need to cool off some place and go and get assistance—the assistance they need academically or emotionally. We [325] have a couple of educational laboratories, a couple of extension centers, one for each school, where youngsters can have an aducational experience, not necessarily within the school itself, but in another location. And again, I think

that probably in the case of Cole, Principal Morrison will be able to describe it in more detail than I could.

Q. Now, the last section in the plan is entitled Instructional Guidelines—Innovative Practices. Will you please describe what is in this portion of the report? A. Well, these—these are a number of programs, some of which have been in practice for a while, where we have gotten some experience and have had some evaluation. Evaluation with others were very early in the planning stage and—the first one was a program from which was—which was financed under Title I, cultural understanding, where youngsters from various areas of the city were brought together in a program dealing with a number of different cultural arts such as drama, music, general arts, and so on, in an integrated setting. These programs have been in operation I believe now—probably three and a half years.

Q. Is that at the sixth-grade level? A. Yes.

Q. And is it contemplated to expand that? A. Yes, I think so. I think the program has been successful and should be expanded for all youngsters in the [326] school system. The metropolitan exchange program which is—which we have not really placed as much effort on as we would like, but by and large, programs that have been either developed locally within our schools or in suburban schools in which we have exchange students for differing periods of time.

Q. This is with other districts surrounding Denver? A. Yes, sir.

Q. Is that still in the embryonic stage, so to speak? A. Yes, due to a number of activities this year, we have not promoted it as much as we would like to. I think it has a great deal of potential here if we have the opportunity

to really begin pursuing it. This could be along the lines that Dr. Sullivan indicated in the Boston area or other kinds of exchange programs.

Q. Are the nature of the political setups as between districts—has that been done by agreement with each district in each case? A. Yes, sir. The outdoor education center on which is commonly called Ballerette—I believe that provides us an opportunity to really get at some rather significant changes in the process of education. This center is not purely a natural-science laboratory. It is an opportunity, I believe, for a multidisciplinary approach to education in a setting where youngsters can have practical experiences, [327] where we can provide for integration on a work-oriented basis. We see this as providing opportunity in vocational education. We plan to take some of the program elements out of the Outward Bound which we feel will have many implications for this site, and I think is probably another one of the most significant kinds of programs that we have identified. A great deal of work is left to be done in developing this program as well.

Q. Is this a phase of this, Dr. Gilberts, that you think will have a significant effect on the children who attend to give it an environment in the circumstances under which they are living for the time being to get the understanding and change of attitude that lend toward integration? A. Yes, I would think the programs we develop in this center should be of significant importance in promoting integration.

Q. Is that one of the objectives? A. Yes. We have already talked about expanded summer school programs. We certainly feel that an expansion in many areas is necessary here dealing with basic skills, innovative programs, and cultural arts, recreation, job training, work experience, such

things as that. We have an after-school program which is presently financed with federal funds. The Denver Public Schools open art centers which were planned to attract cross-cultural attendance by offering exemplary [328] instruction in fine and graphic arts. The Denver Public Schools after-hours program in recreation and vocational areas will be continued. And these programs make it possible for boys and girls and the faculty to participate in a valuable integrated activity.

Another program which is a joint program with the Jefferson County Schools is a metropolitan youth opportunity center which is a school which has been provided for youngsters that have dropped out of school, not completed their high school. They can either finish their academic programs for high school diplomas or work on vocational skills or an—a combination of both.

Q. Is this actually being done? A. One site is at Kalamath and just off Colfax. Another one is in Jefferson County. It's out past—it's out past the lake there. I can't think of the address of that, but the enrollment in that paricular school has skyrocketed in the last two years.

Q. Is this to bring kids together who dropped out back into the system? A. Yes. The educational center that is referred to here as a secondary center in which we hope to provide a fairly wide range of educational offerings, both vocational and academic, and will attract youngsters from all over the city. We see this center as not being a full-time enrollment [329] center for children, students at high school level, but part time, based upon the programs that they might elect. We believe that we can put together a program here which will attract youngsters from all over the city and will provide another opportunity for a broad range of social and economic and cultural backgrounds.

We are in the process of making some major changes in our area of vocational education in all schools, not just in this area, but I believe the opportunity to provide job skills at the junior high school level is quite important. We have a number of programs that have been developed, again, and I think Mr. Ward probably talked about the program—a program or two they have there. We have some cooperative educational programs that are presently undertaken by business and industry involving youngsters from all the high schools. I think these are important learning opportunities for youngsters. We have been working in the area of curriculum, on Page 157, in providing changes in our social studies and history classes dealing more adequately with the contributions of minorities. We have purchased books, films, film strips and a number of items to supplement these changes and have been encouraging and working with staff members to deal across the city with these issues. The item on intensified educational programs relates to compensatory programs that—some of which we have already talked about and others which will probably need to be [330] redesigned. The college-Manual High School project is one in which we have begun a relationship with the University of Northern Colorado, I guess it is now, in developing some programs at Manual and again I think Mr. Ward talked about these better than I. The last item, I believe, other promising innovations, really is a review of this program that I referred to earlier which has been field tested in Wisconsin and a number of different school systems and one which we feel will make contribution to looking at the problems of differentiated staffing and individualized instruction.

Q. All right, sir. Based upon your background, your experience, education, your knowledge of the whole situa-

tion here at the Denver Public Schools, do you have an opinion as to whether this program has the probability of success to improve the education in the schools as indicated by the Court?

Mr. Greiner: I object, Your Honor. I don't think there has been a proper foundation laid as a basis upon which the superintendent can tell this Court that these plans will in fact work or even have a probability of working.

Mr. Ris: That isn't the question.

Mr. Greiner: Well, I think there has to be some foundation for the superintendent's opinion.

The Court: Overruled. We will permit him to answer.

[331] A. Yes, sir. Based upon my experience and my reading in the area, I think they have the possibility of success.

Q. Do they have a probability of success? A. Yes, sir.

The Court: There's quite a difference, you know.

The Witness: Excuse me. Yes, sir, I'm sorry, I meant the probability.

The Court: In law.

Mr. Ris: A great difference.

Q. Now, I would like to refer to the plan as presented by the plaintiffs. As you indicated, you spent some time—

The Court: Before you get to that, this idea of a center or cluster—do you contemplate needing new building for this, I assume?

The Witness: I believe so, sir. However, we have the opportunity right off the bat at the cluster sur-

rounding Cheltenham, using the old facility, which is being vacated because of a new school that we're building there. I believe that some additional facilities will have to be provided at least in some locations for some elements of the program.

The Court: Where do you have facilities that you could use presently?

The Witness: Well, as I say, I think that the Cheltenham School right now, the vacated building will provide us with some facility there. There is no question but that, [332] as Denver goes on down the road there is going to have to be a bond issue passed and we're going to have to have additional facilities, and when that is done, assuming a provision will be made for additional space for programs that will be developed here—

The Court: A center of this kind or a campus would call for a good deal of ground and a substantial amount of space, wouldn't it?

The Witness: Not necessarily, sir. It depends upon the kinds of programs that are developed. I think that probably the space that would be required at least for the programs that we could envision at this point would not require a great deal of additional space.

The Court: Well, it's very vague as far as I'm concerned. I don't know where you would do this. I don't know how much time would be required to develop it. This is a long-term program that would take ten years to get off the ground.

The Witness: We hope to have it in operation next fall for some elements of Complex 1 and 2. We have been planning all this year. Those elements that are recommended to us by the planning group

we hope to have in operation next fall. I would assume that the planning process would continue and we would continue to develop the program. I would hope that certainly within several years we could have [333] a pretty well-developed program in these two schools. Now, if the concept has validity and I think some of these things are going to have to be tested and measured like any kind of an educational program, it seems to me the experience we have had in the planning of Complexes 1 and 2 should shorten the planning process for other complexes if we feel this is the direction we should go.

The Court: Well, then, you don't feel at this time that this would fill the bill, so to speak, as far as integration or improvement of the program as far as either one is concerned? In other words, at this point you would be experimenting and testing with this concept? Hoping that it would—

The Witness: I believe—my professional judgment is, after twenty years in this business, that this will make a difference. Now, that is different than having proved that. And I think that we are unfortunately in the position as educators that a good many of the things that we talk about are unproven. We've got to test them.

The Court: You wouldn't want to put all your eggs in one basket? You would want to try out a lot of other programs at the same time, I assume?

The Witness: Exactly. Right. If you will read this, you will find that there are many, many other kinds of approaches that are going to—that are going on at the [334] same time.

The Court: Okay. We will take a short recess now.

(Whereupon, the trial recessed at 3:20 p.m. and resumed at 3:40 p.m.)

By Mr. Ris:

Q. Dr. Gilberts, with respect to the plaintiffs' plan which you have heard explained this morning by Dr. Bardwell and the exhibits that were admitted into evidence, could you tell us your opinion with respect to that particular plan? A. Yes, sir. I think this plan is based upon some unproven assumptions. Dr. Coleman indicated that the perfect influence on achievements, academic achievements, was a factor of socioeconomic difference.

The Reporter: Your Honor, may I have that answer repeated?

The Court: The reporter is having a little trouble getting everything you say. I think the problem arises from the fact that both of you are reading, and when you do this you drop your head. I don't know how we can remedy this but I believe, if you would speak up a little and if the witness box were brought around a little bit or else we could swing it around—

(Colloquy not transcribed herein.)

A. As I was saying, Dr. Coleman has indicated that the perfect influence on academic achievement is a factor of [335] socioeconomic difference and not racial or ethnic consideration, and based upon my reading from this particular area the evidence is even a little thin on the matter of perfect influence in terms of academic achievement just based upon socioeconomic difference. I don't believe that I could in clear conscience as an educator recommend the

approaches that are proposed by the plaintiffs on the scale that they propose them at this time on the evidence that I'm aware of in the field.

This plan is a mathematical solution to a problem which has human dimensions. And I think that a good many of the human factors have been ignored. I think that human factors involving individual students as it relates to the continuity and enrollments, in other words, the moving along of the youngster through the schools with his friends and his neighbors has been ignored. It seems to me that there are some unrealistic recommendations in the plan in terms of numbers assigned to some of our schools, and I am not sure whether or not the kind of distribution that has been proposed here provides a balance throughout each of the grade levels. Certainly it does not take into consideration the need for teachers in terms of dealing more professionally with their responsibilities as teachers. I think that the parents and members of the community by and large have not been considered in terms of their relationship to the school or the community [336] support for the schools. It seems to me that the proposals at the junior high and senior high school levels could destroy some of the new programs which are being developed which I consider quite unique and exceptional in this country and you will hear of several of them this afternoon. Certainly they have indicated a need for some of the things that we have in our plan in terms of in-service and some programs such as this, and I certainly would concur that these are important. I have some concern as to whether and how one would be able to provide some of the compensatory programs which have been indicated as necessary and with expanded—an expanded pupil base, with these youngsters being placed in need of compensatory programs in many more schools in classes involving

many more youngsters. I think it's quite likely that this might not only be more—might not be only more expensive but it might even be more difficult to design.

The Court: Do you think there is some merit in the proposition that, if they are in an environment in which they must compete, that there is more incentive for them to follow up these compensatory programs so that they can compete?

The Witness: Well, what I am saying, Your Honor, here is—

The Court: In other words, the compensatory programs in the abstract seem to fail. I mean, the evidence [337] indicates that is not too effective over a long-term basis particularly; that the children, when they return to their environments or their home environments are inclined to forget what they have learned. Rather, they haven't assimilated to the point where they could use it. Doesn't that seem to be the basic weakness of this compensatory approach so far?

The Witness: I think that in general this may be true, but the same thing can be equally true and there is proof to substantiate the different points of view that the same thing could occur in an integrated setting. Now, it may not be—I'm not aware of any proof that would indicate it wouldn't be true, but—

The Court: Well, I just mention it in connection with your saying that the compensatory programs might fail—might fall by the wayside.

The Witness: No, what I said was—

The Court: —in this kind of— If you do proceed to integrate the schools, because the—I gathered

from what you said that there would be—an accelerated effort in the classroom, that it would just be about impossible for the person who was there to keep pace and also to take compensatory education. I mean, I sort of gleaned that from what you said.

The Witness: That wasn't what I was referring to, but that might be a problem as well, Your Honor. What I was [338] referring to was the distribution of the resources that would be necessary to provide the compensatory education and a much expanded base; pupil population base. Now, that's something which, of course, one wouldn't know until one designed the compensatory programs. But it would seem logical to me that that certainly—that certainly compensatory programs, if they're going to be effective in an integrated setting, would probably in some way involve more than just the youngsters that would be coming in, let's say from the area where compensation was necessary and that could provide, as I say, a problem in the economic distribution of the resources within the school system.

The Court: One other point that Dr. Sullivan made—that when you get a group of homogeneous origin together, that sort of brings out the worst rather than the best in them when they are all together.

The Witness: Certainly I wouldn't disagree with that.

The Court: Sort of like a convention of lawyers. Individually, they're great, but—individually they are, you know, very intelligent. But you get their group decision and it might not be too good. Some-

how or other the psychology of their all being together doesn't add to their wisdom. It sort of detracts from it, perhaps. The same might be true of other groups.

[339] The Witness: I wouldn't disagree absolutely and totally with that position, Your Honor, but I think there can be exceptions to it. I think perhaps it can be designed to change that particular attitude and that particular orientation in some of these schools. Again, I'll let you listen to some of these programs at Manual and Cole.

The Court: Also, isn't there sort of a degree of comfort when you have those you are accustomed to around you? You don't need to put forth extra effort and you don't do it. I mean, there is a tendency along that line, as human beings; and don't you think that these are sort of predicates for this?

The Witness: I think these things might be true. I don't think they necessarily are true. I think there can be circumstances where they are not true. And I think those circumstances can be designed into educational programs.

Now, I don't think, as I indicated earlier, that we have identified any pat solution to these problems, but it seems to me that there are some potentials in the areas that are now beginning to develop that may allow us to do that. For example, Your Honor, two years ago at Cole Junior High we had a problem which nearly caused us to close that school in terms of attitudes. The very thing you're talking about. Now, some two years later we have a situation that's quite different.

The Court: Was that when Mr. Morrison was installed?

[340] The Witness: Yes, sir. Now, this is an example in change in climates and attitudes after—or that reflected on the educational program. That sort of thing I believe could occur in these schools with the right kind of leadership; with the right kind of programs and so on.

The Court: But you look forward to this integration step as the only possible solution to avoid polarization of the races, do you not?

The Witness: Absolutely.

The Court: You don't want to have separate cultures, do you?

The Witness: Certainly not. I believe that integration can come in many different kinds of form. I don't think one can identify one way of doing it and say that that is the end, that's the only way it can be done; I think that integration can be accomplished—and I am talking now about the psychological, philosophical definition that has been described here. I think it can be aided by many kinds of activities, a good many of which will probably go on outside of the school through other institutions and through other kinds of activities. I think that integration is an essential. It's not important. It's an absolute necessity. It has to occur. That definition which is in this case. I would remind the judge that I did recommend—

The Court: Higher education has been integrated [341] since—oh, for twenty years.

The Witness: Right.

The Court: I suppose longer than that in most parts of the country, and everybody would feel that it was pretty ridiculous to have a Negro college and a white college in the North and West, wouldn't they?

The Witness: I think so, yes.

The Court: I mean they would just think it would be absurd.

The Witness: What I'd like to point out, Your Honor, is that I did recommend last spring a considerable amount of change affecting the—affecting literally thousands of youngsters in the school system which the Court sustained and at that time I indicated there were two reasons why I felt that was important: number one, to see whether or not that kind of a move in that area could in fact stem the tide of resegregation which was occurring in the northeast area of the city; secondly, to provide us a basis upon which to gain some more experience to see whether or not the claims for integration could in fact produce what is claimed for—

The Court: Well, has it been successful?

The Witness: I think, by and large, it has been. However, our evaluation that we are undertaking this year is not completely completed in terms of the evaluating measures that we're going to be using. I have—it seems to me that [342] it's going to take more than one year to really judge whether or not it's going to be effective.

The Court: For example, at Smiley which was a real testing ground—hasn't that been a successful experiment, by and large?

The Witness: As far as my subjective judgment—

The Court: Because there was more feeling and more resistance there perhaps than any other place.

The Witness: If we're talking about academic achievement and equating this with success in schools, then we have yet to see the evidence as to whether in fact it does or does not do it. I have some biases. I think, by and large, the operation of that school has been successful but I don't have the objective measurement upon which I could recommend we do this to the entire city at this time.

The Court: Oh, I see what you mean.

The Witness: This is my point.

The Court: I see what you mean on that. But the parents' attitude and so on in that area of the city I think were pretty much resistant to this movement and at this point they have settled down a good deal, have they not?

The Witness: I believe so. But I don't have much —as much information on that as I'd like to have.

The Court: You don't feel the pressure, I don't suppose, that you did.

[343] The Witness: Sir, I can't tell the difference between the pressure from one day to another. There is always pressure; all kinds of sources.

The Court: Well, that's the hazard of your occupation.

The Witness: Right.

The Court: From that particular source you don't—

The Witness: Yes. I have been receiving current pressure on problems at Smiley.

The Court: So you're not prepared to say that it's either successful or unsuccessful?

The Witness: No, sir. I think that a good deal of more careful evaluation in my subjective judgment at this point is indicated.

The Court: You wouldn't recommend it be abandoned at this point, I don't suppose?

The Witness: No, sir, I would not.

By Mr. Ris:

Q. In this regard again, you're speaking of—you still don't have any objective evidence from Smiley? A. Yes, sir.

Q. Are you speaking in terms of the testing results? A. Not only Smiley but all of the schools and all of the youngsters that were involved in this program.

Q. Or that Smiley—the fact that they were bused out [344] of the Smiley Subdistrict or into the Smiley Subdistrict? A. Right.

Q. Do you have any evidence at all from testing from these that there has been any improvement on those who were bused out? A. Not as yet.

Q. Is that what you mean by that, that you have no objective evidence? A. Yes, sir.

Q. Now, again getting back to what we discussed previously, before, is this the type of innovation or the type of thing that you say you recommended for that particular area on a testing basis, a trial basis? A. Yes, sir.

Q. And if it succeeds, then you will recommend it be expanded into other portions— A. Yes, sir.

Q. And—now, as to transportation, is transportation per se a problem with you, Dr. Gilberts, in busing? A. Yes.

Q. I'm not speaking of just the— A. Just general—

Q. General transportation? A. Yes, sir. This has been one of my major projects, I guess, through some twenty years of—well, seventeen years [345] of my experience.

Q. And the evidence previously has been in the trial that without any mandatory busing you're— you are already busing some 12,000 students. That was the figure as I remember, was it not? A. I believe that's correct.

Q. But that is considered by you to be a permanent thing that is desirable or was it a temporary transient thing to get more money? What is the background of that? A. Well, the background is that Denver has not had a bond issue since 1955 and we have tried to build buildings on a buy-as-you-go basis and I think the assumption has been all along that certainly space will ultimately be provided in areas where there is no space.

The Court: Is busing 12,000 students from these newly-annexed areas and distances beyond walking distances and so forth—has it been contemplated to be a permanent condition that you intend to leave there forever?

A. I don't believe it's been contemplated at this—that this—

Q. Again, just a temporary expedient until more funds are available? A. Yes, sir.

The Court: You hope it won't be a permanent fixture, I take it?

[346] The Witness: Yes, sir. I think that programs—that plan for transportation, especially in urban settings poses unique kinds of problems and probably ought to be minimized as much as possible.

Q. And then you—

The Court: Certainly not desirable, per se.

The Witness: That's right.

By Mr. Ris:

Q. Dr. Gilberts, as far as any specifics of the plan are concerned, is there anything specifically you wish to discuss with the Court in the matter of the critique here? A. I had one final point that I didn't get an opportunity to make. It seems to me that in this plan it proposes to eliminate some programs which in my judgment have a great deal of significance in terms of educational improvement in the future not only for this area but in general and we can't ignore our responsibilities for that improvement for all youngsters. We have had not as much time as I would like to review this plan, but I have had my staff go over it. I have read it myself—

The Court: You mean when they talk about utilizing funds that are devoted to particular programs that you now have—

The Witness: Yes, sir.

The Court: —you feel that the unbalance in the [347] programs—that the programs might be more valuable than the integration—the busing program?

The Witness: I consider them important things to be doing for the school system, looking at some of the specific concerns that members of the staff have identified, under proposed Plan 1, wherein twelve of the Court schools—designated by the exchanging students with seventeen predominantly Anglo schools—these are a few of the points that were raised that I think are significant.

By Mr. Ris:

Q. And with which you would agree? A. Yes.

Q. Go ahead. A. In some cases the number of pupils involved in busing from one school to another is negligible and Bradley will send only a small number, and this was discussed this morning, but the matter of adjusting individuals is a lot different than adjusting numbers. It's easy to say there are four kinds and, well, okay, we can accommodate them. But how do we identify—how do we make decisions when those are not the four we are going to take and we take eight somewhere else and so on. These are complicated human decisions to make, which cause great difficulty. It's much easier to do this on a computer than it is in the community. There is no assurance that the interchange of pupils will provide the necessary numbers of pupils at each grade level.

[348] Q. Can you elaborate a bit on that? What do you mean by that? A. Well, I'm assuming that the intent at least here was to integrate not only the school but each of the classrooms as was discussed yesterday. I can't tell—and my staff can't apparently tell from reading this whether or not that consideration has been taken into account. How do we go about—on Grades 1, 2, 3, 4, 5 and 6—that there is a reasonable distribution to produce the results that they have indicated? In order for me to quote, as outlined in the transportation schedule, an arbitrary method of selection must be designed. For example, if "geographical areas were used and annual adjustments . . . might be necessary, which could result in pupils attending several schools during at least the elementary program and probably beyond that." In other words, it could cause us to have to move youngsters about more than we would like. And "No. 7, rather than another item here—it not clear that we plan—how the

average achievement factors were determined." Consequently there is a question on the validity of the projected average achievements. Another item, in some cases these plans—this plan does not take into consideration the human element or the actual limitation which exists in the school. For example, Bryant-Webster has four Negro pupils, three of which are to be assigned, and here again we get into these difficult human kinds of problems to [349] deal with. A leveling of achievement scores of low-performance schools would be due to moving in high achieving pupils and moving out low-achieving pupils. The population shift rather than improved test scores of low-achieving pupils. The plan tends to mask the extremes of achievement without actually improving performance.

The Court: Well, at the outset that was explained that you couldn't expect any improvement in the low achievers as of the day that the exchange occurs.

The Witness: Maybe—it may be argued that the capacity of a school facility as reported by school authorities is not an accurate reflection of the school's ability to properly accommodate the educational programs and we discussed this one morning, as well, considering delivering and picking up of pupils, there would be the possibility of some kindergarten youngsters could be on the bus almost as long as they would be in class and consideration must be afforded the impact of this plan on the federal and state assistance.

Now, how do we redistribute them and reallocate them to provide the help that they were intended to provide?

On Plan 2, this involves the pairing of elementary schools. This plan requires additional expense—an

additional expense not considered by the plaintiffs, and there was mentioned this morning the modification of facilities. You can't take care of kindergarten, first, second and third-grade [350] youngsters in the exact kind of facilities that one would with the fourth, fifth and sixth grade. There are differences in certain appointments in the room that would have to be changed.

Q. Such as what? A. Well, a simple example would be the blackboard. We have youngsters that work on the board in the classroom. Primary youngsters—the board is much lower for them to reach than the older youngsters. Seating is a problem, of course, that could be accommodated by moving seating from one school to another, so that is not a particular big problem. But, sizes of bathroom facilities and such things as this pose a problem with primary youngsters. I think that some of the same concerns that I expressed in Plan 1 would probably apply in this one as well. And Plan 3 and Plan 4, here again, it's just a matter of expanding the application. Therefore, the problems aren't really changed.

The Court: How long would it take to implement this plan—a plan of this kind?

The Witness: Well, I think that Dr. Sullivan's estimate of two years is a fairly realistic one. It might take longer than that if we were to accomplish the objectives identified by each phase of this planning process, community acceptance and so forth and staff preparation, et cetera.

The Court: I'm not talking about this exact plan.

[351] The Witness: Well, any modification of it—

The Court: You might feed a few additional items into the computer, you know, in order to come up with—in order to introduce some human aspect. But, you said it would take two years to accomplish a program of this magnitude, you think.

The Witness: I would assume that Dr. Sullivan's estimate of time with his experience would be fairly accurate.

The Court: Do you think that there could be an integration program that would be more efficient, that would accomplish the same objectives and wouldn't require 6.5 miles each way of transportation, for example? Have you thought of it in that light?

The Witness: Yes, sir, I have. And I think the approach they have taken here in terms of efficiency by reducing—assuming they're shooting at the racial composition, they are probably as efficient a means of doing it, again in terms of numbers, distribution of kids, as you could come about. I can't think of any that would be simpler to apply, using this criteria of what they are proposing.

The Court: Does the staff agree with that?

The Witness: I believe so, so far as I'm aware.

The Court: Although, this cluster or campus idea would cut down substantially on transportation?

The Witness: It would, but it doesn't meet the [352] criteria that the plaintiffs have established in their plan. I think it meets other criteria that are more in—more important in my mind. And under that definition, under those criteria, then I think it will accomplish the end that we're looking for.

The senior high school level I would just comment that the boundary changes are not defined sufficiently

that one can absolutely be certain of the problem. But certainly it would cause attendance problems by elongating districts and so on. I would have some concern that it would certainly upset the factors that were involved in the initial resolution that the judge has sustained and I think this could pose a problem. Walking distances can be problems. The only students in the northeast tip of the city near Smith School would be more than two miles from their senior high school. It is not consistent with the fact that some present South students living near Washington Park, live nearly four miles from Manual. I believe you mentioned that—this morning, Your Honor—since numbers of pupils being transferred to Manual are not given, no comparisons can be made of the capacity of the high school involved, sending Anglo pupils from East to Manual and minority pupils to East, would increase proportions of minority pupils at East, was the thing I was mentioning. No plan is offered to ameliorate the resegreation which could occur at East. North High School was presently [353] overcapacity and transfers could cause some problems. And then I would reiterate that I think that some of the items that they have measured or identified as those things that could be conveniently left out of any kind of our planning in my judgment is not true. I don't believe that Denver can afford to ignore looking at those concepts and testing and evaluating them.

Q. Will the adoption of the plaintiffs' plan constitute a gamble, in your opinion, Dr. Gilbert? A. Yes, sir, I certainly think it would.

Q. As between the two plans, considering your background, your experience and the circumstances that exist in Denver, which plan do you think has the greater probability of success in improving education in the fifteen schools? A. I believe that what we have proposed would indicate better probability of success.

Mr. Ris: You may examine.

The Court: I'm not clear on your plan for eventual integration. How it would really take place. You said that this is the only solution eventually.

The Witness: Well, sir, the definition of integration used here in the case is that integration is a psychological, social, philosophical kind of process for individuals where individuals accept one another for themselves. With no bias exhibited as a result of race, color or creed, et cetera.

【354】 Now, it seems to me that there is a—this is a state of mind. That is, not necessarily a state of how one distributes within our society. Now, sir, if that is our end, if that is our ultimate end is to truly open our society so that all individuals can live and operate with that kind of philosophy, it seems to me there are many ways that we are going to go about doing that, not all of them are going to occur in the school. Certainly, they are going to occur in business. They are going to occur in oother governmental institutions. They are going to occur in our daily life, so I'm not saying that ultimately our society has to be totally desegregated, which is the physical aspects of the distributing of people of different ethnic and racial backgrounds, equally throughout our country. I'm not sure that has to be the end. I

think the free and—and the option to do that if one chooses to move where he pleases, live where he pleases, work where he pleases, is the ultimate end. I'm sorry. I don't necessarily accept the fact that we have got to have people distributed physically in that manner. Therefore, I say that the programs that we are proposing, carried out appropriately and developed appropriately, will contribute to producing that end result along with other things that I have mentioned.

The Court: But you don't have any plan or—I misunderstood you. I thought that you anticipated that [355] eventually this isolation of schoolchildren would be eliminated?

The Witness: Well, I think eventually it will and I think it will be eliminated on the basis of choice of the individuals involved. I'm not putting a time on the eventual—I don't know when that will be.

The Court: Very well.

Cross-examination by Mr. Greiner:

Q. Dr. Gilberts, I guess—unless I indicate otherwise, my questions are going to be directed to the fifteen schools which the Court has selected for relief in this case. Since the Court has selected the schools, Dr. Gilberts, what kind of examination has been made of those schools with regard to the conditions that obtained in those schools? What has your staff done? A. What do you mean by conditions? All factors involved in those schools?

Q. Well, now you already knew something about those schools. A. Exactly.

Q. A lot of the data is right in the Court's opinion of March 21st, is it not? A. Right.

Q. Now, we have heard during the course of the trial [356] for example a great deal of testimony primarily from Dr. Dobson—and I believe you were present when he testified—regarding the psychological environment of these segregated schools. Do you recall that testimony? A. Yes.

Q. Do you recall that it was Dr. Dobson's opinion that it was the schools themselves that caused the unequal educational opportunity that existed in the schools?

Is that right?

A. I'm sorry. I don't recall that. I don't recall him saying that.

The Court: Well, he wasn't here the last time.

Mr. Greiner: I believe—

The Court: He didn't hear him testify.

The Witness: Last summer I was here at the hearing.

Q. But you were not here this spring when Dr. Dobson testified? A. No, sir.

Q. Now, have you done anything to—

The Court: That's what he said, though, in effect.

Mr. Greiner: Yes.

Q. Have you done anything to study whether or not those psychological conditions, low student self-esteem, feelings of hopelessness, lack of experience with ever succeeding, no control over one's destiny, teacher attitudes which don't [357] expect the minority child to attain any level of meaningful achievement—have you done anything to check to see whether those factors do exist in these schools? A. Not on terms of any kind of basic research here in our school system. Certainly we have been reading

the literature that comes out and are aware of some of the feelings of various people in the profession, various professions, that these are factors.

Q. Now, I assume, Doctor, that an integral part of your plan would be to test the children in these integrated schools, since you're going to leave them there basically. Are you going to test them for these psychological attitudes? A. Yes, I think that certainly any plan of evaluation of any kind—any kind of an educational program would have to involve examining those elements.

Q. What tests are you going to use? A. I'm sorry. I'm not an expert in that particular area and couldn't identify what tests would be used.

Q. Where is that in your plan? A. I think we have allnded in the plan to evaluation systems. We have not talked about precise kinds of evaluation. Those are part of the plan in terms of future development.

Q. Who is going to do it? A. Well, I assume my own research and development department will have a fairly important role in that process. [358] The psychologists and the psychiatrists and social workers will probably have some input into that. I think we will use experts in the field of testing in these areas beyond our own staff. I would assume all these resources would be used.

Q. Has your staff ever done it before? A. I couldn't answer that. I don't know what individual members of my staff have done in this area.

Q. Now, as I recall, we've got about 9,000 minority children in these schools, Doctor. What would it cost to test those children? A. For what?

Q. For the presence or absence of these psychological attitudes? A. Well, again, I said I'm not an expert in this area. The forms of evaluation as I am aware of—some of

which could be very expensive if they are individually administered.

Q. Now, this is a part of your plan? A. I say, this would be a part of the plan.

Q. Well, is it or is it not? A. It is in the state it is right now, but it would be a part of the evaluation system that would be designed.

Q. And you agree it's an important factor? A. Sure.

[359] Q. Are you making a commitment that it will be —that it in fact will be done? A. Well, sir, I'm not able to make a commitment considering the fact I'm leaving here September 1st, but I think any responsible professional would see that it was a piece of the evaluation process.

Q. Where is the Board's commitment that this facet or program is going to in fact be undertaken? A. Well, the Board has accepted the fact that we're making this proposal a piece of which is evaluation, and I would assume that they would leave the professional judgment of what kind of evaluation that would be necessary to us. They usually do.

Q. Now, you have attempted to evaluate certain costs, that is, your plan for relief that these schools will entail. Can you point to one of those costs? A. Of evaluation?

Q. Yes. Where is the cost of this testing program reflected in your figures? A. Well, in the first place, this would be something which would be done in succeeding years. It wouldn't be done in this budget year and there is no identification of testing costs in here other than those funds which we provide in our budget for testing. I do not have that available, but there are funds that are used for tests and evaluation both in the [360] Department of Research and Development and Testing Services.

Q. You're not trying to— A. Excuse me. It's very difficult to make an estimate of the costs in the area of testing when one doesn't know what the total design of that testing process is going to be, which we don't. And I have just admitted that. It needs to be developed. Once it is developed, the estimate of cost can certainly be developed too.

Q. Well, before you can start solving some of these problems that exist in a minority school, you first have to find out whether or not the problems exist, don't you? A. I think we're quite aware of the problems that exist in the schools.

Q. Well, are some of the problems which I have described —do they exist? A. I think—yes, they do.

Q. Are you going to have to test to confirm the presence of those problems in the schools then? A. I think we're going to have to test probably more to see whether or not we have corrected them than whether they exist. I think they exist without a great deal of question. But we will probably have to do that to provide a research base, yes.

Q. Now, you're familiar with the literature, I take it, relating to these segregated schools, are you not? [361] A. Reasonably so.

Q. And you're aware of the fact that there is literature to the effect that these segregated schools simply reinforce all of the so-called cultural deprivation which the minority child brings to this segregated school? You're aware of that, are you not? A. Yes.

Q. Do you agree or disagree with that proposition? A. I think in the forms in which these schools have existed, this is true. I think there are ways, though, to have—ways of countering that within the school setting. And again I think you will hear about some of these later from members of our staff.

Q. Now, you're aware, Doctor, that when the plaintiffs talk about integration, they're talking about a concept which has as its premise the mixture of various racial and ethnic groups in the city in the schools? A. I thought the first step was desegregation and the second step was integration. Yes. If you mean in this context, I'm aware of it.

Q. As I understand it, when you talk about integration, there need be no mixing? It's simply a change of attitudes and elimination of racial prejudice? A. No, I think that each are needed.

Q. Well, when one reviews the plan that has been [362] submitted in response to the Court's request by the Board, I see references to integration. For example, in—this plan has embraced a program of voluntary open enrollment with space guaranteed, is that correct? A. Yes.

Q. And the heading of that is a plan for raising educational achievement, is that right, Page 16 of your plan? So I take it you feel there is some correlation between the integration that would follow from VOE and the raising of educational achievement, is that correct? A. I believe that that is sort of a general introductory statement.

Q. For the whole VOE program, right? A. Well, not only for that but for the rest of the plan as well.

Q. Well, it's under the VOE tab, isn't it? A. I realize that.

Q. Well, is that a misnomer? A. Well, as I recall in reading this it had implications for all of the elements of the plan and that may have been where the tab was put. I'm not sure.

Q. Well, is there a relationship between the VOE program as it applies to these fifteen schools and improving the educational opportunities of the minority children that participate in that program? [363] A. There may be.

Q. You're not sure? A. Not absolutely.

Q. So it's a gamble? A. Yes.

Q. But it's a gamble which you are recommending? A. Yes.

Q. Do you have any idea of the kinds of participation that you're going to get out of these fifteen minority schools? Have you made any kind of survey at all? A. Not as yet.

The Court: Do you have any predictions as to the extent to which this will be utilized if it is on a free—

The Witness: I think—

The Court: I don't like this descriptive phrase that you have here. It ought to be called free transfer program or something like that.

The Witness: We'll be glad to change it.

The Court: It would be a bit more descriptive.

The Witness: I think it probably would be. In this particular section my recollection is, and if I'm wrong somebody can correct me, that we have approximately 1,500 youngsters involved in the voluntary open enrollment plan right now.

By Mr. Greiner:

Q. In these fifteen schools? [364] A. No, in the entire city.

Q. How many in the fifteen schools? A. I'm sorry. I can't answer that. But to answer the Judge's question, this increased, as I recall, approximately 500 from the previous year and this increase was accomplished with what I would consider a very minimal amount of information and making the knowledge available to people that such an option was there. How much a concerted effort of informing people if they would choose to—what they would choose to do on

this option was available, what it would accomplish, I don't believe, Your Honor, I could honestly make an intelligent estimate.

The Court: But you do agree that it would have to be an organized effort through the PTA or some other citizens' group?

The Witness: I certainly think that kind of plan would enhance its chances of getting more youngsters, including the ones from the fifteen schools that Mr. Greiner is referring to.

By Mr. Greiner:

Q. Well, this kind of VOE that would guarantee space—that is a privilege that is restricted to the minority children in the fifteen schools, is it not? A. It is a specific provision for these fifteen schools. I don't believe, in operation, the limitations that existed in the previous plan have been a practical [365] problem. I think that, by and large, we have been able to accomodate all the pupils who have asked for such transfer. Now, there may be some exceptions.

Q. Well, then, is the space guaranteed in your mind? Is it going to contribute then substantially to the increased participation in VOE? A. I don't believe that it will contribute nearly as much as the matter of making the information available and so on. It may have an influence, possibly. I can't say how much.

Q. Now, as I understand it, if a minority child in one of these fifteen schools happened to pick an Anglo school which was at more than 100 percent of capacity, the child would be allowed to go into that school and presumably an Anglo child in that school would get bumped, is that right? A. No, I don't believe so.

Q. Well, what does space available guaranteed mean? A. Well, it means that they will be assured an enrollment. There are, as I recall, in the plan provision for three options, three choices, and within those three choices space will be provided.

Q. It's not an absolute— A. In the event that there is need, additional space could be provided for the school of mobilities, as you people had proposed. Certainly, the potential addition of space, [366] as we receive funds, I hope, for additional buildings, and there is also a possibility of extended days which allows some latitude in terms of enrollments and such things as this.

Q. Now, this is a program that is going to be implemented on September 1970, is it not? A. Right.

Q. Now, that's for a—for the budget year which has already been established, is it not? A. Right.

Q. Now, where is the money in the current budget coming from to fund the VOE program? A. You mean on—in terms of transportation?

Q. Yes, first. A. Well, I hope that there are funds in the transportation budget, what with adjustments of routes and so on, that will accommodate it. If there are not sufficient funds in there it will be necessary for the Board then to consider transfer of funds from other budgetary areas to take care of whatever the needs are.

Q. Do you have any idea at all, Dr. Gilberts, of how much participation you could stand under your current budget before such transfer of funds would be required? A. No, I do not.

Q. Now, as I understand it, then, the guarantee is just to guarantee that the child's first, second or third choice [367] will be accommodated, is that correct? A. Yes.

Q. There is no guarantee that his first choice is going to get accommodated? A. No.

Q. So it's a conditional guarantee, is that right? A. Yes, sir.

Q. And I take it that, if the Anglo school is over-capacity, then what you're going to do is simply increase the capacity of the Anglo school, is that correct? A. Well, either increase the capacity as I indicated by mobile units or look at modifications of the program itself and I suppose that is increasing the capacity, yes.

Q. Now, then, if you're talking about an Anglo school that is at your capacity limitations as you have established, for every 30 minority students that transfer into that school, if you go to—go the mobile-unit route, that is a capital cost of how much? Those mobiles aren't cheap, are they? A. No. I'm sorry. I would be guessing if I gave you the figure.

Q. Well, the figure is in evidence as to what the District has paid for mobiles? A. Yes, it is.

Q. And what it will cost to install them? A. Yes.

[368] Q. Now, what about additional construction? What provision do you have for additional construction in September of 1970, should it be found necessary? A. I believe that in January 1971 that the moneys that are available under the two-mill levy will become available for assignment by the Board of Education. There is also the possibility, of course, of increasing that two-mill levy to some other number of mills to meet our needs. Now, that can't be done until January. There is no way that we can, except by moving facilities, maybe—we already have mobility in the mobiles in the fall to make the additions.

Q. What kind of project could that two mills be used for? Any restriction on the use of that kind of money? A. Yes, there are. It needs to be used for new construction. I don't know—there are some restrictions, but it's generally new construction of equipment.

Q. Equipment? A. I believe so.

Q. Can it be used for compensatory education equipment? A. It could be used for any equipment, I believe.

Q. Can it be used for teacher training? A. No.

Q. Or for hardware? A. Capital expenditures.

Q. You're quite sure of that? [369] A. Yes.

Q. Then you mentioned increasing the two-mill levy. Is that a procedure whereby you go to the public with a proposed budget? A. No, sir.

Q. How do you increase the two-mill levy? A. The Board of Education has the authority to increase capital expenditures at its discretion.

Q. With no limits? A. I don't believe there is a legal limit. There is a practical political limit, I suppose.

Q. Why does the Board ever bother to have bond issues if the Board can just keep raising the mill levy? A. Because when one makes substantial capital expenditures, it's not a very sensible kind of economics to pay for those out of the immediate pay-as-you-go. The more appropriate approach is to amortize your costs over a longer period of time. This is the general reason the school systems across the entire country use bond issues.

Q. I see. So, bond issues provide for deferred payment? The increase in the two-mill levy is for immediate pay-as-you-go type of— A. Yes, sir.

Q. Now, the mobile units that you refer to on Page 5 of the summary of your plan, are those mobile units in [370] existence today? A. Some of them might be.

Q. You don't know? A. Well, for example, with some of the changes that could occur at some of the schools presently having mobile units—if students would transfer out of these schools they would be available. If they do not, they would not be available. Now, if there is a need

beyond the availability of them for whatever reason, then we would have to provide funds.

Q. Well, Dr. Gilberts, in assessing the amount of space currently available in what would be the Anglo receiving schools, would you tell us, for example, at the elementary level how many spaces are currently available on the basis of 1969 and 1970 enrollment? A. I'm sorry. I could not do that.

Q. There isn't even a thousand spaces, is there? A. This is based on rated capacity.

Q. Right. Well, aren't you using—when you say extending building capacity ten to fifteen percent, what kinds of capacity are you extending? Is that rated capacity? A. Yes.

Q. So you're using rated capacity, are you not? A. As a base, yes.

Q. Well, then, we're using the same basis. But you [371] couldn't tell me, based on rated capacity, how much space is available in those Anglo schools? A. Not without reference.

The Court: He might be able to compute it tonight and give it to you tomorrow.

Mr. Greiner: I think that might be helpful, Your Honor.

The Court: Very well. It might be helpful for me, too.

Mr. Ris: Do you have in mind what he wants?

The Witness: Yes.

The Court: This would be an estimate of how many pupils could actually be accommodated in a program of this kind.

Mr. Greiner: Before we had to look at construction or mobile units or some increase—

The Court: —before we at least have to look at new buildings. I don't know about—I say "we", maybe the School Board doesn't appreciate that. But certainly I think that it would be well to have some idea as to the number of students at every level who could be accommodated in a program of this kind.

The Witness: Yes, sir. I can provide that to you by tomorrow morning, I'm sure.

The Court: Very good.

By Mr. Greiner:

[372] Q. Now, Dr. Gilberts, I notice with regard to the Hallett School that Hallett was exempted from the benefits of this VOE program. Why was that? A. Because in the Hallett School we have a special program already under operation covered by resolutions this spring providing for an integrated school.

Q. Well, Hallett is not an integrated school, is it? It's not a predominantly Anglo school, is it? A. No.

Q. Pardon? A. No.

The Court: You mean there is some activity there, I guess. There is some movement at Hallett, at least, isn't there?

The Witness: I just can't recall right off the top of my head.

Q. My recollection is that Hallett has got about 35 percent Anglo enrollment. Would you agree with that? A. I'm not sure.

Q. Another thing I wasn't clear on, Dr. Gilberts—I take it that the new VOE program would apply to Manual High School, since Manual was one of the Court-designated schools, is that correct? A. Yes.

Q. So you would actually be transporting senior high [373] school students away from Manual? A. If they choose to go, yes.

Q. And the whole concept of this VOE with space guaranteed is one-way busing, is it not? It's busing the minority students away from minority schools? A. Not necessarily. A student from a predominantly Anglo school could volunteer to go to Manual.

Q. On a space-available guarantee? A. On the same criteria that it's guaranteed in the other districts.

Q. I understand, Dr. Gilberts, that there is some sort of a ceiling imposed by state law on increases in the schools' budgets of six percent from year to year? A. Some limited portions of the budget, yes.

Q. Now, what parts of the budget are exempted from that ceiling, Doctor? A. Well, those portions of the budget that relate to capital expenditures; those portions of the budget that relate to vocational education; those portions of the budget that relate to special programs. Well, roughly that equate with Title I programs of the federal program.

Q. Compensatory programs? A. Compensatory programs, right.

Q. Anything else that is exempted? A. I have missed something. I can't recall what it is. [374] I think those are substantially the ones that are excluded.

Q. Now, at Page 21 of the plan, Dr. Gilberts, I assume that you're talking now about the minority students in the schools. You say, "Few would deny that intensive programs can prepare students academically to meet the demands of our society". Now, to date, Doctor, I take it you would agree that those schools have not done the job of preparing students academically, those minority students, would you not? A. I don't think they have been done as well as they can and should.

Q. Well, these are schools that are all achieving at, I think, an average of about the 22nd percentile, is that right? A. Right.

Q. So those schools have failed so far, have they not? A. Those schools have not produced the results that we like to see. And that, of course, is a national phenomena. Again, youngsters from lower socioeconomic backgrounds have this reflected achievement in all schools throughout the entire country.

Q. Now, you say that also in this—in the same page that integration is the value which must be cherished as an objective, and I take it that there you're talking about your kind of integration, namely, attitudinal change, is that right? [375] A. I'm talking about the definition that has been used here. I think you used that, too, did you not?

Q. No, my kind of integration assumes a—a desegregation to start with. A. I'm sorry.

Q. Now, also on that same page, you say that tantamount to such a plan is the provision of leadership which will result in the deliberate improvement in the educational process, and result in the lasting integration of the Denver Public Schools. Now, what kind of integration are you talking about there? A. I think it is misused in that particular place.

Q. What are you talking about there? A. I'm talking about the kinds of integration that you have described here, promotion of mutual respect, understanding, elimination of unwarranted fears, and—

Q. What I'm talking about there is an integrated setting. A desegregated setting. Is that what you're talking about? A. I'm talking about this as a general condition within the community.

Q. I see. Well, is there any particular program in this

plan, Dr. Gilberts, other than the voluntary open enrollment that directly and immediately addresses itself to the elimination of the racialization that exists in these [376] fifteen schools? A. Not directly, as you have in your plan.

Q. What about indirectly? A. Yes, I think indirectly in terms of the kinds of programs we have designed or will design, in terms of opportunities for these youngsters to have experiences in an integrated setting by your definition, special programs and so on, the opportunities for these youngsters to develop a sense of self-importance, of self-direction, et cetera, within the schools due to programs or as a result of programs that can be developed, and I think these will contribute to my definition of integration.

Q. Dr. Gilberts, these problems that you have just described, the frustration, the lack of control over one's destiny— Now, those are all attitudes which have been known to exist in these minority schools for a number of years, isn't that right? This isn't a brand-new discovery, is it? A. Right.

Q. And for a number of years there has been a massive effort, particularly under Titles I and III of the federal act to remedy those deficiencies in those segregated schools, has there not? A. Yes, there is.

Q. Some $4 billion has been spent? [377] A. Yes.

Q. And yet those programs have not been successful? Would you agree with that? A. No, I would not agree with that. I think that is a generalization that is unwarranted by the evidence that's available. I think many of the programs have been successful. I think many of them have not. And I indicated in my earlier testimony that I felt a good many of those initial programs once created and—were what I called coping education rather than really compensatory education. I think there is the potential

of developing programs that will be more successful than many of those that have not been.

Q. Now, relating that feeling to these fifteen particular schools, what is the basis for that optimism? A. Well, I think a certain amount of experience which has accrued in the last few years in the process of looking at how we begin approaching educational change, is a part of it. I think the fact that there are some new ideas in terms of how we begin approaching this process of educational planning have some implications for it.

Q. What is the new idea? A. I think the new ideas that have not been applied in very good form, at least, throughout the country is the involvement of the people at the local level who have immediate knowledge of what the problems are in conjunction [378] with those people who have certain specific kinds of expertise. Many programs have been designed at a systemwide level, not taking into consideration variations of staff, facilities, commitments, et cetera, and I think this will make a difference.

Q. Is there any evidence that it will make a difference? A. There is at least as much evidence that it will make a difference as there is that your desegregation will make a difference.

Q. Is that right? A. I think so.

Q. Well, would you cite for me some studies, some data about the success of what you're proposing, Doctor? A. Well, I'm sorry that I can't cite specific ones because there is a great deal of literature available in this area. Some of it is fair, some of it is poor. Some of it is maybe better than fair. But I know that there have been research and studies that I have read and I'm sorry I can't cite them. And these are dealing with programs—programs dealing with compensatory in nature and that have shown success

in the evaluation. I wish I could be specific but I'm sorry I can't.

Q. You can't identify one of them? A. Not by citation, I cannot.

Q. Isn't there anybody on your staff that might be able to furnish evidence? [379] A. I'm not sure.

Q. Who on your staff concerns himself with evaluating the efficacy of compensatory educational programs? A. Well, there are right now two departments; one is the Department of Federal Programs—

Q. Who heads that up? A. Bob Hirsch.

Q. Who is the other person? A. The other department that has something to do with this is our Department of Research and Planning—the Budgeting, Research and Planning Department, Dr. Brizinsky (phonetic spelling).

Q. So perhaps Dr. Brizinsky or Mr. Hirsch—he was the other person? A. Yes.

Q. And Mr. Hirsch—perhaps he may be able to help you out on an indication of which of these new programs have been successful? A. Perhaps?

Q. Now, do you have any recollection as to the types of—I understand that you have a feeling that each school community, each school district has certain unique attributes, is that correct? A. Yes.

Q. I take it you also agree that each urban school [380] district has certain common characteristics with other urban school districts, is that right? A. Yes, certainly.

Q. Now, do you recall the kinds of school districts that these successful compensatory programs were tried out in? A. Well, I can think of one. Dr. Shepherd's work in St. Louis is—was one that I—and I can't cite the research, but I think that in that particular case in a midwestern large city there have been evidences of success. I think there

are other programs that probably are fairly representative of a cross-section of the largest cities across the country where individual programs have been evaluated as having been successful.

Q. Now, what do you mean by successful? What criteria do you use? A. Successful in terms of achieving the objectives that were established as the reasons for the program.

Q. Now, I take it some compensatory educational programs are not even directed, are they, at improving student achievement and particular skills? A. Yes.

Q. Is that correct? A. That's correct.

Q. In other words, not all compensatory programs are directed towards teaching minority children to read better, [381] are they? A. That's true.

Q. Or to understand mathematics better? A. That monopoly will be an outgrowth of most of them, I believe, though.

Q. Now, with regard to the area of improved achievement, is it your recollection that some of these successful compensatory programs have been successful in the area of improving achievement? A. It is my recollection that they are.

Q. Have other successes been in the psychological areas, is it your recollection? A. I can recall a few I have read about, yes.

Q. But I take it the basic thrust of this plan aside from this new program of open enrollment, the basic thrust is that the racialization that exists in these schools can be allowed to continue, yet the problems in those schools can be solved, is that right? A. I think the basic thrust in this plan is that we believe that through some of the changes here within the settings of those schools we can

make sufficient changes to improve achievements of these youngsters and in effect the other aspects as well; psychological solving of these things you were talking about.

Q. Segregated settings, racially isolated settings? [382] A. Yes.

Q. So you're going to create schools which are separate but equal? A. I'm not going to create them. I'm going to offer programs within these schools that I think will have an effect in my judgment.

Q. And they're going to be separate schools, aren't they? A. I'm not going to create them. They are separate schools.

Q. You're going to continue them, is that right? A. At this point in time there is no recommendation for distinguishing them.

Q. Well, I don't see even a prospective recommendation for discontinuing them in this program. A. There is none.

Q. Now, was the Board's approval of this plan unanimous at the Board meeting the other day? A. No, sir.

Q. What was the vote? A. Four to two.

Q. You said that you consulted with the fifteen principals in these schools, is that correct? A. They were brought in and worked with my staff.

Q. How long did that consultation take place? [383] A. I was not present so I can't tell you.

Q. You don't know whether it was a short meeting or a long meeting? A. No, I don't.

Q. Do you know who on your staff actually conducted those meetings? A. Dr. Keppe was primarily in charge and other members of his staff.

Q. Were the principals asked to give their views as to how some of these problems might be solved in their schools? A. Yes, I believe so.

Q. Was the question of desegregation of those schools

raised by any of the principals to your knowledge? A. I have not seen all of these individual and specific recommendations of the principals, so I really can't answer that.

Q. Was desegregation of those schools even one of the alternatives that was even considered in the discussion with the principals, to your knowledge? A. I have no knowledge of that.

Q. Did you seek the opinion of the principals as to whether desegregation in an integrated setting might be more effective than compensatory programs? A. I can't answer that either.

[384] Q. Now, again, as I understand it, you feel that one of the problems with the plaintiffs' plan is that it's ramming mixing down the throat of the community that is not yet willing to accept it, is that right? A. I indicated that I felt that the basic problem was that it is based on an assumption that I believe is inadequately proven at this particular point in time for the kind of application that you're recommending.

Q. But I take it that at least on some kind of scale, for example, when you formulated Resolutions 1520, 24 and 31, that you felt that there must have been some validity to that kind of an approach, is that correct? A. I think I explained that a little bit earlier. There are two basic reasons why I recommended that. One was to see whether or not it would have an effect on desegregation in an area of the city; in making, I think, greater efforts to try to stem the tide, and the second, to provide a broader base upon which to evaluate; whether or not that kind of integration really would make a difference academically.

Q. And there was a third reason. And that was the Board—that the Board actually directed you to prepare a plan which at least in part implemented the Noel Resolu-

tion? A. Yes, there was a Board direction; however, I would have provided it without that direction.

Q. Well, Resolutions 1524, 24 and 31 were not a part, [385] were they, of planning equality education? A. They were not in the specific form, but in planning equality education I indicated I felt it was important that we provide an opportunity here—or provide some kind of suggestions for stabilizing the enrollment in those schools in Northeast Denver. That was part of it. That was an outgrowth of that element—of that development of that element.

Q. A more specific plan than your original plan had contained? A. Yes.

Q. What are the programs which are now in existence, Dr. Gilberts, for evaluating the success of Resolutions 1520, 24 and 31? A. I'm sorry. I can't describe it in detail. My research department has worked them out with the assistance of some of the colleges—or one of the colleges or universities in this area and I'm sorry I can't give you details.

Q. Can you give us some of the general concepts that are being employed in that evaluation process? A. Well, I'm not sure it would be inclusive. Certainly the achievement aspects are an important part of it. I think the attitudinal aspects have importance, and I think that they are a part, but there may be others.

[386] Q. Now, there is some sort of testing being done this year to try to get the pulse of the attitudinal changes that are—that have been brought about by this program? A. I can't say for sure but I think probably so, and certainly I'm not looking at this as a one-year evaluation process. It's going to take longer than that.

Q. Well, when are you going to start evaluating? A. We have begun.

Q. Now, community support for a plan you have indicated is one of the major important components of any plan that is going to be successful, is that right? A. I believe community support in any public school system is extremely important.

Q. How do you get community support for a plan of desegregation and integration? A. Well, I suppose you would get support by proving to people this was an important thing to do; that it in fact achieved results, provide time for them to understand and accept, by and large, the tenets of that proposal.

Q. How long do you think that would take? A. Well, I suppose it would be quite different in different communities. And depending upon the kind of plan. But I just indicated to the judge recently that I thought that probably as Dr. Sullivan's suggestion, you have two years of concentrated effort, that would be possibly [387] realistic to apply that to the Denver system. Really, I don't know.

Q. Now, Doctor, where in this plan has the Board submitted their—a provision for even the beginning of that kind of effort to change community attitudes? A. As it relates to desegregation?

Q. Yes. A. Well, I think that the elements of evaluation and—not this plan but part of a provision of the plan which is in existence under the three resolutions you have talked about, is a place to begin developing some of the data I think that will be important if it proves out to be successful for selling it in the community.

Q. But there is nothing in this plan about that, is there? A. No, there is not.

Q. Now, there are multiple provisions here regarding in-service training of staff, for example? Now, are those provisions directed only at these fifteen schools? A. No.

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Q. What portions of them are directed towards solving some of the problems of these fifteen schools? A. Well, I think all of them have implications for solving some of the problems of these fifteen schools but [388] they also have implications for other schools than these fifteen schools.

Q. Dr. Gilberts, if I understand—this school district does not have an unlimited amount of money at its disposal, does it? A. No, it certainly doesn't.

Q. Well, is it necessary to correct the problems in these fifteen schools to implement district-wide programs? Isn't that a basically—basically a district-wide plan, a total concept of education for Denver? A. I think there are some things in the plans that have implications for the total systems. They grow out, by and large, of our planning quality education. We think it has implications both for these fifteen schools and the other school systems in our community. I don't know how you separate these ideas in saying that these are only relevant to fifteen schools. I think they have relevancy beyond that.

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By Mr. Greiner:

Q. Dr. Gilberts, you recall one of the questions that came up during your cross-examination yesterday was the question of how many spaces are available for the new open enrollment program. I have been handed a resume that reflects your understanding. Do you have a copy of that in front of you? A. Yes.

Q. I'd like to ask you a few questions about it. First of all, with regard to the spaces available on the basis of normal capacity at the elementary school level, that shows 878 spaces, is that correct? A. Yes.

Q. Now, of those 878 spaces, are they all in predominantly Anglo schools? Do you know? A. I think this includes all of the elementary schools in Denver. That's my understanding, at least.

Q. So that then would include the Court-designated schools? A. Yes.

Q. And would also include plaintiffs' target schools, these ten other schools? A. Yes.

Q. Now, a black child wouldn't be allowed to transfer [395] into any of those schools under your program, would he? A. No.

Q. So, as far as the availability of space for minority children is concerned, how would that 878 spaces be affected? Do you know? A. I have a modified sheet like you have here which is—which has removed the capacity available in the twelve Court schools, and that reduces the capacity at the elementary level— Shall I read these to you?

Q. Yes. A. At normal capacity it is reduced by 258, leaving 620. Ten percent is reduced by 1,019, leaving 5,363. And a plus 15 percent is reduced by 1,676 leaving a capacity of 7,457.

The Court: None of this makes any sense to either the record or me, you know, because I don't know what he's talking about; these figures.

Mr. Greiner: This goes to the question, Your Honor, of—

The Court: I know that, but he's reading from a document that we don't have before us, so we don't know what he's talking about.

Mr. Greiner: There is an extra copy we might have marked for identification.

The Court: We just don't know what these figures

[396] represent that he's reading, the various figures. I have the 878 reduced by the number of spaces that exist in the so-called Court schools.

Q. Leaving a balance of how many spaces? A. 620 spaces.

Mr. Greiner: Now, we have marked this piece of paper Exhibit 517.

Q. Is that right, Dr. Gilberts? A. Yes.

Q. So that subtraction that you have just made reflects the fact that the so-called Court-designated schools are not predominantly Anglo schools, is that correct? A. Yes.

Q. Now, there are other schools in the District at the elementary level that are also not predominantly Anglo, is that also correct? A. Right.

Q. For example, we have some 5,000 students in the so-called plaintiffs' target schools, is that right? A. Yes.

Q. Or about ten percent of the elementary school enrollment, is that right? A. I believe that's correct.

Q. So that, if we were to further reduce these capacity figures by subtracting other predominantly Anglo space, do [397] you have any idea as to how much of a further reduction would be required? A. I'm sorry. I don't have that information available and I would just be guessing.

Q. But, even just taking into consideration the Court-designated schools, the available space is brought down below the total number of minority students in the Court-designated schools. Isn't that right? A. Yes.

Q. Because there are about—some 9,000 minority children in these Court schools? A. True.

Q. Now, have you made a similar adjustment with re-

spect to the asserted available capacity of the junior high school level? A. Yes.

Q. What is that adjustment, please? A. The normal capacity reduced by 737, leaving 1,088. The plus ten percent is reduced to 3,048. The plus 15 percent is reduced to 4,029.

Q. Now, I take it then that those figures that you have just read me as being net figures, those figures still include capacity at Morey Junior High School, don't they? Because Morey is not a Court-designated school? A. I would assume that is true, but I don't know that [398] to be a fact.

Q. And Morey, of course, is not a predominantly Anglo Junior High School, is it? A. No, it is not.

Q. So perhaps there is a further reduction that would have to be made in that 4,000 figure, is that right? A. Possibly.

The Court: These figures are within the rated capacities of these schools?

The Witness: Sir, the rated capacity is defined as the capacity normal here and then the plus ten percent is adding a ten-percent factor onto that, and a fifteen-percent factor on that. The base is a normal capacity.

The Court: So these figures then contemplate that you're going to be using these schools substantially over capacity?

The Witness: Yes, sir. As we said yesterday, we felt that we would probably have to provide space through mobiles, possibly, to modify schedules to possibly add on to these buildings to produce the space that could possibly be necessary.

The Court: And you would do this with mobile units?

The Witness: It could be done.

The Court: Or whatever else you can muster, is that right?

[399] The Witness: Yes, sir. These ten and fifteen-percent capacities we feel we can operate with pretty much—pretty much within the existing facilities. If we went beyond this we would then probably have to begin providing additional space through adjustments in schedules or additional facilities.

The Court: This doesn't take into account possible double sessions?

The Witness: No, sir, this does not.

By Mr. Greiner:

Q. Dr. Gilberts, have you made a similar adjustment on Exhibit 517 with respect to the senior high schools? A. Yes, sir.

Q. And would you read those figures for us, please, the net figures? A. The capacity normal is a deficit here of 337 pupils over capacity, as I read this. This is adjusted to 478.

Q. Is that plus or minus? A. Minus, I assume; an additional minus of 141. The ten percent is 1,697, a minus of 297, leaving a capacity of 1,382. The plus fifteen percent is a minus 375 with an adjusted capacity of 2,311.

Q. Now, one other question with regard to these net figures, Dr. Gilberts. Do the net figures now reflect the [400] fact that some of these available spaces are currently being filled by students participating in the District's regular VOE program? A. Yes, I believe they do.

Q. They do? A. Yes.

Q. Now, one of the other questions—there was a question with respect to the description of the new VOE pro-

posal, Dr. Gilberts. We are assuming, and I'd like you to confirm this, that there is a racial balance condition being imposed under this special VOE program. Is that correct? A. There is a paragraph, I believe, where it mentions that we will try to keep a ratio of some sort. I don't believe it's defined precisely.

Q. But I am right in my assumption, am I not, that under the new VOE, a minority child couldn't transfer into a predominantly minority school? Is that right? A. That's correct.

Q. I'm going to be referring to the Board's plan, Dr. Gilberts. Do you have a copy of that in front of you? A. Yes, I do.

Q. Now, before we leave VOE, I assume that if a minority child transfers into a predominantly Anglo school that you feel that it will be necessary to undertake some programs in that receiving school in order to properly [401] prepare the school for the minority child, is that correct? A. Yes.

Q. And what kinds of programs do you conceive as being necessary in these Anglo receiving schools? A. I think essentially the same kinds of programs that are going to be necessary in those schools that are predominantly minority.

Q. Well, could you be a little more specific, please? A. I suppose the information that we have included under our in-service education, those areas would be covered. Those areas would include the nature of the minority community, the child and his problems, his strengths, his weaknesses in terms of our program, teaching techniques that it may be appropriate to be used with these youngsters. Certainly understanding of the cultural, social heritage of the groups that are brought into the school.

Q. So this is a program directed not only toward teachers in the Anglo receiving schools but it is also directed towards the Anglo students in the Anglo receiving schools, is that correct? A. Yes, it would have to be.

Q. And I take it that your description of what is to be done in the Hallett program receiving schools is a pretty accurate description of what you have in mind for all Anglo receiving schools, is that correct? [402] A. I'm not just sure exactly what you are—the one in the plan here that—or, which description are you talking about?

Q. As I recall, and correct me if I'm wrong, the proposal contemplates an allocation of certain of these minority schools. A. For in-service?

Q. For in-service, or for anything else, as I understand it. A. Planning.

Q. Additional salaries, for example, extended school year; that type of thing. A. Yes.

Q. I'm looking here now to see if I can find the exact place. Well, at any rate, you do talk about this—in this plan, what you're going to do with the Hallett program receiving schools, and as I recall the proposal it is to give the Hallett plan receiving schools approximately one-half as much aid in terms of dollars as that which is going to be directed towards the Court-designated schools, is that correct? A. I'm afraid you'll have to refer me to the place in the plan here that you're talking about.

Q. If you would look, please, at Page 66 of your plan, down towards the middle of the page, it reads: "Budget [403] allotments should be made to the schools which will receive the Hallett pupils at the same rate as that recommended for the twelve minority schools except that the time involved for the extended work year would only be one-half as long or a period of two additional work

weeks per year. It is estimated that the total cost for these receiving schools for this purpose would be $114,500." And that is the cost, I believe, for ten receiving schools—no, nine receiving schools, is that correct? A. I'm afraid I don't see where you're reading.

Q. Page 66. A. Yes, that's correct.

Q. So, if you divide nine into 114,500, you get somewhat over $12,000 per school, is that right, per receiving school? A. Yes, I presume you're correct.

Q. Now, you're going to have a multiplication, are you not, Dr. Gilberts, of Anglo receiving schools under the Board's concept of special open enrollment? A. I wish you would define what you mean by that a little more.

Q. Well, for example, there is not going to be any limitation placed—well, let's take an example. Approximately how many predominantly Anglo elementary schools do we have in the District? [404] A. I'm sorry. I don't have that figure right at hand.

Q. How many elementary schools do we have in the District? A. Eighty-six—87.

Q. And would you say that about half of those are predominantly Anglo? A. Yes.

Q. So let's say there are 42 predominantly Anglo schools. Now, under your program of special open enrollment, a minority child could transfer into any one of those 42 schools, is that correct? A. Correct.

Q. So it's possible that you may have 42 receiving schools that are going to require these special receiving school budget allocations, isn't that right? A. That's possible, but it seems to me that one would have to apply a little bit of judgment with respect to the nature and the size of the problem. If there are two or three youngsters transported into one of these receiving schools I doubt

very much that the investment there would have to be as great as it would in a school where substantial numbers of youngsters are transported.

Q. But you don't contest the fact that some sort of program is going to be required? [405] A. Yes.

Q. Even for one minority child? A. I think some kind of program, yes.

Q. So, actually, you have a potential for more receiving schools under your proposal of open enrollment than under the most comprehensive of the plaintiffs' plan? A. We already have that potential under the plan we presently have.

Q. Now, I'd like now to call your attention to Page 6 of the summary that is entitled Staff Stabilization. Now, over in the right-hand column there is a figure given for the estimated cost of 1970 under the voluntary incentive program of $633,000 per year. Out of that 633,000 how much of it is going to be spent for two of the items—or three of the items over here in the left-hand margin? For example, how much is going to be spent on superior materials? A. I'm afraid I couldn't define that at this point.

Q. How much is going to be spent on special programs? A. I can't define the precise costs in any one of those elements at this time.

Q. Now, if I understand, that $633,000 figure reflects the fact that in these twelve minority schools—there are fifteen minority schools designated by the Court—there are 633 teachers, is that right? A. Yes.

[406] Q. And it contemplates that each one of those teachers would receive an extra $1,000 per year for additional—for this additional four-week work period, is that correct? A. That's certainly a possibility.

Q. So it's one of the possibilities that all of this $633,000 is going to be—going to go toward teacher salaries?

at's one possibility, is that correct? A. It's a possibil-
, yes.

Q. Now, as I understand it, another possibility is up one-half of that amount, depending on a decision made the local school level, up to one-half of the amount uld be allocated for other purposes, is that correct? A. s.

Q. But any such allocation would automatically cut wn, would it not, the amount of funds available to pay chers for this extended work year? In other words, n can only—you can only use this $633,000 once, not ce? A. Certainly that would be true if it were spent some of the programs that are identified here.

Q. Well, for example, if money were spent on superior terials, it wouldn't be available for teacher compensa-n, would it? A. Right.

Q. And if money were spent on special programs, would 07] it also be available to pay teachers for their four-ek extended period? A. These special programs could olve teachers, yes. It could be available for extended ployment.

Q. How about pre-visitation to assigned schools? A. I nk that would be a matter of additional pay for chers.

Q. And the orientation program? A. That, too.

Q. So some of this is to pay teachers for the extra e? A. Right.

Q. Some of it is available for other resources. Now, s $633,000—is this to pay teachers only in the Court-signated schools? A. Yes, I believe that's correct, the y it was written in this proposal.

Q. And then you contemplate spending an additional 4,500 in the Hallett receiving schools, is that correct? Yes.

Q. And then we have also, I think, agreed that you're going to spend something like—we don't know how much—for the other Anglo receiving schools, is that correct? A. Yes.

Q. Now, the orientation program is a separate expense [408] under this itemization, is that correct, on Page 6? A. Yes.

The Court: What's your point? In that this is going to be expensive?

Mr. Greiner: Very, very expensive, Your Honor, and a lot more expensive.

The Court: You're not really worried about the costs here, are you? I mean, that's not a real problem? I mean, this is not a great issue from your standpoint?

Mr. Greiner: Well, not only I am not worried about the cost but evidently the defendants aren't worried about the costs, either, Your Honor.

Q. Now, this orientation program of $15,000, that's a thousand dollars per Court-designated school, is that correct? A. Right.

Q. Is it going to be necessary to have similar orientation programs in receiving schools? A. Again, I say this would depend upon the number of youngsters and individual—the individual school's evaluation of whether or not this would be necessary.

Q. Now, turning your attention to Page 7, differentiated staffing, I wonder if you could distinguish for me the difference in concept between that of a paraprofessional and a teacher aide. Is there a difference? [409] A. Well, I think there is no difference that one could identify that would hold true across the entire country. These terms

are used in a number of different ways in a number of different school systems.

Q. How are you using it? A. I would use the paraprofessional as somebody who has some specialized training. Let me give you an example. For example, an individual who had been trained as a technician in the use of audiovisual instruction materials would probably be a paraprofessional. I suppose that one could consider individuals who have had degrees in various academic areas who would assist teachers, work with them, as a paraprofessional and not a certified person—but somebody comes in as an aide to the teacher. I'm sure there are other kinds of positions.

Q. I think that clarifies the question. Now, in the implementation of your differentiated staffing program, and bearing in mind your current contracts with D.C.T.A., is differentiated staffing now entirely compatible with the current school district contract? Or, is some sort of negotiation and agreement of D.C.T.A. going to be necessary? A. I think that certainly some conference and involvement with the D.C.T.A. will be important. I think the Board has the authority to move in this direction if it chooses but obviously the professional organization has an interest.

[410] Q. So you wouldn't force this down the D.C.T.A.'s throat? A. My impression, I would not. We have discussed this over the last year or two and people I have talked with at least are interested in examining—

Q. Because, in essence, it's going to make the teacher's job a little easier, isn't it? A. I don't believe so. I don't think it would make it—I think it would make the teacher's job more difficult.

Q. By giving the teacher more assistance? A. No, by giving the teacher more responsibility in more difficult areas of professional—

Q. Now, with regard to, first of all, paraprofessionals and bearing in mind the character of the Court-designated schools, can you give us at least an estimate, Dr. Gilberts, of how many paraprofessionals are going to be required in these schools? A. No, I don't believe that I can. I did try to describe yesterday how I felt one would arrive at effective—an effective system for differentiating. If one were to take the model that is proposed in the—in back here, under those circumstances, I could give—

Q. That's all I want. A. —that's the kind of solution of the plan that we will be pursuing.

[411] Q. Well, if you were to apply this reference that you just made, how would you come out? A. Well, let me —I really don't believe that I can give you an intelligent estimate. Let me cite an example of where differentiated staffing is being used locally which you could examine, if you choose, in Cherry Creek where they have differentiated staffing in such a way as to staff the schools within the regular budget for elementary schools. Now, that's possible. It's been done.

Q. Do you think that's going to be feasible in these minority schools, Dr. Gilberts? A. I think within the budgetary limitations that we are proposing for these schools with existing support programs, yes.

Q. You might say that the Cherry Creek School District has a minimum number of minority pupils, is that correct? A. I certainly would agree with that.

Q. And as I understand it, this differentiated staffing concept, as you are proposing here, is somehow directly tailored to the problems of minority schools, is that correct? A. Right.

Q. So, is the Cherry Creek example really even relevant here, Doctor? A. Well, only relevant in that an existing

educational program was taken. The staff was differentiated to deal with [412] the educational task that was there within the budget already provided. We already have budgetary provisions in many of these schools that are in excess of many of the other schools in the city. And under this circumstance, I think it's quite likely that we could stay within it. Now, possibly—we won't know until we begin working with the problem.

Q. So the concept would be to remove numbers of professional teachers from these Court-designated schools and add paraprofessionals and teacher aides, is that correct? A. I don't know whether that would be true. It might be.

Q. Well, you would have to do that to stay within the current budgets? A. We already have aides in many of these schools.

Q. Do you have enough? A. No, we're proposing more.

Q. And do you have paraprofessionals in these Court-designated schools today? A. Very few.

Q. Now, one area that I couldn't find a description of on Page 7 is master teachers. And there is an allocation of $212,000 for master teachers. What does that figure represent? A. Well, this represents additional pay for additional responsibility for individuals who would assume leadership roles and instructional programs—I believe if you look at [413] the end of this proposal, the program which is on Page 159, it would give you a general idea of what is being referred to. On Page 160 it talks here about the unit leader, teachers, instructional aids, clerical aids. Now, these are arbitrary decisions with respect to how one differentiates. I am not sure that particular description is what ultimately would be the description used. You've got to keep in mind that we put this plan together in about a week. The complete development of some of these concepts

is going to take time. Many of the elements—nearly, if not all of the elements within this proposal were in certain stages of consideration. It's not possible for me at this point to even be assured that this is the kind of organizational structure that will be appropriate under differentiated staffing. This is what my staff recommended to me. I have a fairly sizable staff. Each of these elements, working on these plans that are in here—in this period of time it wasn't possible to work out the kinds of interrelationships, the kinds of definitions, the kinds of program descriptions we would like to have.

Q. Now, at Page 160, the diagram there that shows five of these unit leaders in the elementary school—that's the diagram of the model which Denver is going to follow, is that right? A. This is a diagram of a model that Denver is going to test.

[414] Q. So that there might be as many as 60 of these master teachers in the Court-designated schools? Twelve times five? A. I think that's entirely possible.

Q. And then you would allocate this $212,000 among those people? A. If there were that many and if that were an appropriate sum of money for the additional responsibility in time and employment, yes, that's probably what would be done. We wouldn't arrive at their salary—which, taking this amount and then dividing the number into it—I'm sure we would arrive at some more logical system than that.

Q. So it's not going to be a per capita distribution? A. I don't know.

Q. Now, I understand from Page 7 that in these minority schools you are not going to—the District overall is not going to need any more psychologists or social workers, is that correct? A. I don't think that decision has been made.

Q. Well, I see here that there is no provision budgetwise for hiring additional psychologists or social workers. A. I'm sure we have not reflected every consideration in what will have to be there in the future.

Q. Well, you infer by assigning these that you can meet these needs? [415] A. We think so.

Q. So you're not sure? A. No. No, we're not sure.

Q. Now, the extended work year at the bottom of Page 7 which is given as a $114,500 price tag, is that included in the $633,000 figure that we find on Page 6? Or is that in addition to it? A. It could be. It is not necessarily. If this plan were to operate in one of the schools that we're talking about, then certainly we wouldn't need two sums for extended school year.

Q. Now, turning your attention to the improved in-service training program, could you describe very briefly for the Court the kinds of in-service training programs that were developed for teachers and were attended by teachers last summer that related to the implementation of the resolutions? A. I'm not sure I can do this inclusively. There were several, I can remember. There was one conducted at Colorado College, I believe, which was an extension of the year before. Last summer there was a—

Q. Pardon me, Doctor. What was the subject of the session at Colorado College? A. I'm sorry. I can't recall exactly but it had to do with the cultural contributions of the minorities.

[416] Q. At Page 69 of your report there is a list. Perhaps that would refresh your recollection. A. Thank you. It doesn't indicate where these were held so it would be difficult for me to judge which one is which.

Q. But I take it, referring to the list on Page 69, Dr. Gilberts, that these are all in-service programs that really

relate quite directly, don't they, to the problems of teaching minority children? A. Yes, I think so.

Q. So the School District has already worked up a lot of things—a lot of this in-service training program, has it not? A. These you see listed, at least, yes.

Q. Now, in the past was a teacher's attendance at an in-service training program mandatory or voluntary? A. It was voluntary.

Q. And do you think, Dr. Gilberts, bearing in mind these special problems at these Court-designated schools, do you think it is reasonable to require that every teacher in those schools be required to attend these in-service training programs? A. Yes, I do.

Q. And is that contemplated in your plan? A. It would be, yes.

[417] Q. If you make such a requirement, do you also then get a concomitant obligation to pay the teacher or give the teacher time off to attend the program? A. Yes, and this is contemplated in the extended school year. Some of the provisions that are already reflected in the budget.

Q. So all teachers in the target schools are going to be required—in the Court schools are going to be required to attend these sessions, is that correct? A. Right.

Q. Now, in view of the achievement levels and the similarity of problems at such schools as the ten additional schools which the plaintiffs would like to see included in relief, would it also be a good idea to have the teachers in those schools attend this on a mandatory basis? A. Yes.

Q. And that, of course, would increase the cost of the program in terms of teacher time off, is that correct? A. Yes. And those also would—those will be things that will be required no matter what we do.

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Q. Now, you say that, for September of 1970—and I am on Page 8—that improved in-service training will be implementd to the extent of currently budgeted available funds. What does that mean in terms of dollars, Doctor? A. I'm sorry. I can't tell you what is left in that [418] fund for next fall.

Q. Do you have any idea? A. No, I don't.

Q. I take it that your estimate was that it would cost about $100,500 to fund a similar program in 1971, is that correct? A. I think this is a mistake. I think this was supposed to be $200,000, and somehow in the reproduction of this document, it was not changed.

Q. So that cost there should be $200,500? A. It should be $200,000, period.

Q. I see. All right. Now, Doctor, that contemplates mandatory participation by teachers in all of the Court-designated schools, is that correct? A. Yes, and other schools as well.

Q. Oh, and other schools as well? A. Right.

Q. So this is going to be a district-wide program? A. Yes.

Q. Does it contemplate that teachers in all of the Anglo receiving schools would also be required to attend these programs? A. Yes.

Q. And what estimate of that $200,000 do you allocate to that part of the program? [419] A. Well, in view of the fact that a good bit of these programs could be made available in the Court-designated schools during the additional time period that has been provided for employment, I would assume that most of this could be spent in that direction.

Q. Now, what about the human relations seminars and the workshops in the history and cultural aspects of minorities—how much is available this year for that program?

A. As I indicated to you, I'm not sure what's left in the budget and how much is committed to these programs.

Q. Can you give us a ball park figure? A. No.

Q. Can you assure us that there are sufficient funds to adequately run these programs? A. I don't believe that I could assure you of that at all. As a matter of fact, I'm sure in terms of what we contemplate in the succeeding years when we can budget for these funds, there are not enough funds to do what needs to be done.

Q. Now, programs directed toward the special problems of teaching disadvantaged pupils aren't scheduled to begin under this timetable until a year from this coming September, is that correct? A. Well, it appears that way on this schedule. It [420] doesn't make that much sense to me that that would be the case. I would assume that these would begin immediately after funds are available when we have budgeted for them.

Q. Now, the cooperative workshops put on by black educators and the Hispano teachers—that's a program that's already in existence, is it not? A. It is being contemplated for this fall.

Q. And this is a separate cost for that program? A. I think that's included in the amount of moneys in the in-service budget that we have included for this year.

Q. Now, I'd like to call your attention, Dr. Gilberts, to the school complex concept which is summarized on Page 9. First of all, you have in mind, I take it, the identity of the Court-designated schools, do you not? The Columbine, Bryant-Webster, Elmwood, Fairmount, Fairview, Greenlee, Hallett, Harrington, Mitchell, Smith, Stedman and Whittier. Now, as I understand it, it is your proposal to implement first, Elementary Complexes 1 and 2, is that correct? A. Yes, we are working on those this year.

Q. Now, how many schools are involved in Elementary Complex 1? A. One. Wait a minute—

Q. What's the total number? A. Not in Complex 1. One in Complex 2.

Q. I'm sorry. What's the total number of all kinds [421] of schools contained in Complex 1? A. Eleven.

Q. And of those eleven schools there is only one Court-designated school, isn't that right? A. Yes.

Q. And that's Hallett, is that correct? A. Right.

Q. Now, how does the implementation of Complex 1 in your view afford relief to any of the other schools which the Court has designated? Does it? A. Not in a direct way, but as I indicated yesterday, I believe that this concept has some important implications for all the schools in Denver. I believe that the things that we will learn out of the planning of these complexes will have some implications not only for the Court-designated schools but all the schools in the city.

Q. Now, when we turn to Elementary Complex 2, what is the total number of schools in that complex? A. Twelve, I believe.

Q. So in this complex—and there is only one Court-designated school in that complex, is that correct? A. True.

Q. So in the implementation of Complexes 1 and 2, you are dealing with 23 schools? A. Yes.

[422] Q. Only two of which are Court-designated schools? A. Exactly.

Q. Now, as I understand the complex theory, one of its premises is decentralization, is that correct? A. Yes.

Q. And you look to this committee of teachers, staff and local community representatives to sort of put the meat on the skeleton of the complex concept, is that correct? A.

Along with central office personnel and any kind of resources that they should ask for.

Q. Now, am I correct in my understanding, Dr. Gilberts, that these kinds of committees composed of teachers, staff, community representatives and so on, were in fact designated for Elementary Complexes 1 and 2 sometime last fall? They do exist, is that correct? A. The planning committee?

Q. Yes. A. Yes.

Q. When were they appointed? A. I'm sorry. I couldn't give you the exact time, but last fall I think is reasonably accurate.

Q. And they have been meeting and working continuously since then, have they not? A. I believe the heavy effort on this began probably in about December, but I could be mistaken.

[423] Q. And have you had any kinds of input or output from those committees? Are you familiar at all with what they have planned so far? A. Yes.

Q. How much integration has been planned so far in the schools of Complex 1, Dr. Gilberts? Do you understand what I mean? A. Yes. I'm sorry. I just couldn't be sure that any has been planned in terms of special programs. As I recall, and this is from recollection, I may have missed something—that in the complexes are some ideas that have been developed at this point. The instructional centers, diagnostic learning center approach, the cultural arts type program, all of these could provide for some integration within the programs.

Q. But that would go only to relieve the minority children of Hallett, isn't that right, in Complex 1? A. As far as the Court-designated schools, yes.

Q. As a matter of fact, Hallett is the subject already of a special program, is it not? A. Yes.

Q. Now, what about the input and output with regard to elementary Complex 2, Dr. Gilberts? What sort of integration is currently being provided for that complex? A. Essentially the same as in Complex 1 at this [424] point.

Q. In other words, none? A. Only through special programs.

Q. Now, Elementary Complex 5, the planning for which starts in January of 1971, and implementation in September of 1971—is that correct? A. Yes.

Q. In other words, this is another program that is a year off, is that right? A. Yes.

Q. Now, it contains some more of the Court-designated schools, does it not? A. Yes.

Q. For example, Columbine, Harrington, Mitchell, Smith and Stedman, is that right? A. Right.

Q. Now, as I go down that list of schools of Elementary Complex 5, Dr. Gilberts, am I right that those are all predominantly minority schools? A. Yes.

Q. Well, where do the children in the schools of Complex 5 get their integration experience? A. I wasn't aware that the Court ordered us to produce a plan of integration. The plan to improve educational quality in these schools. Therefore, that plan is not [425] necessarily aimed primarily at integration.

Q. Well, it's not aimed at all at integration, is it, Dr. Gilberts? A. In this particular case, if these are the only schools that will be involved, you are right.

The Court: Well, this Complex 1 and 2, I thought you said was put together long before I issued any judgment.

The Witness: Yes, sir. It began last fall—the planning began last fall.

The Court: So you were not offering this in response to any order that I issued?

The Witness: No, sir. But we certainly have been planning to improve the educational quality in these schools before you issued an order.

The Court: Well, I thought you just said now that you thought I was seeking to improve the quality of education and that is what this has to do with?

The Witness: No, I'm just showing that this is a response that we think will have an effect on that; that's already begun.

The Court: Well, then, your famous Exhibit 20, one of the important objects is to bring about some integration?

The Witness: Yes.

The Court: And you have just abandoned that in these two programs?

[426] The Witness: Not totally.

The Court: Well, it's just so minimal it doesn't amount to a thing. How do you explain that? I can't understand what your thinking is. What's the use of doing it if you're going to do it this way?

The Witness: Well, I first began my presentation yesterday—I said I felt that one of the major needs in education in terms of improving the quality of education, and this includes these schools and other schools as well, is to reconstruct the climate of the educational institution itself. Now, this is a good deal more than integration. This involves the kinds of programs that are developed.

The Court: True.

The Witness: It involves the kinds of input the staff has. It involves the kinds of attitudes the community has. It involves a host of things. One of which can be certainly desegregation. No question about that. Now, I believe—

The Court: Well, you wouldn't put a new system together that would perpetuate—

The Witness: Sir, we are not changing the schools that exist within the city in this complex. Possibly I didn't get that across. We are using the existing facilities that are presently there. We are not changing that. We are merely putting them together in an organizational structure [427] which I think will allow us to free up the educational process to do some of the things that I have been talking about. We're not changing the physical structure of the school system; merely the operational structure of it. Now, I think that's a significant requirement in the improvement of education and I think it's significant in all the schools of the city. That is my professional judgment.

The Court: Well, that may well be, but it makes very little contribution in this kind of setting. That's all I can say.

The Witness: Well, it doesn't make a contribution—

The Court: I mean, this is what we're concerned with. I submit that we are definitely concerned with these complaints of discrimination. I mean, that's what we have been trying here, I take it, for almost a year, off and on.

The Witness: Sir, if you look at the entire plan, there are all kinds of things that I feel will change

the educational climate. I thought in your decision you had asked that educational achievement be improved in these schools. That was the direction that I read in that. In my judgment the things we are talking about here will contribute to that end. Now, not this alone. I think this is only a piece of it. I think all of the other elements that we talked about will also contribute to it. I think when you have an opportunity this morning to listen to Mr. Ward and to Mr. [428] Morrison, our elementary principal, you will see some things that are going on that are qualitatively oriented to better education. I guess what I'm saying is that one can't assume that one can solve this problem by any one approach. You've got to use a very broad approach to changing the character of education. And certainly desegregation is only one of those.

The Court: Well, what I'm expressing really is that your whole cluster approach is described in Exhibit 20 was designed in response to a demand for integration and in this you say, "Well, you get the best of two worlds. You have a home school. At the same time you achieve this integrating experience in a campus atmosphere." These evidences would indicate to me that the thread that runs through all of his would be to bring about some kind of integration and either you didn't anticipate this at all or somebody put it in here without your knowledge or else you abandoned your former principles. That's all.

The Witness: There are some other schools in Complex 2 not identified by the Court that certainly will provide some integration in those cases. The

important schools that the Court has identified are only two, as is indicated here. But there are other schools in which this can occur.

By Mr. Greiner:

Q. Dr. Gilberts, Elementary Complex 5 [429] and the schools contained therein, those are the same schools that were put in Complex 5 in Exhibit 20, Planning Equality Education, is that correct? A. Yes.

Q. Now, is my recollection also correct, Dr. Gilberts, that when you originally drafted—or in Exhibit 20—actually I think it's Exhibit D, Planning Equality Education, that in Complex 5 you were going to leave the minority children in those schools for Grades K through 3? A. Yes.

Q. And then you were going to mandatorily transport them into Anglo schools, isn't that correct? A. That was my original recommendation.

Q. And you have abandoned that concept completely? A. I have not abandoned that concept.

Q. Well, it's not in the plan, is it? A. No, it's not.

Q. Well, does it continue to exist somewhere? A. No, it does not exist in any other way than my recommendations.

Q. So that concept has been abandoned, hasn't it? A. I don't believe it's been considered as a separate issue.

Q. Now turning your attention, Doctor, to early childhood education, as I understand it, the Head Start program [430] which centers upon three- and four-year-olds is now being conducted in 18 separate places in the city and encompasses about 600 children, is that correct? A. Yes.

Q. Now, which schools do these children go to? Do you have any idea? A. I couldn't recall that.

Q. In other words, this Head Start program is not specifically tailored in particular to teach children or to reach

children who are ultimately going to end up in these twelve minority elementary schools that the Court has designated? Isn't that right? A. These programs are tailored to youngsters that qualify under the Title I area of the city, which is determined by parental income and so on, I believe.

The Court: Where are you now?

Mr. Greiner: Page 10, Your Honor, of their plan.

Q. What is the Title I area of the city, Dr. Gilberts? Can you roughly describe it for us? A. Well, I think that, by and large, with the exception of south—part of a south central area, generally beginning with—well, with the dots you have following in that general area around that part of the city.

Q. Well, referring now to what has been designated in the Plaintiffs' Exhibit 415, which is a map of the school [431] district—for example, is Smedly in the Title I area? A. I believe so but I could not be absolutely certain.

Q. Bryant-Webster? A. Yes.

Q. Garden Place? A. Yes.

Q. Elyria? A. Yes.

Q. Swansea? A. Right.

Q. How about Harrington? A. Again I'm not sure but I think so.

Q. Somewhere here in the east is a divided—a dividing line, is that right? A. Yes.

Q. Do you know whether or not Stedman, Hallett or Smith are Title I schools? A. I believe so. I think there are some programs in those schools.

Q. Under Title I? A. Again I can't be absolutely certain.

Q. What about down in southwest—the southwest section here, Fairview, Greenlee? A. Yes.

Q. Elmwood? [432] A. Right.

Q. Fairmount? A. Yes.

Q. Now, as I understand it, Title I has an economic premise to it, doesn't it, Dr. Gilberts? A. Yes, sir.

Q. What is the economic premise? A. $3,000 income, as I recall.

Q. So there is a very high correlation, is there not, between these minority schools that we have just listed and low socioeconomic status? A. Yes.

Q. In fact, every one of those schools is low socioeconomically, is it not? A. Yes.

The Court: Now, the school facilities are not necessarily used for the Head Start program, are they?

The Witness: No, some are outside the school facilities.

The Court: They are just put in neighborhoods?

The Witness: Right.

The Court: That probably are involved in—they probably are involved in a particular school area, but, as I understand it, these are conducted in store buildings or whatever they have available, is that correct?

[433] The Witness: Yes.

By Mr. Greiner:

Q. Now, as I understood—is it your understanding, Dr. Gilberts, that these Head Start programs are directed throughout the geographic area that we have just been describing? A. In general, yes.

Q. Now, are there children, Dr. Gilberts, who qualify for Head Start but who can't be accommodated into the program? A. Yes.

Q. Can you give me any idea of how many children must be turned away each year under the current funding? A. Again, this would be a guess on my part. I can't give you that figure.

Q. Well, can you tell us if half the children who need it are getting it? A. No, I don't believe I could. I don't believe I could hazard that guess.

Q. Is there anybody on your staff that could?

The Court: I think we can take notice of the fact that there are many that are not getting it. I mean, do you need the exact number?

Mr. Greiner: No, I don't think so, Your Honor. I'd just like to get some idea.

The Court: I think it's a matter we can take judicial notice of; that it's not an adequate program in [434] terms of the demand.

The Witness: Yes, that's true.

By Mr. Greiner:

Q. Is that correct, Doctor? A. Yes.

Q. Now, there are 90 children currently participating in the early childhood educational centers, is that correct? A. Yes.

Q. And as I understand the marginal comments on Page 10, this is a program that is not funded by public funds at all? A. The early childhood education program is a pilot program and it is being funded by Denver Public Schools.

Q. Now, no federal funds, though? A. No federal funds.

Q. Is federal funding possible? A. Not unless we would get a special approval of this under Title I.

Q. Now, again, with only 90 children in the program, I

take it there is no doubt that there are many, many hundreds of children who might need this program but who are not getting it? A. Exactly. This is a pilot program. This is the first year we have operated it. It is an outgrowth of the committee that was—that was recognized in 1968, the design program.

Q. And the same is generally true, is it not, of the [435] follow-through program where you have only 370 children affected? A. Yes.

Q. And the other follow-through program, Garden Place and Gilpin, where you have 100 children? A. Yes.

Q. And then the national follow-through which is now a proposal—that would increase the coverage at Garden Place and Gilpin from 100 to 200 children, is that correct? A. Yes, I believe so.

Q. Now, what kind of expansion of coverage for Head Start, early childhood educational centers, follow-through —what do you contemplate in the way of expanded coverage? A. I believe that these programs, as I indicated yesterday, are going to be of extreme significance regardless of what kind of other programs go in this school system, and, as you have pointed out, these are by no means covering the needs in the city, and there will have to be substantial increase in funds for these programs.

Q. Now, do you have any information that indicates that these additional increased funds are in fact going to be available? A. No, sir. That will be an individual yearly budget problem.

Q. Now, you will recall that Dr. Sullivan mentioned [436] something about the $500 million which the President has allocated for desegregation and for the education of minority children. Does anywhere in your plan—do you reflect any of such moneys becoming available to Denver?

A. Only possibly in the educational center at the secondary level, and that is only a possibility. It has not been determined that that will be what we will apply for. As soon as we have more adequate guidelines which somebody informed the Court the other day are in the process of being developed, we will know what it is we can apply to.

Q. Yes. I believe it was Dr. Coleman who was talking about that; not Dr. Sullivan. A. Yes.

Q. Do you have any idea when these moneys would become available? A. It is my impression that the early funds will become available for next fall.

Q. And do you have any idea how much of those funds Denver might expect to receive? A. There is no way to know until we have programs designed, and that can't be done until guidelines are available, and it will be on an individual program basis.

Q. Now, I take it that you do not have a lot of personal knowledge about the particular programs that are going on at Manual, Baker or Cole, is that so? [437] A. Not nearly as extensively as Mr. Ward or Mr. Morrison would have.

Q. When did you first find out, Dr. Gilberts, about the kinds of programs that were being put on at Manual? A. Well, they began, really, the first year I was here.

Q. I'm asking you when you first became personally aware? A. I became personally aware of the beginning program—some of the things Mr. Ward was thinking about the first year I was here.

Q. And have you had occasion to visit these programs while they have been in operation? A. No, I have not.

Q. What about visitation at Baker or at Cole? A. I have been in the schools but not specifically for that program.

Q. So we will direct, then, our questions about those programs to those persons. Now, the Educational Achievement Act of Colorado—the Senate Bill 174, as described on Page 14, as I read Senate Bill 174, the funds allocated by the State Legislature were directed toward the improvement of reading, is that correct? A. Yes.

Q. Now, how many children in Fairview in this interest-motivating program—how many of the children in Fairview [438] participate directly in the Fairview program? Is every child in Fairview participating? A. This is Grades 2 through 6.

Q. And every child is participating? A. I believe so but I'm not absolutely certain of that.

Q. And how many children is that? A. I'm sorry. I don't have that figure.

Q. Fairview is one of these Court-designated schools, is it not? A. Yes, sir.

Q. Now, this program was implemented at Fairview when? A. Well, I believe it began in late or the middle of this year, and—the funds were not certain until after school had begun and after school had opened.

Q. Now, there are 825 children, I am told, at Fairview. And is it your impression that all 825 children are fully participating in this program? A. That is 825 in all grade levels?

Q. Yes. Total school population. A. Well, it wouldn't be that because there is just Grades 2 through 6.

Q. Do you know how many first-grade and kindergarten there is at Fairview? A. No, I don't.

Q. We're talking about some 500 children perhaps? [439] A. I don't know.

Q. Now, what is the new concept being employed at Fairview? How does the Fairview program differ from pro-

grams which you can characterize as coping programs? A. Well, I think that these programs are rather unique in the sense that they are very much individually—the youngsters are very much individually handled. They are dealing with high-interest areas. They are using the talents of teachers, I think, in a creative way. The staff at Fairview is using individualized reading instruction; multimedia communications; communication with the parents and home, in a way that I think is at least—or on this report is producing results that they are looking for.

Q. Now, Doctor, there is nothing new about the concept of ungraded classes, is there? A. No, there is not.

Q. There is nothing new about the concept of individualized teaching methods, is there? A. Well, I don't know. There is nothing new in the concept of it, I guess, but I think the application of it one may question.

Q. And multimedia communication, that just means using films and tape recorders and things such as that, isn't that right? A. In general, yes.

[440] Q. And that is something that's been going on for a long time, isn't it? A. Yes.

The Court: I don't suppose there is any guarantee you will come up with something brand-new in any of these programs. Are they effective? I expect that's what we're interested in.

The Witness: I think the manner in which they are put together and the way in which the staff has committed the program is extremely an important element of it, and that is dependent upon how the programs are developed and implemented in a large way.

By Mr. Greiner:

Q. Now, have you figured out a cost per child of the Fairview program? A. I have not, no.

Q. Well, you're spending $110,671. And, even if every child in the school, some 800 were in the program, that would be over a thousand dollars a child, would it not? A. On that basis, it would, yes.

Q. Or would it? No, it would be over—it would be over $120 a child, is that right? A. Right. I shouldn't agree with you so quick.

Q. I'm like Dr. Bardwell. My arithmetic isn't very good.

The Court: We'd better get a computer in here.

[441] Q. Is that a pretty expensive program, Doctor? A. No, sir, not for the problems that are involved with these youngsters.

Q. Well, that's in addition to the school's normal budget, is it not? A. Yes.

Q. And say, if there were 500 children in the program, that's about $200 per child, is that right? A. If there were 500, approximately, yes.

Q. Now, if you spent $200 per child every year for all of the 9,000 elementary minority children in the Court's schools, how much money is that? A. A lot of money. And if we don't, no matter what kind of program we have, we're not going to meet the problems that are before us. The city is going to have to do that in one form or another.

Q. Where is the money going to come from for these—this expensive program, Doctor? A. Well, by and large, under present conditions it's going to come from the property taxpayer, some support from the state and some from the federal government. And unless those other two forms,

federal and state support, are increased substantially, this city is going to be in the same kind of trouble that other major cities are across the country. But, as I said, I don't care what kind of program [442] you implement, these kinds of funds are going to be necessary.

Q. Now, as I understand it, Senate Bill 174 expires by its own terms after next school year, is that correct? A. Yes.

Q. So the source of this money, at least the current source of this money is going to disappear, is that right? A. Not necessarily. It might be extended.

Q. But we don't know that? A. That's right. That would not necessarily have any implication for these programs because these are funded as pilot programs; innovative programs, to test whether or not they have general application. It was not intended to finance those programs that will be generally applied throughout the school system. So, we have the financial problem, I'm sure.

Q. Now, do you have any idea how much the expenditure of these $110,000—how it was broken down between equipment and teachers? A. Well, on Page 136 there is a budget breakdown, approximately $30,000 for salaries and about $43,000 for supplies and materials. Equipment, another $28,000.

Q. Now, these are the same kinds of expenditures that would have to be made in each of these twelve Court-designated schools if this program were to be implemented, is that correct? [443] A. Yes.

Q. But you don't contemplate any expansion of that program out of Fairview next school year and into any of the other Court-designated schools? It's not in your plan? A. It's not in the plan. Whether it will be in our budget or not is a question yet to be determined. We are in the

process this year of completing our development, our long-range planning system, and this involves some of the things we have tried to do in a big hurry, but on a much more comprehensive and intensive basis than we could do in this period of time, and I am sure we will add a number of things that need to be included in that budget that are not included in this plan.

Q. Now, Dr. Gilberts, I asume that you have the—you have established some sort of a procedure for evaluating the effectiveness of the Fairview program, is that correct? A. I believe that an evaluation is one of the requirements of the plan.

Q. Now, what kind of objective criteria have been established as an objective of the Fairview program? A. I'm sorry. I have, as I explained before, a good many people on my staff who were responsible for literally hundreds of different programs in this school system. There is no way I can be familiar, sitting here off the top of my head, talking about those kinds of specifics; I just don't [444] have it available.

Q. So you don't have in mind what the particular objectives of the Fairview program are? A. Certainly the basic objective is to improve the youngsters' academic achievement in school through reading, as the bill implies.

Q. But you don't know what goal you set for yourself? A. I couldn't describe it precisely, no, not without reading the plan.

Q. Well, then—

The Court: Well, I take it that the whole mission of the program at Fairview is to improve the performance of these students, is that right?

The Witness: Yes, sir. Right. But I thought he was asking for a more precise definition of goals than that.

The Court: One of the faculty there wrote me a letter after the opinion telling me in some detail what they're doing there and saying that, if I'm going to be an expert, I ought to go down and see what's happening.

The Witness: Sir, I think that's a very good idea. I'd certainly like to invite you to see some of the programs in school.

The Court: You ought to visit some of them, too, I think.

The Witness: I think that would be very nice.

[445] The Court: Maybe we could do it together.

By Mr. Greiner:

Q. Dr. Gilberts, on Page 143 of the plan, we were talking about the innovative practices—it says the strenuous efforts are required to eliminate factors that result in a negative self-image of a child and a feeling of inferiority. Practices that underestimate the child's learning capacity. Now, is it true, Dr. Gilberts, that this kind of environment exists today in these minority schools? A. Yes, to some degree.

Q. Now, in the cultural arts program, as it's currently being run, you are spending $165,000 on the program, as I understand it, is that right? A. I believe that's correct.

Q. Now, we're on Page 15 of your plan. Now, last year can you tell me how many Anglo children participated in the cultural arts program? A. No, I can't.

Q. Can you give me the total number of children that participated in it? A. No, not off the top of my head.

Q. The cultural arts program is now being implemented only for 6th graders, is that right? A. Yes.

Q. And is there any—is every 6th grader in the school district participating? [446] A. No.

Q. How many 6th graders of the school district are participating? Can you give me even a rough proportion? A. It would be strictly a guess. Half. That's a guess.

Q. Now, one of the objectives of the cultural arts program, as I understand it, is to bring children of ethnic and racial groups together in an intercultural experience, is that correct? A. Yes.

Q. And this is a form of real integration—in other words, you have these different children there physically present, one with the other, is that right? A. Yes.

Q. Now, in the cultural arts program, when we look at one minority child's participation in it, how many hours of such integrated experience does he get out of the cultural arts program? A. I believe it's a week's participation; a week-long participation.

Q. For a full school day? A. No, because there is transportation involved. A large portion of the day, as I recall.

Q. So he gets maybe twenty to twenty-five hours of experience? [447] A. That's possible.

Q. And gets it in the 6th grade? A. Right.

Q. Now, the outdoor education center—the Ballerette program—as I understand, in order for the District to maintain its right to the development of Ballerette, it made a commitment that over a five-year period it had to invest a half million dollars in the site, is that correct? A. Correct.

Q. Through this current budget year, Dr. Gilberts, how much has been allocated to Ballerette, total? A. I'm sorry. Again I couldn't be—

The Court: During this current budget year, how much has been allocated to Ballerette? That's your question, is that right?

Mr. Greiner: I was thinking in the development of Ballerette—as it started a couple of budget years ago.

The Witness: Last year, I think, was the first year that we made our—that we budgeted our costs.

By Mr. Greiner:

Q. And for this current budget year, Page 15, that shows that there is $247,000 allocated, is that right? A. Right.

Q. Now, was some money allocated last budget year? A. Yes.

[448] The Court: This is what I can't recall.

Q. Can you give us a ball park figure on it? $100,000? A. Pardon?

Q. $100,000? A. A little over a hundred thousand. I guess it's a hundred and sixty or seventy thousand; thereabouts.

Q. So then this is the second budget year of the program and by the end of this budget year you will have allocated four hundred of the necessary five hundred thousand dollars, is that correct? A. No, sir. That's not necessarily correct because this $500,000 commitment was a capital expenditure commitment. These figures include operational costs and this is not a part—that does not respond to the needs of $500,000.

Q. It doesn't? A. No.

Q. What does? A. That portion of that figure and whatever portion of the estimated one hundred sixty or seventy thousand that was allocated for capital expendi-

tures on site development, buildings, et cetera, such things as these.

Q. For what other purpose is this money being used for? A. I'd have to see the budget. Part of it is for staff, planning staff, development, part of it is for educational programs that will be conducted. Essentially those other two [449] items.

Q. When is Ballerette going to open? A. Well, we hope to have some programs beginning this next fall. We had hoped that we could do it last fall but, due to some problems that occurred at that time, we didn't get it off the ground the way we expected.

Q. What is your time schedule for having Ballerette in full operation? A. I would say that it would be a minimum of five years and probably a fullblown operation, it could be more than that.

Q. Well, now, when it's in full operation—or let's say about five years from now, and with a frame of reference of a single given minority child, Doctor, in the operation of the Ballerette program, how often would that minority child get to Ballerette? A. Well, this is a guess and an estimate based upon a supposed program which is not designed and approved as yet. But I would say probably an opportunity in a regular program of at least twice, maybe three times during the school year for a period of a week or so. In addition to that—

Q. Pardon me. I will let you finish your answer, but that is three times in twelve years? A. Well, no, I don't believe it would be quite that. I would say probably three times within, say, six years of the [450]—well, it could be twelve years, yes. It could go lower than that.

Q. Please continue. I didn't mean to cut you off. A. There will be some other programs that will be special in

nature; vocation oriented, as we are presently contemplating, at least; resident opportunities for some youngsters to participate in the management and operation of that center. These would be fairly small numbers of pupils, but for the bulk of the pupil population, probably what I originally indicated.

Q. So then we are looking at the experiences which Ballerette offers to give minority children for these intercultural experiences—it really doesn't amount to much, does it, Doctor? A. Well, I think that the quality of the program will have something to do with how much it amounts to, if you're talking about—surely the time—it's not a great deal of time, twelve years.

Q. Now, what does the Metropolitan Youth Opportunity program do? A. Well, this is an institution that was developed primarily to recapture youngsters that had dropped out of school. It provides opportunities both in terms of academic offerings, allowing people to finish their high school education. It offers, also, some vocational offerings.

[451] Q. And that is to continue as presently constructed? A. We have some thoughts of expanding this operation into another location or two. Nothing is decided on that, as yet.

Q. Now, one of the other concepts described as individually-guided instruction—now, it is scheduled for implementation in 1971, is that correct? Looking again at Page 15. A. Yes. This would be as soon as our budget year is begun or we have the funds to finance it.

Q. Now, as I recall, the $200-per-school-year figure is based on the assumption of a given standard-sized school, is it not? A. Yes.

Q. How many classrooms was it? A. I'll have to refer to it.

The Court: This would be a counseling program, wouldn't it?

The Witness: Pardon?

The Court: Wouldn't this be a counseling program?

The Witness: Well, that would be a part of it, sir. It includes the entire instruction of the youngsters in the school, skills as well as that.

By Mr. Greiner:

Q. A 24-room school, Page 169? Now, applying that criteria to the Court-designated schools, [452] are some of those schools smaller than 24-room schools? A. Yes.

Q. How many of them? A. I'm sorry. I can't answer that.

Q. Well, have you made any attempt to tailor this budget allocation of these particular schools in terms of their size? A. No, I think it has taken the figure of 16,200 as the standard.

Q. So it may be a greater amount or it may be a smaller amount, depending on the size of the school? A. Yes.

Q. And it also depends on the number of teachers in the school, does it not? A. Yes.

Q. Because most of that money goes for some sort of additional teacher compensation, is that right? A. Yes.

Q. Now, is that teacher compensation money—is that the same as that master teacher figure that we have talked about earlier? A. It could be.

Q. But not necessarily? A. Not necessarily, but it could be, yes.

Q. On Page 157, under Programs to Build Understanding, [453] you're going to establish programs to build understanding of the contributions of Negroes, Hispanos,

and others to your common culture? And some of these programs have already been implemented. Now, how does that program work in a 90-percent Anglo school? A. Well, it has become part of our curriculum in social sciences primarily.

Q. But there aren't any real live Negroes or Hispano kids in that school, are there? A. No, we don't have any real live nuclear reactors in our schools either, but we study about them.

Q. So you teach human relations through book learning, is that right? A. I think you can develop an understanding of the contributions of these groups that way, yes.

Q. Do you think a little physical—bicultural physical presence, interreaction, might also be beneficial, Doctor? A. Yes.

Q. Now, the resolution that the Board of Education passed when it authorized the presentation of this plan in response to the directions of the Court, which is Defendants' Exhibit V-B, as I read that resolution, I get the definite impression that regardless of what the Court does, vis-a-vis relief in this case, the Board of Education is going to go ahead and implement that plan, anyway, is that right? [454] A. I don't know.

Q. Well, I'm looking for the language of the—

The Court: Really, I don't think he should be called upon to answer for the Board. If it says so, why, it does, I expect.

Q. Perhaps I misspoke, Dr. Gilberts. On Page 3 of the Board's plan being presented here—

Mr. Ris: The resolution speaks for itself, Your Honor, and I don't think Dr. Gilberts—

The Court: We will all agree that it says regardless of the outcome of this litigation this Board reaffirms its intent to continue improvement in the quality of education offered to all the children of Denver.

By Mr. Greiner:

Q. Now, Dr. Gilberts, as I understand it,—and we have gone through now most of the details of the Board's proposal, and we find that of the fifteen schools designated by the Court, we're going to have some special programs which already were in existence at Baker and Cole and Manual; that is, three schools. And at Fairview. That's four schools. Now, how many other of these fifteen Court-designated schools under this plan for the opening of school this coming fall are going to get something out of this plan? A. Well, as I indicated earlier, what we can do this fall is pretty well limited to the funds that have already [455] been budgeted.

The Court: What he's saying is, he is suggesting, I think, that this is merely a description of what you're now doing in the schools. It's not any—

The Witness: No, sir. It's not. I think when we talk about the increase in planning and in-service time, this is to a great—this is a great expansion beyond what we're doing right now. When we talk about some of the programs that we feel have implications for these schools, there obviously has to be a wider implementation in those plans in other schools. Differentiated staffing as a concept is certainly something that has implications for these schools. I believe I mentioned in-service—

The Court: Well, is that really what your inquiry was, Mr. Greiner?

Mr. Greiner: No, not really, Your Honor. What I wanted to try to determine was this plan as it is now being presented—I wanted to see exactly how it related to the Court-designated schools with regard to the opening of school next fall.

The Witness: It seems to me that anyone who has any understanding of the problems involved in getting at improvement in the quality of education would understand that one just does not snap one's fingers and expect those changes to occur automatically. There is a great deal of time in [456] development of programs, training of teachers, the implications of these programs. There is no way one can next fall move into—move these programs to the nature we have talked about here or what—or expect to implement them completely and totally and effectively. That can't be done. That's not the way schools operate, and it just isn't going to apply—

Q. Do you know how much time southern school boards, Dr. Gilberts, are being given by the courts to implement integration and desegregation programs these days?

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Q. Dr. Gilberts, I take it that in these minority schools and the Court-designated schools that teachers in those schools have to spend a good deal of their time enforcing classroom discipline, is that correct? A. I don't think I could make that general statement.

Q. Do you have crisis rooms in Anglo schools? A. Not probably in the same definition that we have in some of

these schools, but I think we have some of the same kinds of problems.

Q. Now, as I understand it, you have resigned as Superintendent of Schools and a new superintendent will take [457] over September 1, 1970, is that correct? A. Right.

Q. Now, it's possible, is it not, Dr. Gilberts, that the new superintendent may not agree at all with your complex theory, is that right? A. It's possible. However, this is a matter of Board policy and the Board is committed to explore this idea, and I'm sure the new superintendent will do that.

Q. But there may be a lot of changes in concepts with the new superintendent, is that right? A. I don't think I could answer that.

Q. Now, as I understand it, it's the position of the defendants and it is your position that these minority children come into these minority schools with a lot of environmental and family background type of problems? Now, for example, the limited education of the parent is one, is that right? A. Yes.

Q. Now, what in this Board proposal, what particular program speaks to that deficiency? A. Well, I think there may be several that can. Certainly the early childhood educational program is aimed at that among other parental deficiencies the youngsters may have. It seems to me that as the complexes develop that there can be programs developed within those that would deal with this.

[458] Q. How does that relate to limited education of the parent? A. Well, I don't believe that there is anything we can do about limited education of the parents, but I think that we could offset some of the deficiencies that are a result of that by additional programs in schools.

Q. What about lack of reading materials in the home? A. Again, I think that some of the early childhood programs speak to that issue.

Q. Is anything in your program going to put reading materials in the minority child's home? A. Conceivably, yes.

Q. What about the problem of limited verbalization with the child? A. Again I think early childhood programs would have something to do with providing additional experience for the child in this area. I also believe that some of the new programs like the Fairview program and some others that are being used in the schools can provide for some assistance in that area.

Q. How about poor language patterns in the family? A. Again, I think these same programs may have some implication for those deficiencies.

Q. And a feeling of inadequacy by the parents? A. It's difficult to overcome that, but again, as I [459] say, I think some of the programs that we have identified may help offset some of those programs.

Q. The negative attitudes towards schooling by the parents? A. I think in this particular area the involvement of parents, the development of programs that are motivational, not only to kids but to the parents, can have quite a bit to do with the problem.

Q. Do you think these minority parents like desegregated schools, Dr. Gilberts? A. I don't think I could answer that.

Q. You can't? A. No, I don't think I could.

Q. You think minority parents prefer segregation over integration? A. I would say I don't believe I am in a position to answer for minority parents.

Q. What about small vocabulary on the part of the parents? A. Again, as I say, the programs that we are talking about will be designed to help offset some of those early deficiencies that the youngsters experience.

Q. How about the parents' distaste for reading, for conversation and for nonverbal outlets for frustration?

The Court: What page are you on?

Mr. Greiner: This is Mr. Manley's cross-examination [460] of Dr. Dodson, Your Honor, from the transcript of the summer preliminary injunction hearing.

Q. How about the parents' aversion to study or reflection? A. Again I respond the same way.

Q. And the absence or limited use of writing materials in the home? A. My response is the same.

Q. What about the broken family that this minority child comes from? A. I don't know any program that can compensate for those kinds of problems, totally.

Q. How about the absence of father figures? A. I believe again that there are some ways in which the school—if it approaches the child properly and provides motivation for him, can to some extent substitute for some of those problems.

Q. Well, I take it that you believe, don't you, that many of these minority children come into these schools with these kinds of problems that I have been describing? A. Yes.

Q. And I believe that you agree that not all of those kinds of problems can be solved by these programs that you are proposing, is that right? A. No, I'm sure that we can't solve all the problems.

[461] Q. Now, do you have any opinion, Dr. Gilberts, as to how an integrated school environment with a heterogeneous student body might help give these minority children some of these experiences, some of these role models, some of these feelings of self-confidence and expectancy to succeed? The Anglo children have those feelings, don't they? Some of them? A. Not all of them.

Q. Do you think that might make a valuable contribution to these minority students? A. I suppose to some of the youngsters it might. As I maintained before, I think there are some other ways of getting at those problems.

Mr. Greiner: We have no further questions.

Redirect Examination by Mr. Ris:

Q. Dr. Gilberts, do you know of any evidence that mandatory busing would provide for lack of reading materials at home? A. No, sir.

Q. Or would substitute for negative parents' attitude toward the schools? A. No, sir.

Q. Or would substitute or provide for the lack of the father figure at the home or these other things Mr. [462] Greiner was just talking about? A. No, sir.

Q. Dr. Gilberts, generally, there are how many schools in the system? A. 127.

Q. How many employees? A. 7,000, total.

Q. How many pupils? A. 96,000 plus.

Q. As superintendent, are you able to keep track of all of the various statistical figures? A. Unfortunately, no.

Q. And be personally familiar with every detail of every program that is going on, whether it be at Fairview or Cole or wherever it might be? A. No.

Q. Do you have men who do keep on top of the specifics? A. Quite a few of them.

Q. Major staff people here available? A. Yes, there are, but there are many more than these.

Q. One thing I neglected to ask you during your direct examination, — and so this would not particularly be in redirect, but if I may, did your staff analyze Plan 1 in the plaintiffs' proposal to determine how many buses would be required just as a proposal now—as the proposal now [463] stands? A. Yes.

Q. Additional buses? A. I believe that the estimate was that, if they did not duplicate the use of vehicles, just use the vehicles that were assigned to special areas, it would require 147 buses.

Q. Then did they further study to determine if—for the target schools and the hours and using a bus on more than one route—

The Court: How many buses in Plan 1?

The Witness: 147.

The Court: Additional?

The Witness: Additional, yes. By doing the things you have described, it would probably—and this is purely an estimate—we probably could get by with 65 additional buses.

By Mr. Ris:

Q. And this would necessitate in some schools having a starting time of eight o'clock and in other schools a starting time of nine o'clock? A. Or some similar arrangement.

Q. This would also necessitate, of course, additional drivers? A. Yes.

Q. Additional mechanics? A. Yes.

[464] Q. Additional parking space? A. Yes.

Q. Additional driver training? A. Yes.

Q. And a host of other allied matters? A. Yes.

Q. Now, through some of the testimony, Dr. Gilberts, there has been some indication that one of the problems that a minority child has is that he has a lack of sense of power or destiny as to what he can do and what he can't do and to what school he can go and to what school he cannot go. A. I believe that was testified to by Dr. Dodson last summer.

Q. And that one of the things that the—that voluntary open enrollment obviates is to the extent that parents—that the child or his parents for him can select another school? A. I would suppose some—

Q. Now, with respect to the Hallett program, that has been an exchange voluntary program, has it not? A. Yes.

Q. And with special emphasis given on that one school? A. Yes.

Q. On Page 40 of the Exhibit V-A, there is a chart. Does that chart reflect the changes that have occurred in the [465] participants? A. Yes.

Q. And does that chart reflect the Anglos who are bused into Hallett and the blacks that are bused out? A. It indicates the number of Anglos and Negroes in Hallett School.

Q. And does it show also the in and out numbers? A. Yes, it does.

Q. And have the numbers of Anglos coming into Hallett increased each year? A. Yes, it has.

Q. And what was it the first year? A. 76.

Q. What was the second year? A. 132.

Q. And how many whites are there this year? A. 290.

Q. Could you give us the same figures for those being bused out, the Negroes? A. In 1968 it was 634. In 1969 it was 575.

Robert D. Gilberts—for Defendants—Redirect

Q. Now, in preparing your plan, Dr. Gilberts, there has been submitted to the Court as Exhibit V-A—did you draw upon your past thinking or past experience as well as innovative things strictly pursuant to the Court's memorandum opinion of March 21? [466] A. Yes.

Q. So that everything in that plan is not brand-new and had never been considered before? A. No, it's not.

Q. Are there things in there that you considered before and had plans on which—but which had not been approved or accepted by the Board? A. Yes.

Q. So it's correct then that there is a compilation of a mass of experience to which was added additional items which you understood would be required in accordance with the Court's memorandum opinion? A. Yes, it was.

Q. And is any one portion of this plan intended to be an entity in itself? Or does it all have to be considered together.

Q. Do you have the Exhibit 517 before you? A. Yes.

Q. You indicated that the adjusted figure, ignoring the spaces in the twelve Court-designated elementary schools, that there would be 620 spaces available. Correct? A. Yes.

Q. In the elementary schools for transfer out of the twelve schools. Now, if you added the ten percent overcapacity [467] in the other elementary schools, what would be the figure? A. 5,363.

Q. Available spaces? A. Yes.

Q. And if it were 15 percent, how many available spaces in the other schools? A. 7,457.

The Court: Has that summary sheet been introduced into evidence?

Mr. Ris: I don't think it was ever offered.

The Court: I have not seen it.

Mr. Greiner: We would offer it.

Mr. Ris: We have no objections.

The Court: Very well, it will be received.

(Whereupon, Plaintiffs' Exhibit 517 was received in evidence.)

By Mr. Ris:

Q. Dr. Gilberts, as there were whites transferring out of those other schools—that would also make available additional space available? A. Yes, it would.

The Court: Do you think there is any reservoir of white students to be had to transfer voluntarily to black schools?

The Witness: I think there are some; it would be difficult to estimate.

[468] The Court: I'm sure you put on quite a drive in order to get this Hallett program off the ground.

The Witness: Yes, but that was in a very limited area in Southeast Denver and not really going beyond that area.

The Court: Is there any indications that you could get high school people to make this kind of a switch voluntarily? Do you anticipate there's going to be any sizable number of openings from this source?

The Witness: As I indicated, I feel that the program has to be promoted if it's going to be successful. People have to know about it. A year ago when the voluntary open enrollment plan began there was a considerable amount of interest at the senior high school level especially and I believe that, with continued emphasis in this area, that there probably

would be a substantial number of youngsters that would be interested.

The Court: But, anyhow, you're going to go forward on the assumption that you're going to have to accommodate these people with existing openings?

The Witness: Yes.

The Court: And create some more, if you need to, is that right?

The Witness: Yes, sir, if we need to.

By Mr. Ris:

Q. Now, with respect to the questions [469] that were asked you by Mr. Greiner on budgetary matters pertaining to in-service training, compensatory education and so forth—now, do you recall that Dr. Bardwell testified yesterday that in effect they would adopt some of these same programs as ancillary matters to their programs? A. Yes.

Q. Would the budgetary requirements be any different if they were part of the plaintiffs' plan as compared to part of the defendants' plan? A. I think that they might be higher. Because there would be more schools involved.

Q. Now, with regard to Complexes 1 and 2, are there in some of those schools involved in those complexes some Negroes and some Hispanos? A. Yes, there are.

Q. So when you take the groupings of the schools as a whole, there is a substantial mixture of races? A. Yes, I think there is.

Q. Now, Dr. Gilberts, yesterday in response to questions by the Court in regard to Northeast Denver and the schools that were affected by the temporary injunction, have there been any problems in connection with the transportation of pupils in the exchange of students—student personnel in the affected schools? A. Yes, there is.

[470] Q. Could you tell us what some of those problems have been? A. Well, the problems have largely concentrated to the junior high school level and they tend to fall into the areas of transportation, the moving of youngsters back and forth to schools. We have had quite a lot of difficulty in terms of behavior on our buses, on these routes. We have had quite a number of incidents that we have a file on in our office indicating difficulties in terms of human relations which we certainly hope to promote in these schools.

Q. Are you still talking now about—during the busing? A. No, I'm talking about in the school itself.

Q. What type of incident reports come to you in this connection? A. Well, usually incidents relating to relationships between whites and blacks in the schools involving all kinds of interpersonal relationships; fighting, et cetera.

Q. Have you had any communications from either pupils or the parents in connection with this? A. Quite a few. We have a rather thick file on it.

Q. With respect to the program itself or the results, I should say, you indicated yesterday it was too early to assess the results. A. Yes, sir.

Q. So objectively, as you indicated, this would be a [471] pilot program? And it was your thinking originally and objectively then, so far as academic results or achieving—achievement results—you still don't know? A. We have no results yet.

Q. So then, insofar as the actual operation, you have had various problems. So, there are some pluses and some minuses, is that correct? A. Yes.

Q. It's certainly not been exactly a Sunday school picnic, so to speak? A. No.

The Court: I suppose you would have the problems if you were busing them on a voluntary basis, too, wouldn't you?

The Witness: I don't believe that we would. We do bus some on a voluntary basis and my feeling is that the problems have been largely confined to those areas in which we have transported blocks of areas out into the schools at junior—at the junior high school level. Now, those buses may also include some voluntary pupils.

The Court: Why would it be different?

The Witness: Well, I think that there has been certainly some feeling on the part of those that were transported that this was not exactly what they wanted to do. I think that some of the youngsters found the environment hostile [472] where they found themselves. At least, in their minds. And the incidents that have occurred I suppose are fairly representative of the kinds of problems that are going on around the country. This problem is one which has been true in many other cities as well. I think, though, largely—probably it comes from the feeling of these youngsters being moved to schools that they were—that were not of their choice and at that level youngsters, junior high school youngsters are very volatile youngsters to begin with.

The Court: You mean both black and white students?

The Witness: Yes, all adolescent youngsters of this nature, the combination of these things has produced some problems.

The Court: Well, the problems wouldn't be different if you were mandatorily moving them to re-

lieve the overcrowding, I don't suppose. Wouldn't every element you mentioned be present in this kind of a situation, too?

The Witness: Yes, sir. I think that, if this were done for that reason too, you would have the same kinds of problems. Most of our busing for relief of overcrowding has been at the elementary level and not at the junior high school level.

By Mr. Ris:

Q. Have you had any increase in disciplinary problems in the classroom? A. Yes.

[473] Q. And can you give us some further elaboration on what the problems have been? A. Well, I had communications from various faculties in the city, reporting their reflections on the same kinds of incidents that I have referred to in a general way. That there have been concerns expressed on the part of the teachers as to how they are to handle—cope with the disciplinary problems that develop. Certainly a desire to make the experience successful, a sort of concern on their part as to how to react to these situations in a way that doesn't cause problems with other youngsters so far as discipline is concerned in the schools. I believe that generally covers the problem.

Mr. Ris: That's all. Thank you.

Recross-Examination by Mr. Greiner:

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Q. Now, you said that you would need a minimum of 67 additional school buses to implement Plan 1 of the plain-

tiffs' plan? A. That was Mr. Olander's estimate, at the lower limits, if we duplicated routes and dual use of the bus.

Q. And Plan 1 of the plaintiffs calls for the transportation of somewhat less than 9,000 school children at the elementary level. Do you recall that? [479] A. 8,380.

Q. And Plan 2 calls for the transportation of how many elementary school children? A. I have here 11,109.

Q. Now, under Plan 1 of the plaintiffs, we would be transporting less than 9,000 elementary children. If you have complete participation in the minority elementary schools of the limited open enrollment program, you would be transporting about 9,000 minority children into these Anglo schools, wouldn't you? A. I'm not sure of that figure but if that is the total number, that's the total potential, I suppose.

Q. So your capital requirement for buses would be exactly the same? A. The problems of transportation would be relatively the same.

Q. And the annual budget for the School District is what? About $100 million, Dr. Gilberts? A. Roughly.

Q. And buses cost about $9,000 apiece? A. Smaller units do. The larger ones are twelve, thirteen thousand.

Q. What does a smaller unit carry? A. Sixty-five passengers. The larger ones are seventy-five and up, as I recall.

[480] Q. So, if you had to buy 67 buses at $9,000, that's $603,000? Do you agree with that arithmetic? A. That arithmetic I think is right.

Q. That's about half of one percent of the School District's budget, is that correct? A. That's correct.

Mr. Greiner: No further questions.

Mr. Ris: That's all.

(Witness excused.)

Mr. Jackson: Call Mr. James Ward.

JAMES D. WARD, a witness called by and on behalf of defendants, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jackson:

The Court: Please state your name, address and occupation.

The Witness: James D. Ward. I live at 2618 Adams Street. I'm the Principal of Denver Manual High School.

By Mr. Jackson:

Q. Mr. Ward, how long have you been Principal at Manual High School? A. I'm completing my fourth year.

Q. And how long have you been with the Denver Public Schools? A. Twenty-two years.

[481] Q. Immediately prior to your taking over the principalship at Manual, what was your assignment? A. Principal at Wyatt Elementary School.

Q. Was Manual your first senior high principalship? A. Right.

Q. What generally, Mr. Ward, is the racial and ethnic composition of the school student body at Manual? A. Out of the student body of 1,500 original registrations, perhaps 69 percent black; 27 percent Hispano, and the rest other.

Q. How would you generally describe the socioeconomic status of the area from which these students come to school? A. It would be low.

Q. For all students? A. A large majority.

Q. At the time you arrived at Manual in terms of curriculum then being offered at the school, did you find that it was the equivalent of the general curriculum then being offered at other Denver High Schools? A. Basically the same.

Q. And if we may refer to the traditional concept of a high school curriculum as the three R's type of program which is offered in most high schools, that's a program offered at Manual? A. Yes.

[482] Q. In addition to the regular high school curriculum there has been some testimony throughout this trial, and I'm certain that you have heard some of it as you have been seated in the courtroom these last two days about some special and specific programs which are presently under way at Manual. You have heard that testimony? A. Yes, sir.

Q. Mr. Ward, these programs are, as you are testifying, in addition to the regular academic programs at Manual? A. Yes.

Q. How did you first approach this question of devising or innovating new programs for Manual? A. Well, when I was assigned to Manual I took a look at the curriculum offerings and, knowing the economics of the area, some of the problems we were having in the East Side area, I felt that the basic traditional program at Manual was not meeting the needs of certain students, a significant number of students at Manual. And when we talked with business agencies about hiring Manual graduates, we were concerned about their opinions and we found that many of our kids were not—they were having to seek lower types of employment once they graduated from Manual. So we came up

with the idea that if we could establish what we would call a Head Start approach to do some—actually some training in the skills that were necessary to go into certain [483] fields, to do some changing in the academic disciplines that were offered to make them more relevant to students, perhaps we could do something with this problem.

Q. How did you identify these students in the first instance? A. I might explain the program at Manual is a three-phase program. It begins with sophomore orientation; juniors, we go into what we call a more in-depth program where the students then select the area that he wishes to go into, and then in the senior year we go into the co-op approach which is part time in school and part time on the job. We presented the program to the incoming sophomore class at the 9th grade level. We went over to the junior highs and talked to them and told them what it was. We had parent meetings to explain the program, letting parents know that it wasn't purely a vocational program; that there would be opportunity for students. We went into the program and explained to them that if they desired to go into college, they would possibly be required to go to a junior college because we would be taking time from the—they would be taking time from the regular program. It was purely on a voluntary basis from the standpoint of the kids. They were able to make the choice. If they wanted to go in. But at the sophomore level to have a chance to explore five or six areas before they went in, before they decided to go into the program. [484] It's not a track program. Students can either be in it or out of it. It's entirely up to the student.

Q. Backing up for just a minute, Mr. Ward, in terms of examining some of the problems which you faced when you came to Manual, you mentioned the problem of em-

ployer reluctance to employ Manual graduates. Were you also at that time aware of certain community resentment toward this school? A. Yes.

Q. Did you talk to students who had at that time either dropped out of school or ones that you could identify as being potential dropouts from school? A. Yes.

Q. Did you discuss with the students as well as the community some of the problems which they were experiencing with the school? A. Yes. May I add a statement here, please?

Q. Certainly. A. One of the concerns we had when we began this program at Manual was that the school would not be identified as a vocational school. We went to some length in attempting to explain this to both the parents and the students. In the initial program, in an attempt to get at the dropout problem—this was a program that we first attempted which was what we call a hard-core counseling program where we put additional counselors into the field to go out and work with kids who [485] had dropped out or who were potential dropouts. But one of the things we found, there was not a strong interest on the part of the kids to go back into basically the same program. And that they had desires and wants to learn something that they felt would be beneficial to them upon graduation. So the program that we began, which was, as we called it, the vocational skill program, was geared as a holding program, a program with holding power, attempting to keep kids interested in school and to humanize the school in the eyes of some students.

Q. Was this program which you started—had you identified students solely on the basis of their race and having particular problems? Or did this deal generally with all of the students at Manual at that time? A. No, we don't identify any by race.

Q. Were you concerned also with the academic achievement at Manual as measured by a standardized test score at that time? A. Yes.

Q. Did you consider this in terms of the establishment of your program? A. Yes. I personally looked at the academic achievement, one of the necessary ingredients is highly-motivated kids or at least motivated students. And, as far as I'm concerned, you don't get motivated students until they are [486] interested in school. And if we could put in programs where kids would be interested in it and stay in school and see the needs for going to school, then we can possibly look at a higher academic achievement record.

Q. And this is what you meant when you talked of making your school program more relevant to the students? A. Yes, sir.

Q. Now, in order to conserve a little time, Mr. Ward, your first effort was basically within the vocational skills program, was it not? A. Yes, sir.

Q. And could you explain to us generally the philosophy behind that program and some of its facets? A. Well, I'm sure those who read the report have read or at least understood that our basic philosophy at Manual is all education for career; that this is why kids go to school. To become effective in later life, to be able to be productive, and we have gone on this philosophy to point out that there are many levels for achievement, many ways kids can go, and we also attempted to use this approach to help the community take a look at vocations as not something dirty; that if you can't do it here, you do it there. We also built into our program the vocational programs more than what we call just the skill programs. For example, in trades we are more concerned than a hammer and saw program. We

devised [487] the program where we took two of the academics and put the teachers right into the trade programs. In other words, there is an English teacher and a math teacher right in the program working with the vocational teacher, with the carpenter, as a team. The job of these people is to find ways as they see the program to develop —to make changes in the offerings, in English and math and these kinds of things, to make it relevant to what the kids are actually learning in these particular areas.

We also assigned two of our strongest counselors into the academic program—into the vocational program, those who had vocational backgrounds and who could work with the kids, and their job, too, was to be involved in the total program. And this is one of the ways that we see education as being important in that you have to—you've got to get the teachers concerned with the discipline and should have some knowledge of—in the direction in which the kids are going.

We feel that some of the best and most effective counseling can be done by a counselor right in the shop, side by side with the kid, working. So, what we have attempted to do since is to build a strong academic program right with the vocational program. In other words, the kids don't go on the third floor to take their math. They take their math right there where it's meaningful, in the class.

Q. In terms of the staffing of your programs, were you [488] able to draw primarily on your existing faculty?

A. From the standpoint of the vocational teacher, yes, and the counselor and the teachers are involved in the academic —we had to go outside to get paraprofessionals. We actually hired carpenters and tradesmen right in the program on the faculty.

Q. This represents in reality a new approach to the edu-

actional process, does it not? A. Well, I think it was a new approach to the educational process at the high school.

Q. Are you aware of any similar approach taking place at any of the other Denver high schools? A. I think some are looking at programs like this and have expressed an interest, wanting to go into this area.

Q. Because of your experience with the program? A. I don't know whether you could say it was my experience with it. But I think we should—there are many positive things about the program, and I think if you can develop the program to meet the problems—I'm not concerned about programs just because they're programs. They have to be designed for some purpose as far as I'm concerned.

Q. When did you actually begin to implement your vocational skills program? A. I was at Manual one semester and began the second semester.

[489] Q. And did you start the entire program at that time? Or, was that one that was established in stages? A. We developed the basic program at that time.

Q. And could you tell us, please, and tell the Court some of the specific trades which are concerned in the vocational skills program? A. Well, we are concerned with what is known as the building trades which includes carpentry, plumbing, electrical work, bricklaying; some of the so-called gray areas like linoleum laying and things of these kinds. Everything that goes into the building trades. That's what we called the trades program. We have a program that is called power and transportation which deals with the beginning program in small motors and advancing to automotive motors and the introduction to diesel. We are looking at jet engines if we could find ways in the building to hold the noise in there. We are looking at cosmetology, which is an actual program, state-sanctioned program, for girls;

a program which is called HERO, which is home economics and related occupations, which takes in nurse's aides, takes in food preparation, sewing, different types of sewing, power sewing, commercial-type work. Machine metals, which is fabrication. Welding. Different types of welding. And we have what we call machine shop where they deal with the lathe and cutting-type machines.

Q. Do you have any present plans for an expansion or [490] adjustment in any of these programs? A. Yes, we are trying to build additional dimensions in these programs. For example, I just touched lightly on what we want to do more than skill training. We want to give kids as much knowledge about what goes into the total picture. An example was in the trades when we built a house. We actually built a house.

Q. Would you tell us about that, please? A. Well, my advice is, don't get into the house-building business. But we were concerned with—the kids were actually involved. All things that go into it. They establish their companies and we are strong believers in this, which is the experience and the kind of leadership and opportunities the kids have in school. It was the experience where the kids went down to the Urban Renewal and presented their plan for the use of the property. They had to go to the First National Bank and borrow $16,000 as construction money, and they had to listen to subcontractors and weigh bids with help, of course, to see what goes on. What they learned about property: How do you buy property? What are the zoning laws? Spending time in the Engineer's office; spending time in architectural offices downtown; finding the kind of house, the type of house they could build, and that would be attractive in the area. Then, having this experience, actually constructing the house. What it did to them in-

trinsically to see themselves building [491] something; and, the attitude of people in the areas while they are building something rather than tearing something down. These are many of the experiences and many of the values that we feel are important in these programs. On an extension, on one of the programs, the students in the metal shop will be making all of the bulletin boards for the Denver Public Schools. We have the contract now. This is a meaningful thing. Here the kids have a chance to establish a company, here they have a chance to really utilize the math and measure means and figuring out the cost of materials, and these kinds of experiences. The power and transportation program—we are now running a filling station in cooperation with Standard Oil Company. This gives them the introduction to small business. How do you buy? What is this thing called marketing? How do you figure out profits? And these things of experience. This is what we try to build into these vocational programs.

Q. Do the children who participate in the construction of the home and those who participate in the operation of the filling station receive instruction in the general academic areas? A. Yes. Here, again, the power and transportation—we build in a math and English person that worked right there in the shops with the kids. This is also done in the metals shop, cosmetology. No, there is a specific program for that [492] where young ladies have to be in the program 1,600 plus hours. They are there for clock hours a day and then they go to their regular subjects during the day. In the home economics, in the HERO program, the academics are not built into that program. The kids go to their regular program.

Q. And do you intend to continue these programs at Manual? A. If funding is available, yes.

Q. What observations have you been able to gather in terms of the success of these programs as it relates first to the students involved? A. I think we have seen changes in attitudes. To many kids, school is more human. They see means for school; how it can function as far as they are concerned. Academic achievement, I have not seen great gains in this area yet.

Q. Is it an area that you would normally see fantastic gains over short periods of time? A. No, it's something you hope for.

Q. What about the community acceptance of these programs and of the school? A. I think the community's acceptance has been positive. I think they, the community, some parts of the community feel that we are working with the kids to the best we can in trying to give them as many experiences as we possibly can. I might say what we are attempting to do in essence is developing [493] comprehensive high school, where there are many things for the kids to make selections to do.

Q. And I assume you are continually reevaluating these programs and learning as you experience their operation? A. The building committee right now, which is the teachers' evaluating program—those in the program and some of those out of the program—are attempting to evaluate to see what we need to put in and what we need to take out. Do we need to expand? Do we need to remove the program?

Q. Speaking of teachers, Mr. Ward, what generally is the experience level of your teaching staff at Manual? A. It's in that book there, I think. We have quite a few teachers—I'm satisfied with them.

Q. Do you feel that the new teachers are capable teachers in terms of being assimilated either into the District's aca-

demic program or into your vocational skills program? A. Yes. As a matter of fact, I'm a firm believer that the old teachers are the best teachers. I think some with young ideas who are coming in now with this changing society—I think many of those have a very fine idea—have fine ideas to put into the program.

Q. Following your experience with your vocational skills program, did you establish a new program in the pre-professional area? [494] A. Yes. I might point out that the vocational program runs in blocks of time. You can't do the laboratory-type program in a 45-minute period, so we've blocked this at three periods at a time. So we looked at the program to see what were the values of it, and there were some things that we saw that were interesting. We were introducing students to many areas that they were not familiar with, because many of our kids come from not-affluent backgrounds or homes. We saw also a value of our kids getting the experience of going out of the school and working with people, not basically school people. In other words, working with people from unions; working with people from businesses. And I think it's a reciprocal type of thing where people on the outside get a chance to take a look at the kids, too, and see—and have a chance to better understand how kids think. So we took a look at some other areas that are generally considered by society as basically professional areas. We were concerned about the number of youngsters who went to college and we started to examine some of their pursuits and we were concerned about large numbers going into areas like into the social studies areas; sociology, social work. These kinds of things. And also we looked at the results of a questionnaire that we put out for career day. Now, career day is where a lot of people come into the building from all

over, businesses and the broad community, and say what they think to kids and tell [495] them about opportunities. But, when we looked at the choices, we were a little bit alarmed that there were very few kids who wanted to listen to a doctor; very few wanted to listen to a lawyer; engineers. No takers. So we wondered, could we take a little piece out of the academic program. And we thought we could do it without disturbing the educational studies because kids can graduate from Denver Public Schools in two and a half years. They can get their requirements in. So we said, well, let's try to work at that semester time where we could use these experiences, credit these experiences as electives to the kids. And talked to the kids in—small groups of students about their interests in going to college; what they would like to take a look at. How they feel about the medical and the allied health fields. What do you know about engineering? Are you interested in seeing more about these things? In other words, attempting to expose them to these areas. So we selected the areas based on students' interest. One was the medical and allied health fields. One was engineering. One was elementary education. One was communications. We were concerned about minorities being in front of the camera, what goes on behind and how about being a technician or a photographer or running a camera, or writing, producing. We looked at the aviation—the area of aviation. I'm sure there was one other but I can't— So, we started working, meeting with the people concerned and the agencies, [496] schools, et cetera, talking to them about the program. How could you assist in setting up experience-type programs for our kids? But also letting them know that they had to be more than just to sit there and listen and watch. The kids had to get involved. Data processing was the other one.

So, we got a few takers. And in the medical program the C.U. Medical Center said, "Well, we would like to work with them." They got doctors to volunteer to lecture kids and to help them and set up experiments for them. The Denver University picked up the engineering program. The telephone company said, "We've got millions of dollars' worth of business machines. We would be very happy to work with the kids here."

Our own Channel 6 supplied the television area, the support from Channel 4 and Channel 7 were received. So rather than attempt to buy the equipment and put it in the schools we feel that these people have to have updated equipment—have the best, why, then why can't we go out and use theirs. So we bused the kids into these programs where all of them spent a period of time. We had some interesting results in it. I'm looking anxiously at the reports from the kids who are doing the medical research. They are studying tissues—scar tissue after operations. We feel this is very interesting kind of exploratory work for kids. They watch things like circumcision and heart transplants on dogs [497] and animals and these things, and from this we have a number of kids who have elected to go to college into the medical area. This is the purpose. We have one youngster who has received a scholarship already to the Denver University, going into the field of engineering, and we feel the experience he had there at the university in preengineering courses was perhaps one of the things.

Q. Did the students actually take courses at the University of Denver? A. Yes. They are right in there with engineering students—beginning engineering students.

Q. Your medical program—this is not a program run at the school, but at the University of Colorado Medical Center? A. Yes.

James D. Ward—for Defendants—Direct

Q. Your preeducational program, Mr. Ward—what basically does that provide? A. One of the concerns in colleges has been that black male students have not been interested in going into the field of specifically—education specifically at the elementary level, so we were concerned about how could we work into this area. So, we went to the Northern Colorado University, at Greeley, and worked with them on a program and we received cooperation from elementary principals in the area and our kids started what we call laboratory experience, [498] working with teachers in six elementary schools in the area. We did not want them to have experience like running off materials, marching the kids to the lavatory. We wanted to have them to have a chance to work with teachers, working with specific kinds of youngsters doing what we might call backyard counseling with them, helping with their reading problems in the classroom, assisting the social worker and working with the kids, counseling with youngsters. And we found —we had many letters from principals expressing pleasure in having this program because it did a lot to establish an image for some of the kids. The second semester they have been going, still at the elementary schools, but a professor comes down from the University of Northern Colorado and the kids were in a lecture course, general psychology or something like that, psychology courses, and they spent the last three days—the last week they were up on the campus at Greeley studying this to finish their work. This gave the kids a chance to look at Greeley, to talk to some of the professors about going to school there. We have a number that are going there and, of course, they received both high school credit and college credit towards it.

Q. In connection with the University of Northern Colorado, I think we're now, are we not, supposed to call it that? Is this a recent understanding in which you have finally been able to achieve with them? [499] A. Yes.

Q. Is this a basic program looking forward—as opposed to anything you have had going for any period of time? A. Yes.

Q. Do you have any advanced placement opportunities for your students in the college area again? A. Yes, we utilized this—here again, we utilize this time the kids have. We were concerned about this because when kids know they are graduating, they receive their hours—the last semester, and grades start to go down, and attitudes change and you have more kids getting in trouble with teachers because they're sort of fed up with it, you know, and they are through. So, to motivate these kids to go on, we developed with the Denver University a program where these kids could come out to be bused right out to D.U. and take college courses. Now, we were not talking about orientation courses. They were taught actually freshman courses. Some of the kids got in a two-year program—no, in the one-year program—some of them last year. So, the kids had 20 quarter hours ready to go before they had actually entered college. We were also working with Community College on the same basis, where the kids are bused there in the morning. These are limited programs. I think we have 27 going to D.U. and there's about 14 going out at Community College.

Q. There was some testimony at the February hearing, [500] Mr. Ward, regarding the percentage of Manual graduates going on to college, and I think perhaps they're talking about students now taking college courses. This would be an opportune time to straighten this out. What, gener-

ally speaking, last year, was the percentage of your graduates that actually went on to college? A. Fifty-one plus in the graduating class.

Q. This was not applications to college but was actually a matriculation into the college program? A. Yes.

Q. As part of your continuing program for the motivation of the students, have you developed a plan or have you a plan under consideration to continue your connection with the students once they leave Manual and enter college curriculum? A. Yes. We are very concerned about when our students leave because, with the kinds of support they get and which we feel is a very close support, we are concerned about when they leave us, the kinds of help that they will get. We understand that they have to be weaned sooner or later. But we worked out a program with the University of Colorado. We just experimented with that last semester, of sending one of our counselors up on the campus two or three days a week just to see how the kids are doing. It can be a home base; a reference point; where the kids need help, and perhaps, because of the vastness of the school don't know some of the [501] ways in which to go. So we are utilizing this approach. We are also calling back many of our students to make contributions back to the school in terms of ways they have been helped and ways that we could help other kids going on, too, so we could hold onto these kids as long as possible.

Q. In terms generally of the preprofessional type programs which we have been discussing, the premed, prelaw, preeducation, these programs—when were those instituted into the curriculum? A. We began on those programs beginning in the fall.

Q. Of last year? A. This school year. The fall of this school year.

Q. Now, you mentioned earlier in your testimony that having identified some of the problems which you felt existed in terms of the students at Manual when you arrived, one of the foremost problems apparently was in—the question of student motivation as far as school was concerned. As a result of your experience with these programs, have you any observations regarding the motivation of the students as a result of the institution of these programs? A. They definitley have holding power. We have kids that are staying in school. At the present time our enrollment is 1,380 kids, which is much higher than it has been in the past. This is one indication. The attitudes of students in terms of wanting to learn something. What kids talk about [502] now. I see in them having a much broader idea of what is happening; what is going on in the world. And through the opportunities that they have in making a go at it. You see these kinds of things.

Q. How about the reaction in the community, in the employers you mentioned? A. Well, this has been very—a very interesting experience for us, to see some changes in some people. Now, I don't want to be understood that we have changed the world out there. We haven't. But I think our employers are seeing minority students, specifically black students, in a little different light. They're seeing abilities that they didn't—that someone else told them they didn't have in the past. Many of the experiences have been very positive and many of the employers want to continue to go along with the program.

Q. What about the community support and recognition of the high school? A. Well, as I said before, I think the feeling of the community is positive. Still, you don't know what really is going on, but the experiences that we have had from the standpoint of parents, the community support that we have had, I think it's positive.

James D. Ward—for Defendants—Direct

Q. Is part of your program in reality an educational process for the entire community as well as for the students themselves? [503] A. We feel it is. And I think it's probably something that we should just briefly allude to at this time. The school in the community like Manual High School cannot necessarily operate like a school in many other kinds of communities. We are located in the community—in a community that a few years ago had a number of socializing agencies. But, as the community becomes older, people become more affluent. People become better off financially. They move from the area and the leadership is constantly drained from the area. And it's very difficult to get input from these people after they leave. Churches move out where the constituents are moving. The recreation centers, other kinds of socializing agencies move out where the people are. Consequently, it leaves the school in a difficult position, and the role of the school is different, I believe. I think the school has to do what it can to supplement those forces that move out. Probably Manual High School is utilizing more from the standpoint of community after school and on weekends than any other school in the city, because it has become the center. But the physical aspect is one, of course, that we can easily look at, easily see or identify. But one of the most difficult things is to attempt to develop a program, attempt to develop knowledge for kids, for people in the community, where they will be effective citizens in the community, politically, socially, and the school has a very difficult role to play. In other [504] words, it has to be more than an agency. We felt that one of the important things in this vocational program was to get the kids out into the community; get them away from there. Let them see something. Let them experience things. Let the majority of the community see kids can do something. This, in a sense is one of the re-

sponsibilities we felt we had to do. We are right now concerned about a program that we call the environmental design program. Can kids learn in a school like that to redevelop their own community? No one else is going to do it. Outsiders can't come in and rebuild it. It has to be redone by the people. Can kids who will be voting for something perhaps as the eighteen or nineteen-year-olds—and I would sure hate to see them voting for nothing. It seems to me they have—they ought to have some roots. They ought to have some belief or concern about their own community if they're going to be successful people. So I think the role of the school is, you can't wait for George to do it. We have to attempt to put it in. In our prelaw course, if kids don't desire to be lawyers, they at least learn something about law that affects them, you see. We can at least get some of these kinds of things done. And when we talk about law and order and things of this kind, maybe if they understood the law sometimes or how the law is supposed to be interpreted maybe they can see their own relationship to it.

Q. You started to mention one of the future programs [505] which you envision for Manual in the environmental design program. Would you tell us a little bit more about that, please.

The Court: I think we might break at this point for lunch. And we will take up at 2:00 p.m.

(Whereupon, the trial recessed at 12:28 p.m. and resumed at 2:08 p.m.)

By Mr. Jackson:

Q. Mr. Ward, prior to the break for lunch we were starting to discuss some of your future programs. I believe you

were preparing to discuss your program on environmental design. Would you explain that to the Court, please? A. Well, as we have looked at the—here again, the role of the school, what can the school do in providing educational programs, better education for kids? What can it do in helping to improve the social climate and also what can be done in terms of the political climate? And we, as I stated before, we were vitally concerned with what these seventeen, eighteen and nineteen-year-old young people who are citizens in our community, how can they look intelligently at the political picture in the community when it comes to voting? What can they look at as needs for the community, if they haven't any involvement in it? So we worked out a program with the architectural school, the University of Colorado, and with the Urban Renewal, and we are wondering if [506] young people who are in schools learn to work with many mediums, like clay and wood and metals and paper and so forth—are they creative enough to work with the guidance of engineers and architects to start working with larger areas? Can our kids redevelop blocks in the community? Can they build, design miniparks, and can they give suggestions for recreation centers and where houses should be and these things? We do this on a small scale within the school. Can we use the community then as a much larger learning laboratory? So, if funding is available in the fall we want to work in the summer to design the curriculum for this program and to work in this. We think it has some interesting dimensions for youth in terms of having a piece of the action in their own community, hoping that, if kids can get action programs like this going in the broad community in the Northeast, will families and other agencies in the community join in and see what can be done in the redevelopment.

Q. Do you also have plans for an outdoor education center? A. Yes, and I don't want this to be confused with the Ballerette program. We are concerned about the acquisition of a Job Corps Camp. In some areas these camps are declining in use, and we have asked assistance to obtain one of these camps that we would like to use for an extension of all programs. We would like to look at the possibility of taking [507] up youngsters, not only from Manual but from other parts of the city; kids who may be working on joint kinds of programs, to spend a few weeks at a time with their instructors, bringing in tutors from the University of Colorado and Greeley that would be with the kids on—to continue their educational programs. But we feel there is a lot to be gained from this kind of relationship and association. Also, our young people come from an urban setting. We feel that an exposure to some of the activities that we see more out in the open, in the mountains and plains and things where our kids don't have the chance to participate, and that we feel this would be a broad experience. Also, we wanted to use this as a training ground for our young people in the elementary education program where they can get some counseling and training and we could set up camping opportunities for the youngsters in the surrounding elementary schools and where kids could get the experience of providing a camp experience for the young people. We could also use many of the resources of our own young people in our home economics area and in our trades area to maintain the camp and to provide the maintenance-type facilities for the kids. It would be an extension of our regular program.

Q. And you have an airline cadet program that you are considering? A. Yes. We have looked—we have gone into the trades, building trades area and to other areas and we

realize that the [508] airline business is a huge business, and our kids ought be involved more into opportunities there. And United Air Lines is coming in the area with a huge plant in the Denver area where it will be increased. We talked to United Air Lines people—we talked them into working with us in a program that would be—we use the word "cadet"—because it would be a beginning program of learning and operating and working with the people in there and in the many, many jobs in the airline business. And we're talking about ticket agents; we're talking about hostesses; we're talking about stewards; we're talking about many of the kinds of jobs. It would also give us an opportunity to extend the training of these young people into the Community College, in the publication at the Denver University. We're working with Community College where, once they finish high school, to extend their training they could go into the Community College and their kids could either go on performing the skills to work in the airlines or it would give them a chance to go on to college. It would be an entry-type thing into college.

Q. If I could back up for just a minute, Mr. Ward. You mentioned the problems which you had experienced or which your students had experienced in the industry. At the time of the trades program did you have any particular problem either in setting up the program or finding union-type trades that would accept your students? [509] A. When we began the program, and when we made our first inquiry we were told that this would be foolish to attempt; to attempt to work with the unions, because they weren't interested in working with schools. And they want to have their own people do their own training. But we found that this was not necessarily so; that, if you can get anyone to listen to you, you would have a fifty-fifty chance of con-

vincing them that they can do something for you. So we went ahead and we utilized their people—called their coordinators—to help us develop the curriculum. I put them on the advisory committee. They wanted us to build tool boxes and sawhorses as training projects, but we ended up building a house. They will go along with you, I think, if you involve them. And we involved them on a participation level.

Q. Now, in addition to these preprofessional programs and your vocational skills programs, do you also have plans to develop a teacher resource program directed more towards the basic academic areas? A. Yes, we are concerned about this, and the direct effort here is in this thing called academic achievement. I'm concerned about using teachers who are educators to ride herd on kids in lunchrooms, and be on ground duties, and we feel this can be done with trained paraprofessionals. And since we are limited in the time that we can schedule a teacher in the classes and we feel rather than put a teacher [510] in that kind of duty, we could better utilize the teacher's talents to work in individualized construction programs. Briefly, the way we intend to do this—if we can get support to put paraprofessionals in the building under the supervision of a teacher or one of the officers, then students would have the opportunity to come from their scheduled study halls and the teachers would be on duty, not in the teacher's lounge, but on duty in certain rooms, certain places in the building utilizing what we call study materials and visual aid materials and resource materials that they have there to help kids. One of the kinds of things that we are concerned about is that juniors and seniors have difficulty many times in writing term papers and reports. Teachers would be available. We attempted to do this with remedial approach

to tutors from the neighboring universities, C.U., Denver University. But a tutor lacks something. Sometimes they lack philosophy of the school. Sometimes they lack some of the techniques that some teachers use, plus the fact we realize that just because someone wants to help you does not mean necessarily you want to receive their help. There has to be a relationship and we feel this kind of approach would help us develop a relationship between teachers and students.

Q. And this, again, is a program which you now have under consideration and are developing? A. For the fall, yes, sir.

[511] Q. Has it been possible, up to this moment, Mr. Ward, to gauge the impact which your relationship with the University of Northern Colorado will have on your program and on your school? A. Not just yet. There are many problems that have to be worked out. It's not an easy situation for a school—a public school to work with an institution of higher learning. There has to be some trust and confidence developed on both sides. But I think we have taken some significant steps. We have the advisory committee. We have interested people in the community that are attempting to work with the program. We have some teachers that are bending a little, both ways, to work it out, but at this point I couldn't say that we are ready to move in that direction.

Q. Does the same basic philosophy apply to all your programs, that your initial planning appears to be sound? Or is there still additional work that needs to be done in these areas? A. I would be the last one to say that everything is running smooth. We have many problems.

Q. But you feel generally that it holds some prospect for success in terms of the ideals that you have set for the

program? A. Philosophically, I think it's sound. Some programs have to be changed; a change in attitudes. But I think all [512] these things have to be taken into consideration, and with continued work we can develop it into a meaningful program.

Q. Do you think you have achieved some success at this point? A. I think so.

Mr. Jackson: You may examine.

Cross-Examination by Mr. Barnes:

Q. Mr. Ward, the vocational training program began about three and a half years ago, was that correct? A. Yes, sir.

Q. And you have about 1,380 students at Manual? A. In school now.

Q. About how many are involved in the vocational program? A. Oh, roughly 250—300.

Q. Somewhere between 15 and 20 percent? A. About that.

Q. Now, the students coming into Manual—the feeder school for Manual is Cole, is it not? A. One of them it is. It's the largest feeder school.

Q. What are the others? A. Morey Junior High School. A few from Smiley. Horace Mann.

Q. The majority of them come from Cole, do they not? A. The majority come from Cole.

[513] Q. And one of the problems, is it not, is that the children who do come from Cole are achieving in the 9th grade at the 20th percentile grade, is not that correct? A. I believe the figure is correct.

Q. It's about in that area? A. (Nods affirmatively.)

Q. So then they come in there already substantially behind academically? A. (Nods affirmatively.)

Q. And they may be reading technically two to three grade levels behind the citywide average, is that correct? A. Yes, sir. I think it's correct. I don't know specifically.

Q. But that's in the neighborhood, isn't it? A. Right.

Q. So they are having trouble with reading and they have a low percentile rating on their achievement score when they get there and as they go through Manual they take what's called the par test when they get to the end? A. Yes, sir.

Q. And do all of them pass that test? A. No, not all kids pass it.

Q. Can you give us some idea of what the percentages are on that? A. Probably Mr. Cavanaugh, who tested them, can probably [514] give you a better percentage. I'm not evading the question, sir. Some of them take it in summer school and some of them take it at Metro, but we attempt to give it as many times as possible and use our clinics—our par clinics to help them.

Q. Those are special training programs to try and get them through the par test? A. Yes.

Q. Those who get the par test—do all of those who pass the par test also graduate? A. That's basically true.

Q. Is it the same thing, that you get a certificate of graduation for passing the par test? Or do you have some further requirement? A. To pass the par examination and to secure the minimum number of hours for graduation, something like 150 hours, plus the required that's in here.

Q. So those who pass the par test, even fewer who actually get a certificate of graduation or diploma? A. Those who do pass the par test?

Q. Yes. We start off with a certain number who pass the par test, and then an even smaller number who get a

diploma, isn't that correct? A. I would say that would be true, sir. I feel accurate in saying that generally those who pass the par test graduate.

Q. You also have, do you not, at Manual, some special [515] education programs? A. Yes, sir.

Q. Can you tell us approximately how many students you have in special education? A. In special ed we have 60 students.

Q. Sixty out of 1,380? A. (Nods affirmatively.)

Q. Has there been a problem in the past of getting—I think you said there was—a problem of getting graduates from Manual or people with par certificates employed? A. Yes, it's a job we work at.

Q. And your vocational training program is geared primarily at that employment question, is it not? A. Certain kinds of employment, yes.

Q. It's not a substitute for the early academic failures, but rather it is created because of those failures, isn't it? A. Yes, and it's really a slushing program on the part of the student.

Q. When you put it together you took a poll of some of the businesses in the community to find out what their impression should be of the more relevant program? A. (Nods affirmatively.)

Q. Can you say audibly, so the record will pick it up, please? A. Yes. I'm sorry.

[516] Q. And you took a poll of students themselves? A. Yes, talked to students.

Q. So the choice of this vocational training program was in part based on the expectations of the community about employment of your graduates and expectations of the students themselves, was it not? A. But also student interest. I ought to point out that many students do not want

to go to college.

Q. Well, isn't it true that many students want to see that they have a job at the end of where they're going? Isn't that the problem? A. Yes.

Q. And those that somehow feel they're not going to be frustrated when they end up with all this education? A. Yes.

Q. So they're really trying to avoid the fear and isolation of not getting a job, aren't they? A. Yes.

Q. And the program is in part based therefore on the community expectations of what kind of jobs your graduates can get? It's aimed at that, is that correct? A. You've got me around in there someplace.

Q. Well, is it correct? A. I think it's right, yes.

Q. And the failure to get these other jobs— Well, [517] it's the acceptance of reality, isn't it, for these kids?

The Court: I suppose it's an acceptance of reality for everybody. I mean, to do the best you can.

The Witness: I would say yes.

Q. It's based on an acceptance of the past failures to get better jobs, isn't it? A. Yes.

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[518] * * *

Q. You don't disagree, do you, Mr. Ward, that the— A. No.

Q. —that the peer group has an important influence on the classroom? A. Yes.

[519] Q. You do agree? A. Yes.

Q. And what aspect of the vocational training program would be continued if Manual were integrated? A. I would answer that question by saying I would continue,

cut back or increase any program that I felt met the needs of the kids in the school.

Q. Would you expect the needs to change if it were integrated? A. I don't know. I think we have some programs at Manual that many young people would like to take a look at.

Q. Turning your attention, Mr. Ward, to the pre-professional program, can you tell us specifically how many children are in the premedical program? A. Twenty-seven.

Q. In the law program? A. The law runs about 35. There's about 35.

Q. And you have an engineering program? A. Yes, 14 in engineering.

Q. And the education program? A. Fifty-two.

Q. And you have a social work program? Or, do you? A. No, sir.

Q. And you have communications? A. Communications, 15.

[520] Q. So you have somewhere— I'd better do my arithmetic. A. About 150, something like that.

Q. Let's say a hundred and fifty or so—somewhere around ten percent in these preprofessional programs? A. Yes, sir.

Q. And somewhere around fifteen to twenty percent in the vocational programs? A. I think we should say closer to twenty percent, I think.

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Q. Would you agree that a major part of the academic problem at segregated schools results from the failure of the peer group to present linguistic challenges to the minority student? A. I will agree that could be a part of it, yes.

Q. And isn't there a learning factor just in the terminology and the language that other students around one student might use that challenges that student to expand his own vocabulary and his own horizon? A. I'm sure it would affect him.

Q. Would it affect the academic performance of the student to be challenged in that way?

The Court: I don't think he has ever said that a [532] desegregation program might be useful or valuable. All he did was describe his program. And I don't think you're disparaging his efforts, either. But I just don't think we're getting anywhere. Maybe we are, but it just doesn't strike me that we are. What do you wish for him to admit to? I mean, do you want him to say that he could get more mileage out of an integrated setting? Why don't you ask him that if you do?

Q. Can you answer that question, Mr. Ward? A. What was the question?

The Court: Did you get that question?

The Witness: I got it.

The Court: I mean, that's what you're driving at, isn't it?

Mr. Barnes: Yes.

Q. Would you expect an integrated setting to produce higher academic achievement? A. I think it would have a definite effect on academic achievement, yes.

Q. And your classes at Manual are still 96-percent segregated, are they not? A. That's right.

Q. Are you familiar with the academic achievement—the

progress of academic achievement at Manual over the past three or four years? A. Am I familiar with it?

[533] Q. Yes. You're aware of the fact, are you not, that it has declined? A. That's right.

Q. Since 1965? A. Yes.

Q. And Manual was at the 34th percentile rate in 1965 and had fallen to 28 by 1968? A. I'm familiar with the figures, sir.

Q. Are they correct? A. I would have to say that they are correct, sir. They are based on the tests made of the kids.

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GEORGE MORRISON, JR., a witness called by and on behalf of defendants, having first been duly sworn, was examined and testified as follows:

[536] *Direct Examination by Mr. Jackson:*

The Court: Please give us your full name and address.

The Witness: George Morrison, Jr., 3055 Cherry Street, Denver, Colorado.

By Mr. Jackson:

Q. Mr. Morrison, what is your present occupation? A. Principal, Cole Junior High School, Denver, Colorado.

Q. And how long have you held that position? A. A year and a half in June.

Q. How long have you been employed by the Denver Public Schools? A. Sixteen years.

Q. And prior to your going to Cole a year and a half ago, where were you at that time? A. Principal of Wyatt Elementary School.

Q. Had you been principal of a junior high prior to your going to Cole? A. No.

Q. Mr. Morrison, I wonder if you would explain briefly for the Court and for counsel the situation as you found it at Cole when you arrived there a year and a half ago?

The Court: I wonder if you would bring your chair around a little bit so the reporter can hear you.

[537] A. I have a bad leg and I can't—

(Colloquy not transcribed herein.)

A. I would say that the situation at Cole in January of 1969 was one of turmoil, confusion and conflict. These terms as I use them are not necessarily in that sequence, but they had many problems that had been publicized in the newspapers and also by word of mouth where Cole was concerned and that is the type of situation that we run into. Students, teachers, the community, this type of thing. They just weren't together in their endeavors at all.

Q. The students looked upon the school more as a jail than they did a school? A. They used that term; that they were in prison. Of course, here again, this is youngsters' terminology. I think what they meant by that—they didn't have many opportunities to do some of the things that they thought they should be able to do as students.

Q. As a part of your analysis of—in your job, did you have occasion to consider then current achievement test scores of the students at Cole? A. Not immediately. Before the end of the school year I did get a chance to go over this information in regard to our students' achievement levels.

Q. Did you find that they were generally low? A. Yes, I did.

[538] Q. Mr. Morrison, do you feel that the test scores are indicators as such? Or do you figure that they are absolute measures of the students' ability? A. No, they're not absolute measures at all. There are too many intangibles that standardized tests do not measure. And also I'm not sure if standardized tests reflect the abilities of all of our youngsters because of the basic fact that they are standardized and they assume certain prerequisites, preclassifications on the part of the students, and I think many times we have found in order for us to determine how much progress students are making, that teacher-made tests are more effective.

Q. Are you at present utilizing teacher-made tests for your students? A. In part. We still use the standardized tests but we use teacher-made tests in terms of determining progress and areas in which we need to improve our instructional program.

Q. What specific efforts have you made, Mr. Morrison, to attempt to raise the achievement level or to make the educational practices at Cole since your arrival there? A. Well, the first thing I attempted to do was to sit down with our faculty and find out just what many of the problems were at Cole. I was very much concerned about teacher attitudes; also pupil attitudes. And the community attitudes. [539] All these things are an integral part of the total situation there at Cole. So we sat down with the teachers first of all and they had many problems and many demands that had been submitted to the central administration, and we took these one by one and tried to reconcile them. And then I talked with the students very frankly about their role there and their function there in the school

and in terms of "This is your school. We care about you." And I think this is something that many of the youngsters didn't feel prior to the change, that someone really cared about them and what they wanted to do, and their aspirations and this type of thing. And very frankly, I said to them that, if we're going to have a black school here, we're going to have a good black school. And we're going to have a good black school with the help and cooperation of everyone involved, meaning students, teachers, and everyone else. And once they got the feeling that this is the way things were going to move, then we began to sit down and talk with teachers about educational philosophies, exactly what is our purpose in the school where kids are concerned. What are we here for? Are we here to serve kids? Or are we here to go through the motions and draw a paycheck and this type of thing? And I tried to be very frank. I don't pull many punches when I'm talking to the individuals. I thought that it was a reciprocal responsibility of teachers and students, getting together, the role of the student in the [540] building, the role of the teacher. We all are a team and we have to work that way in order to be successful. And when the team isn't pulling in the same direction, we're not making any progress.

Q. What is the racial and ethnic composition of Cole Junior High, Mr. Morrison, at the present time? A. Cole is 72.1-percent black, 25-percent Hispano, 1.4 Anglo, 1.2 Asian, and .3-percent American Indian.

Q. And you came to Cole during the middle of an academic year, did you not, Mr. Morrison? A. Yes.

Q. And did you not have available to you then any additional time prior to the commencement of your job within which to make plans and programs? A. I certainly didn't.

Q. This was kind of—you are here one day and there the next, is that right? A. Yes.

Q. When were you able to institute new programs or new approaches to the educational process? A. September, 1969.

Q. And could you detail some of those for us, please. A. Well, before I do that, may I make another statement?

Q. Sure. A. I have been much concerned, in fact all my teaching [541] experience in Denver has been in the Manual area, and I have observed that what we have been doing with youngsters hasn't been successful. Our youngsters are going into high school, going into junior high with reading deficiencies, and two or three—even four years below grade levels. So I have had some ideas of what I would like to try. So I sat down with the faculty and the administrative staff and said, "What we have been doing hasn't been successful. So let's try something different; a different approach." And I can't say that these things are new because, as more learned educators than I will testify, there is not an awful lot new under the education process, the approach to it, that you can take.

So we decided that we would try to go to what we call a laboratory approach to education over at Cole in an attempt to give youngsters more opportunity for indivualized instruction and also in an attempt to give youngsters more actual experiences as opposed to vicarious experiences. So we started out in the area of reading because this is one area that we definitely are lacking in. And we went to the laboratory approach here. We set up what we call a reading laboratory on the third floor of our building for the staff of eight periods a day with teachers who have backgrounds in reading. Now, the key to this whole thing is, as I see it, that kids love to read what they want to read. And I'm not saying that black and brown kids are inferior in terms of [542] their ability to read, but I don't see much

sense in giving youngsters Dick and Jane to read in school when Dick and Jane actually have no relevance to these kids in this area. You see, these kids don't see their father getting up in the morning, putting on a business suit and taking a briefcase and kissing mother good-bye and getting into an automobile and going to work. They don't see mother going to bridge parties or having time to chat with the neighbors and this type of thing. You have to face things realistically with these kids. So let's get away from this approach and find out where these youngsters' interests are. And to me this is the key to teaching reading.

In reading, if we find youngsters' interest—and they are all interested in something—it might be auto mechanics; it might be cosmetology. They wouldn't call it cosmetology at their age, of course. Hair dressing is probably what they would call it. Automobiles. Anything. And then, we center these kids—these youngsters' reading around their interests now at Cole. And what we do, we identify these interests or interest, even, and then we try to get reading materials in these areas where the youngsters have expressed an interest and we go from there. Because, if a youngster wants to learn how to put an airplane together, if his interest is model airplanes, you give him model airplanes with all the parts. He has to do something to figure [543] out where those parts are, rather than trial and error. Because, if he breaks a part of that airplane, he is lost, and he—if he loses an essential part of the airplane. So he's going to try to figure out some words in those directions. All right. This kid is learning to read. He's improving his reading.

Now, when you centralize the youngster's ability and interest in reading around his own interests—and this has proven to be successful, we think, at Cole this year. And

we also approach it from another viewpoint. Many youngsters have a background—an inadequate background in reading because of lack of phonics. Now, we have tried the phonic system in the Manual area for many years. It was supposed to be so effective that every youngster who had a good background would know how to read. Well, that hasn't been necessarily true at all. So when we do find a deficiency in phonics we go back and we try to correct this deficiency and then immediately begin to capitalize on this idea of interest in reading. And I think that this has done more for our kids. We have kids who voluntarily go to the reading laboratories we have set up now. The old conception of the study hall is something else that we did away with at Cole. When I went to Cole many years ago, I did some things at study hall that were pretty wild for that day and age. And the same thing prevails today. Study hall, as a study hall, just does not [544] make too much sense to me. So we give youngsters the option of going to all of our laboratories on the voluntary basis to pick up additional help in areas in which they are deficient, the mathematics laboratory, the reading laboratory, the science laboratory, social science laboratory, and things like that. And we have found youngsters on their own going to these labs and picking up some additional help which in turn helps them to become more proficient in their academics.

Q. You discussed the reading laboratory. Will you tell us a little bit about the establishment of the mathematics laboratory? A. The mathematics laboratory is one that we're working on very hard to improve. We have machines, calculators and adding machines and things like that in the laboratory and, through the innovative and creativeness of our teachers we are able to assign youngsters to

the lab or else have them go voluntarily to figure out the problems through that manipulative process, of course, which they enjoy quite a bit. Basically, what we try to do here, we don't let the machines actually do the thinking for the youngsters. I think if it's one thing we have to get across to youngsters in school is the ability to think out your problems, whether they are right or wrong in terms of the outcome, but give it some thought, so the youngsters solve these problems and then they prove they are working by going to the math lab and [545] actually verifying the—on the machines what they have done. And if there is an error in their written work, then the machines show them that is—that the answer is incorrect. We go back and we think out—go through the thought processes. Where did I do so and so wrong? And then find their mistakes and they go back and check them. They are beginning to use slide rules in the mathematics laboratory. We're going to try to get them into IBM to see how other machinery works and this type of thing with these youngsters, and we are finding that many of our kids who were given homework assignments—there is no philosophy of mine that says homework has to be done at home. If a youngster wants to go up in the lab and work at school, we have it available for him, and he goes up there, and if he wants to go up there during the day, he can get help from teachers who are able to give him this opportunity to get some of these things done in school where I think the opportunity is greater than in many of our homes in our area.

Q. Have you also established a social science laboratory? A. Yes. This was established before I came to Cole and we have tried to improve it in terms of the addition of audiovisual equipment, soundproofing the room. We had

the room carpeted. We had one whole wall torn out and glass windows put in where we can operate between two rooms now without having to go all the way around through a door. We [546] can observe youngsters who are working at their own individual rates and their own individual ability levels, although we do emphasize that youngsters will try to improve their rate of speed and their efficiency in these labs. The social science lab is very popular. A youngster can tune in on his own lesson, using earphones and get all his directions. He can do the same thing with tape. Move right along. And we have teacher supervision there, at least two teachers in the lab.

Q. Going back for a moment, Mr. Morrison, to your reading laboratory—are there new programs which you started this year that were not specifically related to the laboratory approaches? For example, the 9th grade reading improvement and the 7th grade programs? A. Yes, the 9th grade reading improvement program—one of the things we've doing this year is that we're trying to use our students on a peer relationship with other students to help them in reading. We have some of our students tutoring other students. Here I think this gives a youngster a sense of pride, a sense of accomplishment. And it helps him to stand out and feel that "I have had some success." So much of our trouble in the schools and with youngsters in particular is that we never experience success, and I think it's a terrible shame that we tell youngsters so many times all the things that they cannot do. You're not good at this. You can't do this. Why don't you do better here? Instead of [547] capitalizing on the positive things that they can do. And we are working along this line with some of our students there in the building. Our 7th graders coming in have had a little bit more of the self-contained classroom

approach and many of them who are behind, we are working with them through the remedial-type programs in reading, based again here on their interest level and this type of thing.

Q. There is also in operation a science laboratory? A. Yes. I don't see much sense in a youngster reading a book about an experiment and saying, well, this is great. I'd rather have them get in there and try to do something on his own and experiment. This learning-by-doing theory that we have heard so much about in education for many years, we're trying to provide more opportunity for students at Cole to have actual experiences rather than these vicarious experiences that I mentioned before. That's where the pleasures—some of the pleasures of going to school come in, as I look at it. Kids like to be involved in things, and they should be involved. And if they make a mistake, okay, we made a mistake. Let's try it again. This is the type of philosophy we're trying to give our people and the same thing with our teachers. And it is very difficult for teachers to admit that "I'm wrong" sometimes in their classrooms, and I think it's an important—a more physcial thing when they do, and they say to the youngsters, well, okay. I didn't do this just [548] right. But I think that, if we try to solve our problems together, we will have a better success next time. And I think youngsters like to realize that teachers and principals and everybody else is human. We're not tin gods.

Q. Now, do you also have different approaches to certain of the other fields as well, and without going into detail on them, for example, the home economics, the industrial arts program? A. I think that in home economics programs, we talked about home economics, and it's normally something that is associated with girls. So we

started a boys' home economics program; boys' foods. Some of the fellows were very masculine, of course, and they didn't see the value of being around the building with an apron on, mixing foodstuffs in bowls and things like that. But that was back in September. You could hardly get them into an apron. Along about December, January, it wasn't uncommon to see these youngsters walking down the halls with their aprons on, saying, "I'm in the boys' foods class." We have tried to provide alternatives for youngsters in our program which I think is needed. I think, really, the alternatives are needed in the junior high school program. Many youngsters are adverse to taking physical education as such. Many of our young ladies are adverse to this. So we have tried to give some alternatives rather than saying, if you don't take P.E., then you're going [549] to be sent to the dean's office, or something like this, or you possibly will be suspended from school. Because it is my philosophy that youngsters belong in school and it is our job to provide adequate programs to keep them in school. Innovative programs. So we have the cadets, which is an auxiliary of the R.O.T.C. program at Manual for young ladies. For the young men, we have the R.O.T.C. program. We have gymnastics laboratory where they begin to become more proficient in the areas of tumbling, gymnastics, and this type of thing and we're trying to offer more and more alternatives. There are boys' cooking classes and thing like this so that youngsters have experiences that are meaningful.

Now, here's something else I want to bring out. That these just aren't off the top of my head. They are things that will be of a great deal of value to these youngsters, not only now but as a concomitant assist later on in life.

Q. Are there at present certain programs which you have instituted at Cole under what's been commonly referred to as the Senate Bill 174, Educational Achievement Act? A. Yes.

Q. Will you describe those programs? A. Well, that is a three-phase program and it takes into consideration the many different types and personalities of youngsters that we have at Cole. The first phase of it [550] is called the Crisis Room and it is designed for youngsters who are having troubles either of their own or of the teachers' making, period by period. Youngsters might come to school the first period and he gets along quite well. The second period he bugs the teacher or vice versa and gets into a little trouble. Now, heretofore, youngsters were being suspended from Cole and let out and they were out on the streets. And I think this is entirely wrong. We need to provide things to keep them in school. So this youngster will go to the Crisis Room. And he will stay there for one period or any part of that one period and he will receive academic instruction while he is there. Now, he might and he might not come back to that Crisis Room that day. If he can make it through the rest of the classes successfully, the more power to him. That's great. Now, the second type of youngster we have is one that might be able to tolerate the total program of the school for let's say three or four periods a day only. Well, the alternative is either to put him on a half-day schedule or else discourage him from coming to school at all. Well, we have another alternative and that is put him into the educational laboratory. And this program—he is given all of the academic areas that he would normally miss with the exception of physical education, home economics, and industrial arts. And music, of course. But, if it's an academic situation that he can't

compete with, then he goes to the educational [551] laboratory. Now, history has proven to us that the reason that most kids are bugged by the schools is because of tradition, that is to say, the traditional approach to educational problems. The structure, the pressures and things like this. And many youngsters just cannot endure these types of programs. But this is not to say that they cannot make it through school if somebody cares about them and wants to help them. So this program in the educational lab does this. It's an informal setting. They have chairs in there, they have all types of reading machines. They have a television set that is not always tuned to Channel 6, either, incidentally. It's tuned to other channels because many times what a youngster needs when he is in there is this type of—or this frame of mind, or some relaxation. And we try to counsel with youngsters. We try to provide them with opportunities to express themselves and tell us what's wrong so that we can help them. Now, I agree that a great many teachers don't have time for this, so the educational lab is there for that purpose. Then we have another type of youngster who has decided that school is just not for him. And he has either dropped out or he's a potential dropout. And in an attempt to get him back into school this youngster has said to me or someone in the building, "I just refuse to come to Cole Junior High School. This building just turns me off," so to speak. So we have an extension center. It is located at [552] 2563 Glenarm, and here we have a program that is built around a reading specialty as well as teachers who are very proficient in the areas of social science and mathematics. And these youngsters have —after we do a lot of screening, we do have consultation with the parents. We have visitation with the parents and with the youngsters and they go to the extension center

each day. Now we have around 21 youngsters registered to go to the extension center and of these 21, not one of these youngsters has had a successful experience in Cole. Many of them refuse to go to school at all. But now they are going to the extension center. They go there on their own. At first we accommodated them to a degree where we would even go by and help them to get there, but now we figured, "You have some responsibility in this matter yourself. So, if you're interested in what we're doing down here, you get down there on your own." And these youngsters are attending between 70 and 80 percent of the time. Now, here's another program or here's another way we're trying to help kids. The kids have something to say about some of these things. Not only in our main building but in our special programs. It isn't the type of program where we sit there and pour out all of our wisdom to kids and expect them to digest it and this type of thing. We try to get them involved. And if anything has made a difference at Cole—and we're not taking credit for any miracles at all because we have problems galore [553] at Cole right now—but if anything has made any difference over there I think it's the fact that kids feel that they are part of the situation and they can come in and talk to any of the administrative staff. They can come in and talk with their counselors and with teachers and some of this fear that was so rampant at Cole when I first went there on the part of teachers in terms of their attitudes with children has disappeared. You don't find teachers leaving in groups any more for example because that was the safest way out of the building. "Don't go out there by yourself. Go out there with somebody else." We don't see this any more. Teachers come and go freely and the youngsters seem to be even a little bit more relaxed in the building. People

are talking to them. And we're friendly with them. And they seem to have an idea that, well, maybe somebody does care enough about me to speak to me in the morning, anyhow, and if I'm having a problem, to take time to find out what it is. And I think these types of things have helped as well as these other programs that I mentioned earlier.

The Court: We will take our afternoon recess now.

(Whereupon, the trial recessed at 3:30 p.m. and resumed at 3:47 p.m.)

By Mr. Jackson:

Q. Mr. Morrison, we have been discussing programs which you instituted at Cole following your assignment there. Are there other programs which you are [554] presently considering for implementation next fall? A. Yes, there are. If funds are available, we would like to go into photographic darkroom programs, a darkroom with our industrial arts program, and we would like to obtain an IBM Varityper that we can use to help prepare our youngsters for this line of work. We have presently an offset press that we're using and a Varitype headliner in our printing shop, and I can see some real value here, not only for our youngsters at Cole but I could see youngsters from Manual coming back to Cole getting this experience. And if the funds are available we would like to certainly move along this line. We were also planning to work cooperatively with Manual next year in moving more of our students to Manual in the 9th grade into some of the programs that are existing there. We have what we call a biomedical program going on at Cole which is not a part of the regular curriculum, but is proving to be very interesting and important for youngsters who have designs

on getting to the area of medicine. This program is sponsored by Mrs. Shirley Carter of our school, who is a community aide. And we are able to work with hospitals in the summertime. We have youngsters going into hospitals working with doctors, technicians, this type of thing. And we would like to expand this. We would also like to go into a prelaw type program at Cole in terms of identifying youngsters who have an interest here.

[556] Q. Are you also considering expanding the language program? A. You mean the total language arts program?

Q. The foreign language program. A. The foreign language program, yes. We are able to work cooperatively with Manual here this year in sending some of our youngsters over there to take French. We didn't have the staff to do it at our own school, so we worked out a program with them and we hope to expand this into the area of Latin next year for those who are interested in the biomedical program, particularly, and in law as well.

Q. How about an expansion or an implementation of the work study program? A. The work study program we have found to be very helpful to our youngsters. It teaches them responsibility and we would like to expand this program. This is part of the ESEA funded program that we have now. We would certainly like to continue along that line. One thing that we're trying to do in our business education department which I think will prove to be meaningful to our youngsters is, instead of them typing letters out of old traditional books to fictitious companies and individuals—we are using these youngsters who have shown ability to work right within the building to help prepare masters, ditto masters, and this type of thing. They are learning how to do this work neatly and efficiently [557] for teach-

ers. And this type of thing of getting experience of doing many of the jobs that will help prepare them we hope for successful endeavors in the area of secretarial science.

Q. Mr. Morrison, have you been able at this point in view of the fact that these programs were instituted only last September to come to any conclusion as to whether or not the achievement levels have been materially affected by the institution of these programs? A. I have no hard data on it. I have what teachers have told me, what I have observed and what I have found out from talking with the youngsters in the building in terms of what do they think of some of the things we're trying over there. And we have found that from these sources we have been able to get some positive data verbally from these individuals. I think, also, the fact that we notice a decline in our discipline cases in the assistant principal's office and the dean's office, which is indicative of some meaningful things going on in classrooms.

Q. What generally is the composition of your teaching staff in terms of its experience level? A. We have, I think, around 22 to 23 teachers who are tenure teachers. We have around 53 who are either in the first, second or third year.

Q. How do you find the activities of these teachers in [558] their first, second or third year? A. I'm pleased to say that the group of new teachers that we received last September has been one of the most outstanding groups of new teachers I have ever had the experience to work with. They have seemed to come in and make the adjustment very well at Cole. They were for the most part new teachers. And I think their assignment was satisfactory to them from the way they are performing at Cole this year.

Q. Mr. Morrison, do you know at the present time, based upon the data available to you, what type of teacher turn-

over you will experience this next year? A. If every teacher gets his or her wish, that will be a total of 18; that is to say, either for sabbatical leave, maternity leave—of course, there you have no choice—or else transfer.

Q. Are there any who have requested transfer to other junior high schools? A. Not to my knowledge. The ones who have asked for transfers wish to go to senior high.

Q. None of your present junior personnel are trying to get out of Cole into another junior high, to your knowledge? A. Not to my knowledge, no.

Q. Now, Mr. Morrison, you described briefly earlier [559] in the testimony the situation briefly at Cole when you first arrived there. Does that same situation prevail today? A. Now, you mention—you mean in terms of—

Q. Community attitude and student attitude. A. I think that we have seen an improved attitude in the community. People that I visit and chat with on different occasions, and those who come into the building, the student attitude seems to be much more positive than it was when I first went to Cole. The teacher attitude seems to be much better. And I think that—well, there are just little things but perhaps to people outside of Cole these would sound very trivial, but this year we had a Christmas tree. Now, this doesn't sound like it would be something to anybody, but it was my understanding that they couldn't have a Christmas tree in the hall because the youngsters would tear it down and that type of thing. This year we got a tree, put it in the hall and the youngsters decorated it and almost defied anyone from going in there trying to damage the tree. This type of thing. The class of 1969, which was a pretty rough class—they had a lot of problems. I think that they had three principals in three years over there and this type of thing. But this class showed their feeling for

the school in that they left us an inlaid linoleum letter C that they designed themselves. It has the letter C in gold and the eagle on it and this type of thing, and they raised the money [560] for this and left it to the school last year before they left. I see other signs of pride in the youngsters at Cole. Some of our athletic leaders—fellows on our basketball team and football team—will actually go down the halls occasionally and tell other youngsters who are running or misbehaving, in their language, to just "cool it." We don't want this going on at Cole. Well, these are some early indications, I think, of some pride that they are developing in their school. And we like to think that it is their school and let them know that this is your school, to take care of it.

Q. Do you expect then that pride to carry over into their classroom work? A. Yes, I do. Unfortunately,—and I would like to see more of this pride carried over into the classroom work. I don't think that there is enough of it.

Mr. Jackson: Thank you. You may examine.

Cross-Examination by Mr. Barnes:

Q. Mr. Morrison, how much of the regular curriculum is left? Are there any standardized programs or regular textbooks and regular tests? How much is left? A. Not an awful lot. There are still some phases of the regular school program that we use but we're trying this new approach for the entire student body. I think that's the [561] best way to state it, and to actually find out what's effective and what isn't effective.

Q. I just want to focus on the reading, English aspects of your presentation and what is in Defendants' Exhibit V-A, which I think you probably wrote for the special program now being implemented at Cole Junior High. A. Yes.

Q. In reading laboratory, that is a voluntary program, is it? A. It's voluntary three periods a day and it can be used by a regular English class, English-reading classes the other periods of the day.

Q. Is it a supplement or a substitute for the regular reading classes? A. I would say it would be a supplement.

Q. So they are still required to take the regular reading class as well? A. Yes.

Q. How many students would you estimate participate in the reading laboratory in a given day? A. I would say one-half to three-quarters of all of our English classes.

Q. In the reading improvement program, that is an experimental program, is it not, a 9th-graders' program? A. May I refer to this just to make sure that we're [562] talking about the same thing?

Q. Yes, Page. 116. A. Yes, this program was set up in one English class because of the prohibitive cost. This activity is concept English or—the kit costs us nine dollars, I believe, a kit, and we were experimenting with about 40 youngsters with this. And this is a new concept in the approach to reading in that it differs from the SRA approach in that youngsters are able to move along at a more effective rate at their own level than they can with the SRA approach. And the reason we experimented with only 40 of these this year is because we didn't have any more money. But we are hoping that we will be able to get additional money to work with this because the teacher who is in charge of this is very high on it and he has shown me some results as far as the reading improvement is concerned with these youngsters that have been really outstanding.

Q. What is the total enrollment at Cole? A. 990.

Q. And of—you have 40 participants in this program. How many do you have in the special reading classes for

the 7th grade? That's 20 for each of four teachers? Or is it 20 altogether? A. Actually, all the youngsters in the 7th grade are in a reading program. And we hope to keep the numbers down [563] to around 20 so that the teachers can give these youngsters more individualized instruction.

Q. And the total of how many students, though, Mr. Morrison, in this program? A. I would say about 160.

Q. And is that all of the 7th grade or is that a portion? A. All the 7th graders have reading, but these are youngsters who are three to four grade levels below their normal grade level in reading.

Q. Now, as I understand it, all of the other programs in mathematics and social science and science would have been under way even without this Court's order and were not prepared specifically for this plan, is that correct A. Without this Court's order?

Q. Yes. These other programs are not conceived especially for this program, are they? A. No.

Q. They have been in effect for some time? A. Well, they went into effect last September. Are you speaking of the laboratories?

Q. I'm speaking of the social science laboratory and the science laboratory and the mathematics laboratory. A. Yes. Now, those went into effect with the exception of the social science laboratory last year. The social science [564] started a few years before that.

Q. And the other things you have listed in this plan: the art classes and the home economics and the music class, industrial arts, phys. ed., work study and extracurricular programs, business education—those are not seriously considered to be programs which will raise academic achievement, are they? A. I would certainly hope they would.

Q. Are those subjects tested under the achievement test?

There is no test— A. No, but if I may say, sir, I would like to state again that, here again, I don't like to measure youngsters only in terms of a standardized test. I don't believe that this is fair. I don't believe that it is really conclusive as to what the youngster is actually able to do. The standardized tests measure various areas of academic work, of course, but many youngsters who might excel in the areas of industrial arts, home economics and other programs—other areas, might not score so high on the standardized tests. But I wouldn't say that this isn't helping his academic progress. I wouldn't say that at all.

Q. The educational laboratory and the extension center are relatively new, aren't they? A. Yes. As far as the funding under Senate Bill 174.

Q. Doesn't that give you, together with the Crisis [565] Room and the special education programs, a total of four different kinds of programs where troubled students or difficult students are isolated by themselves? A. Well, I guess you could put it this way. I figured them with students with problems, really.

Q. And there are four different kinds of ways in which students with problems are put with other students with problems? A. Yes.

Q. So, as far as the peer group effect for those is concerned—for those students is concerned, with the Crisis Room, they are all students with discipline problems or something of that kind, isn't that right? A. Well, I wouldn't classify special education in that category at all. That's a program for the mentally retarded youngsters and I certainly wouldn't say they are all discipline problems. But the other three programs are designed specifically to help the alienated youth.

Q. Do you think that being in an integrated program

would help these students in any way? A. Well, yes, I think an integrated situation would help.

Q. And do you think that it would alleviate some of your problems if they were integrated programs at elementary level, for example?

[566] Mr. Jackson: I'm going to object to that, Your Honor. We're talking about programs specifically at Cole.

The Court: Well, he may not be able to answer, but maybe he can. You can try him out.

A. Well, I would think, yes. I think, if this thing is going to be effective it would have to start at an early age and not wait until junior high school to get going.

The Court: This wouldn't eliminate these other programs that you speak of, would it?

The Witness: No, I would certainly try to adapt these programs to any students that attend Cole Junior High School, because I think that they have some merit. And I think the approaches that we are trying to make here would benefit the students from any part of the City of Denver, yes, sir.

Mr. Barnes: I have nothing further.

Redirect Examination by Mr. Jackson:

Q. Mr. Morrison, the Crisis Room and the extension center—these are programs designed to keep children in school who would otherwise not be in school, is that true? A. That is very true, yes.

Q. And has the program demonstrated that it can function in that fashion? A. Yes, definitely.

[567] * * *

ALBERT C. REAMER, a witness called by and on behalf of defendants, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Jackson:

The Court: Give us your name and address, please.

The Witness: Albert C. Reamer, 1710 South Kearney.

By Mr. Jackson:

Q. Mr. Reamer, what is your present position? A. I'm Principal of Bryant-Webster Elementary School.

Q. How long have you held that position? A. I have had that position four years. I'm completing my fourth year now.

Q. How long have you been employed by the Denver Public Schools? A. Twenty-one years.

Q. Prior to your assignment at Bryant-Webster, what was your position? A. Assistant Principal, University Park, out by the [568] University of Denver, for three and a half years. Teacher assistant at Knapp for one-half year. Prior to that time, eight years as teacher at Asbury School, and prior to that time, five years as a teacher at Ashland School in North Denver.

Q. Mr. Reamer, what is the general racial composition of Bryant-Webster? A. The makeup is this: Hispano, 75½ percent; Anglo, 23.4 percent, as I recall, and a very small percent—less than one percent Negro and Asiatic.

Q. At the present time, are there any Negro students at Bryant-Webster? A. This is very difficult to say. There is one child who is half Hispano and half Negro this year.

Q. As principal of an elementary school, do you have oc-

casion to examine the achievement results of your students? A. Yes, I do.

Q. And could you characterize present achievement levels for the Court, please? Is it generally low? A. The performance level is below that of what we would expect by grade level reference. I think maybe this would be an indication. I would say at the 3rd grade, based on 1968 statistics, about half a year below where they belong, and at the 5th grade, somewhat near a year below from where we would expect the child to be by grade level.

Q. Mr. Reamer, during the period of time that you have [569] been principal of Bryant-Webster, what has been your experience with regard to the mobility rate of pupils? By that, I mean, does a child entering Bryant-Webster in the kindergarten or first grade generally continue through the 6th grade in Bryant-Webster? A. Well, we have problems—we have some children who continue right on through. Generally, as an overall statement, as I recall the facts, the turnover is about 34 percent a year. As a matter of information, I can recall one cumulative record that came across my desk recently where the child had been in 16 different schools. A 5th-grade child. So, we do have significant problems.

Q. Is this mobility factor—does it create any specific problems as far as the school is concerned? A. Yes, tremendous problems in terms of the school's ability to rally its forces and to bring effective education into focus for that youngster. Yes.

Q. After your assignment at Bryant-Webster, did you and your staff or the staff undertake any comprehensive type of study to determine what was available to you in terms of either altering the educational approach or by other new, innovative approaches, raising your achieve-

ment level? A. Yes, sir. This did happen. In the fall of 1968 and throughout the entire year, the entire staff undertook a very extensive study involving the cost of several thousand [570] dollars in terms of releasing teacher time, of having experts in the field come in and discuss the matter with us and this type of thing. As a result of this study, we did come up with a document in terms of what we felt we could do to help the youngsters in a better way.

Q. This was a study which took a little over a year to perform? A. Yes, it did.

Q. And again you started this in the fall of 1968? A. Correct.

Q. As a result of that study, Mr. Reamer, have you introduced any new programs or new approaches to the educational process at Bryant-Webster? A. Yes, sir, we have. I have taken the liberty this year to give continuous attention to the things that we called for in here. It is true, at the same time, inherent in this study were demands for financial needs and this type of thing and some limitations. However, just to give you some ideas of the things that we achieved, we did ask for a counselor. We did get a guidance counselor this year. We asked for and in our early education program we got one of these—one of the three programs.

Q. Would you explain that briefly to us, please? What this early education program is? A. Well, I think as a result of this study teachers, [571] principals and the community sensed the need to get at the problem of education and orientation as a start at a far earlier age with regard to the youngster. We sensed in the Head Start programs and other research available and in publications and whatnot that really this was a hopeful thing in the future. Actually, our program involves some 30 youngsters. They are not

housed in our school. They are housed at Remington Elementary School, due to the fact that we do not have sufficient space. But it is a problem that—I mean, it is a program that focuses on considerable involvement on the part of parents and the bringing in of highly-skilled teachers and aides to work with these youngsters.

Q. As a result of a child's participation either in the Head Start program or in the early education—early childhood education program, has experience shown you and your teachers that these children become identifiable in the kindergarten? A. Well, I was thinking just the other day the reference that the two kindergarten teachers in my building have made to this very subject area, and they said they could tell the children who had been in the Head Start programs. So I think, in terms of assessing it in terms of what they have said, there has been success in it and there can be success in it.

The Court: Is this a grant that you are working [572] under from Congress?

The Witness: No, this was a program financed by the Denver Public Schools; one of three programs.

Q. What other programs did you institute? A. One of the concerns, of course, had to do with pupil-teacher ratio and we were effective this year in reducing the pupil-teacher ratio by two pupils per classroom. Another significant one as far as I'm concerned had to do with the involvement of parents in the school. I personally believe this has been a great and critical loss in terms of large cities in America, having come from a small rural area in Colorado myself, I knew what the school meant to my family personally. Our involvement in it. I think in the city the size of Denver

here, this close attachment was not available. So therefore we were bent on programs of trying to confer with people in our school—a special means of parent-teacher conferences; the creation of a truly significant advisory committee that is run literally by the people in our community where they say anything they want to. I merely sit as a spectator in this. These kinds of things. I think involvement was one of the big areas we worked on. I think maybe another thing that we have accomplished, too, had to do with acting as the coordinating agency between other programs available to early childhood education, such as the Day Care Center under the Model City. We have been very close to that program [573] and we do meet in our building to coordinate that.

The Head Start people have come into our building and it's a three-pronged effort, and in these early education programs currently we are initiating the forward thrust, trying to bring all these elements together in the interest of children to be served.

Q. Are there any other new approaches which you have taken directly and specifically toward this question of your school's achievement that you have already instituted? A. Well, of course, the question of overcrowdedness. It probably is important to say that the school was built for 660 youngsters and we have been serving this year 750, and at one time well over 800. I did raise some basic questions of double sessions and these types of things. Our advisory committee did go down to the Board of Education and seek relief, and we are lucky in that at least we helped in some small measure the bringing in of a mobile unit in this area—in school this year. So that has lessened the pressures there. We felt that through our advisory council, through their efforts and the school's efforts, something happened in that field.

Q. Prior to the installation of mobile units, was the community given an opportunity to express its opinion on the question of double sessions or busing at Bryant-Webster? A. Yes, sir. This was a part of the plan. The problem [574] was faced up to in the fall of 1968 when we came back and found that we had a hundred more youngsters than we expected. I think, in part, this was due to the rearranging and the closing of some of the parochial schools. These youngsters were thrown off into public education.

Two alternatives on our—occurred to us in terms of how the school could meet the educational needs of these youngsters. We had talked with our advisory committee. Our PTA, we discussed this with them and other groups and the two alternatives were arrived at. One was busing and the other was double sessions. And we didn't know which one at the time. But they did go for the double-session program twelve to one. I think it involved about a hundred and twenty children and our returns were based on how the—probably 98 or 99, as I remember—eight of which said they did not want to bus.

Q. Now, in addition to the programs which you have presently instituted and—

The Court: What was the total vote?

The Witness: I'm just trying to recollect, Your Honor, but I think it was 98 who participated of the 120 people. Some didn't send them back.

The Court: In other words, you gave one vote to each family?

The Witness: Yes, each child who would—

The Court: And you have 120 in the school?

[575] The Witness: 120 who were affected by the—

The Court: Oh, this is your overflow?

The Witness: Yes, sir.

The Court: And you say they voted twelve to—

The Witness: Twelve to one, as I recall.

The Court: These were predominantly Hispano?

The Witness: Yes, sir. There are indications—I have lived among the Hispano people all my life in Northern Colorado. As a child, I have thinned beets with these kids. Have been poor with them. They are very—a very tight-knit family really and they feel very keenly about their children and I have heard expressions to our PTA against busing any number of times. I think maybe this whole question—

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The Court: Do you have any Spanish language program?

The Witness: Yes, sir, we do. In 5th and 6th grades.

The Court: And that's been very successful? I mean, is this—is there a great deal of interest in it?

[577] The Witness: We did an intensive study, sir, I guess maybe two years ago, and we were very interested to find out how many of our families and youngsters spoke Spanish. On a determination of a survey made with every third Hispano family made by another Hispano person, a community aide, we discovered that about eleven percent, as I recall, of our youngsters spoke Spanish yet and 66 per cent of our adults spoke it. And, oddly enough, one of our—one of the outcomes was that the adults were using it to keep secrets from kids. This would be a clear indication that the language—

The Court: Well, that figures, I would say.

The Witness: This is probably a clear indication that in another generation the language will be lost, unfortunately.

The Court: But has it been successful in the 5th and 6th grade programs that you have followed out? I mean, it's pretty young, I'm sure, but are they interested?

The Witness: I would say there is an interest, yes, sir.

The Court: More interest generated in a subject like this than other subjects?

The Witness: No, I wouldn't say that. Two years ago we had the option of letting the children and the parents choose whether youngsters would be involved in these programs, [578] and that year, two years ago, quite a number of the families decided not to do it. But this year we had an extremely competent person in the field who really wanted to do it and all children are involved this year. I would say it's successful.

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[579] * * *

Q. How do these relate to the overall problem which you [580] indicated that you identified and that being the relatively low achievement? A. I think they have meaning. I think they have meaning in terms of self-identity that these youngsters have to acquire for themselves; how they feel about themselves. I think, for example, a new reading program, a newly-designed one that is designed just for us by our teachers can have a real impact. I think outgoing experiences in terms of many more field trips—one of the

things I neglected to say in here has had a greater impact for our children. This year we have practically doubled the number of excursions into the community and—as an outgoing, outreaching experience for the children.

Q. How do these programs relate to any increase in the achievement level? A. Well, we have said in here that we would sincerely hope that within two years we would hope to eliminate one-half of the deficiencies.

Q. Through these programs that you have been mentioning and the staff study which you have? A. It's a goal to shoot for.

Mr. Jackson: I have nothing further.

Cross-Examination by Mr. Greiner:

Q. Mr. Reamer, who authored that report that you keep [581] referring to? A. Is this the one that I spoke of with regard to the 34 pages on our study?

Q. Yes. A. This was put together by the teachers in our school.

Q. Did this advisory council that you had reference to play a part in the preparation of that report? A. Yes, the parents were involved in the process.

Q. Now, we have been told, Mr. Reamer, that the education of minority children is a very complex area. Would you agree? A. No question in my mind.

Q. And it's one that requires a great deal of specialization or special background and so on? A. I think that would be a fair statement, yes.

Q. Are the people on this advisory council—are they possessed of this kind of technical training? A. Well, this is the citizens and the patrons of the school—I don't know quite what you're driving at.

The Court: Well, the answer would be no, that they are not. They're not professional educators nor do they have any specialized training.

The Witness: Yes.

Q. Now, with regard to the faculty at Bryant-Webster, I understand you indicated it's a very stable faculty, is [582] that correct? A. Yes.

Q. What is your annual rate of turnover for all causes? A. Well, let's see. Let's go back three years. Three years ago it was 23 percent. At that time—I don't have the exact facts in front of me, but I think—23 percent involved five teachers; two for maternity leaves; two or one on retirement; and one or two resignations—

Q. What about two years ago? A. Two years ago, one or two teachers; I'm trying to think back and I think maternity may have been one of the reasons for one of them.

Q. Are you familiar with the educational background, experience and training that the teachers of your faculty have as members at Bryant-Webster? A. I have a fair understanding, yes, sir.

Q. How many of these teachers have ever engaged in special education programs directed toward the problem of educating minority children? A. A part of this study had to do with in-service programs, of bringing Daniel Valdez, a noted sociologist, from Metro State. Father Torres and some of the other people in the field who were helping us understand and comprehend the problems that we were dealing with. It was an in-service involvement.

[583] Q. Well, have you had that in-service program? A. Yes, sir, as we developed this.

Q. And it's finished now? A. It's finished now.

Q. And all the staff in fact have participated in it at Bryant-Webster? A. There were four teachers who did not choose to give study to it.

Q. What was the subject of that in-service program? What did the teachers learn in it? A. It had to do with the understanding of the cultural heritage of these youngsters. The history where these people come from, what their problems were, what their aspirations in life are. These kinds of things.

Q. What their aspirations in life are? A. Yes, sir.

Q. What does that mean? A. Well, what they aspire to; what they want to be; what they want to make out of their lives.

Q. Is it different than for other people? A. No, I don't think it is.

Q. So the program was—to say that its bounds were basically the same as far as the aspirations were concerned, is that right? A. I would say so.

[584] Q. Now, how many Hispano teachers do you have at Bryant-Webster? A. We have one surnamed Hispano teacher. She's an Anglo. Her husband is a teacher in Denver and he is Hispano.

Q. Now, Bryant-Webster in the past, Mr. Reamer, has added, has it not, a certain compensatory education program, one entitled Cultural Education? A. Yes, sir.

Q. And you have tried team teaching? A. On a very limited basis.

Q. And it was discontinued, is that correct? A. That's right.

Q. And you have tried study activities, is that correct? A. We're still doing those extensively.

Q. And cultural arts? A. Yes, sir.

Q. And lots of field trips? A. More so now.

Q. Trips into the community? A. Uh-huh.

Q. Individualized instruction? A. Uh-huh.

Q. Differentiated staffing? A. No, I think that is a never-never land. I'm not quite certain.

[585] Q. Is it? A. Yes, it's new and emerging and it's difficult for me to assess exactly what the—

Q. You use paraprofessionals? A. Yes, sir.

Q. You've got community aides? A. We have one community aide four hours a day. Teachers' aide, is what we call them.

Q. And you have tried counseling? A. This is our first year.

Q. This year? A. This year.

Q. Do you have a phychologist? A. We do have a school psychologist one-half day a week.

Q. You have lowered the parent-teacher ratio—or pupil-teacher ratio? A. Yes, sir.

The Court: That would be quite an undertaking.

Mr. Greiner: I'm sorry.

I didn't get the witness's response.

The Witness: Yes, sir, we did.

Q. You lowered the pupil-teacher ratio? A. Yes, and—

Q. From what to what? Over what time period? [586] A. It was lowered two pupils per classroom.

Q. What is it today? A. The pupil-teacher ratio? It fluctuates; give or take twenty children a building, due to the mobility, standing at about 24.5. You could have, of course, in the process—you may well understand that a certain—that certain teachers are counted who do not keep records until—it's strictly an accounting system. This

means that if you went in a schoolroom at Bryant-Webster you could well see 28, 27, 29 children.

Q. You're giving me an average and you're going over the range there, is that correct? A. Yes, sir, that's right.

Q. Well, did the parents at Bryant-Webster vote against busing? A. The parents at Bryant-Webster were involved in the decision, children coming out of kindergarten and into first grade voted on this issue in the fall of 1968.

Q. These were very young children, is that right? A. Yes, sir.

Q. Kids just entering first grade? A. Yes, sir.

Q. And that was the fall of 1968? A. Yes, sir.

Q. Before school started? [587] A. At the time, we didn't discover that.

Q. Until they all arrived at school? A. Until they got there and it was about two weeks after school started that the decision was made.

Q. Now, that vote then was taken, wasn't it, before the School District released the achievement data on the schools of this District? A. In the fall of 1968? I don't know when that—

Q. That was in October, November 1968. A. Uh-huh.

Q. So that the people voting about that question really didn't realize how comparatively bad Bryant-Webster was at that point, did they? A. They wouldn't have known these facts, no, sir.

Q. And the program that you have described, Mr. Reamer—these programs are—these are programs that are designed to—designed especially for a predominantly minority school? A. I would say by and large they are, yes, sir.

Q. If Bryant-Webster were integrated, could certain of those programs be continued for the benefit of the minority children? A. They could.

Q. In other words, the integration of Bryant-Webster wouldn't necessarily destroy the presence of those programs? A. No, sir.

[588] Q. Or their efficacy if they have any? A. Yes.

Q. Do you have any opinion as to whether it would help the scholastic achievements of Bryant-Webster children to integrate them with Anglo children of a higher socio-economic class? A. This is a very difficult question to assess. I think there could be some benefits.

Q. What kind of benefits do you foresee? A. Human understanding.

Q. Cultural? A. Cultural.

Q. How about language skills? A. Very possibly.

Q. How about vocabulary? A. Very possibly.

Q. Perhaps a more competitive atmosphere? A. That could be a by-product.

Q. So all the benefits just aren't in terms of cultural understanding, isn't that correct? A. Right.

Q. But there might be very significant benefits in that area, too? A. There could be.

Q. And that is an important area, isn't it? [589] A. Yes, it is.

* * * * *

[593] * * *

ROBERT O'REILLY, a witness called by and on behalf of plaintiffs as rebuttal testimony, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Greiner:

The Court: Give us your name and address, please, and occupation.

The Witness: My name is Robert O'Reilly. I am a psychologist and I live at 10 Alona Lane, Lockville, New York.

By Mr. Greiner:

Q. By whom are you currently employed? A. The New York State of Education Department.

Q. And what is your current position?

The Court: What's the organization.

The Witness: The New York State Education Department.

By Mr. Greiner:

Q. What is your current position? A. I am Chief of the Bureau of School and Cultural Research.

Q. How long have you held that position? A. I have had that position for a year and a half and a related position for an additional year and a half.

Q. And that was also with the same bureau? [594] A. The same bureau.

Q. Would you tell the Court just briefly what your educational background is? A. I have a Ph.D. in educational psychology and a Master's degree.

Q. From what school? A. From Cornell University. And I have a Master's degree in educational psychology and I have four years of teaching experience, including experience in teaching in a black school.

Q. Where was that? A. In Buffalo, New York.

Q. Now, what are your primary duties and responsibilities with the New York State Department of Education? A. Well, I direct and formulate research for other department units which serve all schools in the state at the elementary and secondary levels. I direct the programs designed to yield new educational programs in accord with the educational needs of the schools in the state, and I consult and design research programs relating to compen-

satory education in New York State, where we have expenditures of approximately $200 million in this area.

Q. These are programs— A. There is one more.

Q. I'm sorry. [595] A. I also provide the research basis for the formulation of state policy.

The Court: What?

The Witness: Relating to public school education.

The Court: Let's have it all again.

The Witness: That was the fourth. You want me to repeat that?

The Court: Yes.

The Witness: The last one is to provide—we are the research arm for the State Education Department, the regents of the State of New York; in questions of policy we provide the research basis in the form of reports and so on which relate to making major educational decisions at the state level.

Q. Did you also then make recommendations in the normal course of your duties to the regents of the State of New York? A. Yes.

Q. And this is educational policy for the entire state, is that correct? A. Yes.

The Court: Over the entire school system, at every level?

The Witness: Elementary and secondary and preschool.

By Mr. Greiner:

Q. That includes such urban areas as [596] New York City? A. Yes, more than half of our efforts are directed at New York City.

Q. Now, in the course of your work have you had occasion to direct a study of the efficacy of compensatory education programs at racially or other segregated schools within the State of New York? A. Yes, I have.

Q. Now, did you then study and evaluate compensatory education programs carried on both in New York State and throughout the United States? A. Yes.

Q. Approximately what time period was covered by the compensatory education programs which were studied? In other words, how long has compensatory education been going on? A. Well, the major effort of compensatory education began in 1965 with Title I, ESEA, but it goes back before that, to the late '50s when schools started to develop some of their own compensatory education programs, such as New York City developed a number of them at that particular time. It is at least ten years old. But actually, it can be traced back considerably further than that.

Q. Now, in the course of this study and evaluation, Dr. O'Reilly, how many compensatory education programs did you have cause to study? [597] A. We have effectively reviewed more than 1,200 programs.

Q. And these are programs both in New York State and nationally? A. Yes.

Q. And did these include compensatory education efforts in large urban areas such as Denver? A. Yes.

Q. And did it include the study of compensatory education programs carried on in segregated schools? A. That is typically where they are carried on. So, the answer would be yes.

Q. Now, what was the purpose of this study which you drafted? A. Well, the major purpose was to advise the regents of the State of New York who are responsible for formulating policy—educational policy for the whole state.

It was to advise them as to what was the best thing to do in relationship to the problems of the disadvantaged student in New York State, primarily Negroes and Puerto Ricans, and with respect to integration versus compensatory education.

Q. Now, at the conclusion of your study, Dr. O'Reilly, did you in fact make a recommendation to the regents of the State of New York? A. Yes, we did.

Q. And what was that recommendation?

[598] Mr. Ris: If the Court please, what was made to the regents of the State of New York I don't think is relevant here. I object for two reasons: one, insufficient foundation. He said he made some studies in the abstract. No evidence to show what he studied and how he studied it and what evidence he developed and analyzed, and secondly, what his recommendations were to the State of New York is not of any help to the School Board of the City and County of Denver.

The Court: Well, I suppose that, if he does describe the scope and extent and character of the work that he did, that he can express an opinion as an expert as to the value of this.

Mr. Ris: With a proper foundation, I think he can.

The Court: But I don't think that what he said in New York has any great evidentiary value in and of itself.

Mr. Greiner: Well, it simply points out—

The Court: I suppose he could be cross-examined on that.

Mr. Greiner: Certainly, because it does point out

what the nature and conclusion of this rather comprehensive study was, Your Honor.

The Court: Well, he can give us his opinion once the foundation is laid. It's like any other expert's.

Q. Now, you said that you have studied some 1,200 compensatory education programs. Would you give us some idea [599] of the procedure which was employed? A. Yes, we gathered studies from every major source. These are empirical research reports.

The Court: If you could just keep your voice up, you know—

A. We gathered studies from every major source. In the State Education Department we have an excellent setup for reviewing research all over the country and our interests in compensatory education programs were to see whether or not we might be able to find anything that might be useful in New York State, so our review was national. This is not a review in the state. This is a review that covers the whole country. One of the programs that we reviewed in some detail is Title I, ESEA, which is the major source of funds for compensatory education in the United States. One of the studies reviewed was based on an examination of 20,000 programs all over the nation, and from that 20,000 programs random selection of 1,000 programs was taken and these were then studied in detail. We have also reviewed programs like the Baniker Project in St. Louis, which I believe was referred to here the other day. We have studied major compensatory education programs in New York City.

Q. Does that include, for example, the Higher Horizons project? A. It was one of them.

[600] Q. And More Effective Schools projects? A. The More Effective Schools project—we have reviewed that but it's not in this report.

Q. And the All Day Neighborhood Schools project? A. Yes.

Q. Dr. O'Reilly, to your knowledge, is there any major compensatory education effort which has been carried on up to the point of your study which was not considered or reviewed? A. I don't believe that we have missed anything that is important.

Q. Now, at the conclusion of this study, then, you did make a recommendation to the regents of New York, is that correct? A. Yes.

Q. Was that based upon your opinion of the relative efficacy of the choice as to what is effective for teaching minority students? A. Yes, it was.

Q. And what was your opinion? A. Well, our opinion—

Mr. Ris: Just a moment, please, Doctor. The same objection, lack of foundation.

The Court: I don't know what he did. He says he reviewed them all. What did he study? That's the thing. I mean, how can we derive any value from his opinion unless we [601] know what type of thing he considered. Was he just reading narrative reports from these various sources? Or was he actually examining raw material—raw data? I mean, this is the type of thing I think we need in order to know whether his opinion has probative value.

Mr. Greiner: Thank you, Your Honor. We will proceed along that line.

Q. Dr. O'Reilly, what was the nature of the evaluation which you carried on? A. We reviewed in most cases orig-

inal sources, the actual research reports turned out by the people who manned the programs. These were educational researchers; psychologists; school districts; their bureaus of research who tendered reports. Some of them were done by national agencies like the American Institute for Research in California. In general, these are scientific reports, not narrative reports, not opinions, not ideas. This is what is considered empirical evidence in the field.

Q. Now, with regard to this empirical evidence, for example, did it include studies of achievement data related to these compensatory education programs? A. This is the major factor in studies in compensatory education programs.

Q. Can you describe for the Court what we are talking about in terms of achieving data? How was it evaluated? [602] A. Well, we are typically talking about standardized achievement tests which are generally accepted as measures of a student's achievement all over the United States.

Q. And what did this achievement data—was there some comparison made of the achievement of students before and after these programs? A. Yes, there are a lot of different ways in which comparisons are made. Some of the studies employed experimental groups who received compensatory education treatment and compared them with groups—well, in some instances with students who were in an integrated school without compensatory education. In other cases we have compensatory education compared to no compensatory education, comparable groups of students. And the usual indexes of achievement used in these studies are reading, mathematics, sometimes the studies go beyond that and give a more detailed account of the factors of the achievements that are being subjected to consideration.

Q. Now, Dr. Coleman in court the other day identified the nature of his study, which also included achievement data. In the course of your study did you also have cause to review Dr. Coleman's study? A. Yes, we reviewed Dr. Coleman's study and all major studies of racialization in the schools and formed these studies into a—well, we did a comprehensive review on these studies and came out with what are regarded as justifiable [603] generalizations relative to the efficacy of school integration in improving students' achievement.

Q. And this evaluation of achievement data—is this a typical component of each and every one of these evaluations? A. Yes. It is a major component.

Q. And a major objective of each of these compensatory education programs was what? A. The major objective is to generally improve educational development as measured by the standardized achievement tests.

Q. Now, did you also have any occasion to check the actual raw data upon which these reports which you evaluated were based? A. Yes. There are different levels of checking raw data. In evaluating reports like Coleman reports and reports like this one here—

Q. Racial isolation?* A. Racial isolation in the Public Schools. We did not focus to any great extent on the author's interpretation of the data but went directly to the appendices of the reports where the results of the analysis are given in tables and examined this and based our conclusions on these. We have also had occasion to examine the data—actual test data summarized, coming back from the schools in New York State, in which these are Title I schools where we expended—well, this year, we have been

* The parties have agreed to correct the transcript to read "Racial Isolation" instead of "racialization".

spending $180 million on Title I [604] programs. The data are grouped in accordance with where the schools are. They are all disadvantaged students. And from these we can tell whether they are segregated schools or whether they are not segregated schools in general. We have three years of data of this type in which we are able to look at what proportion of the students are below the 23rd percentile in these schools from year to year. I have examined these data for the New York State Education Department this year and a report on this and my conclusion was that the changes above and below—

Mr. Ris: If the Court please, now we're getting into the conclusion. I think we're still on foundation. So I will object to that.

The Court: Sustained.

Q. That's all right, Doctor. We will get to your conclusion in a moment.

Then I take it the nature of your evaluation of these compensatory education programs and the result contained in the study—I take it the study has been marked for identification as Plaintiffs' Exhibit 508, is that correct? A. That's correct.

Q. And the evaluation is contained in Exhibit 508. Are they just mere parodies then of the evaluations set forth in the evaluations which you studied of these plans? A. Would you ask that question again, please.

[605] Q. Well, in the course of your evaluation did you make an independent examination? A. Of these studies?

Q. Yes. A. Yes.

Mr. Greiner: Your Honor, at this time we would offer Exhibit 508.

Mr. Ris: May I voir dire the witness?

Robert O'Reilly—for Plaintiffs—Voir Dire

Voir Dire Examination by Mr. Ris:

Q. Dr. O'Reilly, is this the Bureau of School and Cultural Research? A. Yes.

Q. That you are director of? A. Yes.

Q. How many people do you have in that bureau? A. Well, we have, now, eight. We will be adding three, and we effectively have about 40 other people working for us.

Q. For a total of how many? A. Well, that would give us 62.

The Court: These are all psychologists?

The Witness: Primarily we work with people who —whom you would consider technicians. People who have certain kinds of specialized training. They may be [606] psychologists. They may be psycholinguists. Many different fields which can be considered under the rubric of psychology or related fields.

By Mr. Ris:

Q. What is the relationship of the New York State Department of Education to a local school district? A. Well, I'm not sure. You would have to be quite specific in asking me that question. The relationship is—the relationships are extremely complex.

Q. Well, does the New York Department of Education set policy for the New York City Public Schools System, for example? A. Yes.

Q. How do they do that? Do they hire the personnel? A. No, they don't hire their personnel, but—

Q. Do they establish the curriculum for the elementary schools? A. They do have an effect on the establishment of curricula.

Q. I didn't ask you that. I said, do they set— A. These questions really can't be answered in black and white terms.

Robert O'Reilly—for Plaintiffs—Voir Dire

Q. Well, you have been sitting through this trial, have you? A. Yes.

[607] Q. You know the general setup, I presume, from what—

The Court: They probably lay down general principles of policy, is that right?

The Witness: Yes, they do lay down general principles of policy.

The Court: But they don't seek to implement the details of the curriculum at every school, do they?

The Witness: No, but there is a general curriculum outline for the schools in New York State.

Q. This is recommended or is it required of the districts to follow? A. Some parts of it are required.

Q. And some parts are not required? A. They would be sort of in between being required.

The Court: What are your goals? Do you want to make everybody the same? You want the Spanish to all fit into this pattern? Do you want everybody to become part of the Great American Dream? Is this your object?

The Witness: No, sir.

The Court: Then how can you apply these things across the board willy-nilly?

The Witness: These are general. And there is considerable flexibility and latitude within the kind of control that the state exerts over the schools.

The Court: Well, you wouldn't recommend, though, [608] a similar standardizing of every single school in New York, would you?

The Witness: Not at all.

The Court: Doesn't it have to have its own character?

The Witness: I think perhaps maybe my response is being somewhat misunderstood at this point. The kinds of policy that have any direct effect on the schools are only relatively as gross as that you have so many years of English.

Mr. Ris: I'm sorry, Doctor. I can hardly hear you.

The Court: The kind of policy, he said, would be to require that you have so many years of English, for example. Is that correct?

The Witness: Yes, this is very broad and very general, and the way in which a particular program is conducted—the particular approach to education in school, is pretty much up to the school because—well, community control is also a very significant thing in New York State.

By Mr. Ris:

Q. Well, all of the public educational facilities then in New York State are not administered by the New York State Department of Education? A. Well, the New York State Department of Education is there to serve the schools.

Q. Provide them with research and advice? [609] A. Yes.

Q. And set minimum standards in certain areas? A. Yes.

Q. But the day-by-day, year-in-and-year-out implementation of the educational process is done by local boards and local administrations? A. Yes.

Q. Now, with regard to your particular work that you have been describing, do your people in your bureau actually go out into the various local districts and give tests to pupils? A. Yes, that includes me.

Q. Pardon? A. That includes me.

Q. That's in New York State? A. Yes.

Q. And do you also prepare the tests or do you use standardized tests prepared by other agencies or both? A. Well, both. We have a statewide testing program in which we administer tests of reading and mathematics to Grades 1, 3, 6 and 9. And I, myself, am now involved in the development of a testing program for Title I schools in which we are developing our own testing instruments.

Q. And then does your department actually take these test results back and correlate them and run them through [610] your computers, I presume? A. Yes.

Q. And is it down on a computerized basis now? A. Yes, it is.

Q. Now, with regard to studies that you make that are not in New York State, take St. Louis as an example, that you mentioned, and I personally know what the St. Louis study is. A. The Baniker program.

Q. All right. You say that you studied this report? A. Yes.

Q. And you have not been in St. Louis to examine the programs yourself, I don't suppose? A. No.

Q. Or to test the students? A. No.

Q. Or to review the test results in their raw form that have come back? A. No.

Q. That haven't been executed by the students? A. That's right. I haven't been there to do those.

Q. And this is a—this is typical of what you're talking about outside New York State? A. Yes.

Q. You don't go outside of New York State yourself [611] ordinarily? A. It's not typical.

Q. Nor members of your staff? A. That wouldn't be typical, either, but it does happen.

Q. I'm sure you go to meetings and conventions and things of that nature? A. No, some of our staff in the State

Education Department do go to other states around the country and other programs and actually look at the programs.

Q. But basically what your studies, insofar as these other programs outside of New York State—you're studying the reports made locally in the school district, for example, who haven't made their own studies? A. They may be made by local districts. They also may be prepared by consultants or they may be prepared by educational research or psychologists.

Q. And you're studying somebody else's studies then, is that right? A. Yes.

Q. And when you're talking about the Coleman report, you are studying the Coleman study? A. That's correct.

Q. And the various other studies—these 1,200 you mentioned—are they all outside of New York State? A. The 1,200?

[612] Q. Yes. A. Are they all outside New York State?

Q. Yes. A. No.

Q. How many are outside New York State? A. The largest proportion of the studies would be outside of New York State.

Q. And with respect to those studies, if you wanted to find out what they're doing in Missoula, Montana, you would ask them for their report of such studies as they had made? A. I might do that.

Q. You wouldn't ask them to send you all the raw data or analyses? A. Not usually.

Q. So that you then studied all the various studies and then made and submitted a report of your studies, is that correct? A. That's correct.

Q. And is the volume that he just offered on Exhibit 508 based on such a premise then as a study of studies? A. Not entirely.

Q. A substantial portion of it? A. Yes.

Mr. Ris: If the Court please, we again object, number one, that this is a study of studies and not a study [613] of raw data to arrive at his own conclusions, and, secondly, there is no showing that this has any relevancy to the Denver situation.

May I ask one more question?

By Mr. Ris:

Q. Have you been to Denver before to study the Denver system? A. No, but I do have a little bit of exposure to Denver before.

Q. What has been your exposure? A. I looked at a good deal of material before I came here for about a week.

Q. Submitted by plaintiffs' counsel? A. Yes.

Mr. Ris: That's all.

Direct Examination by Mr. Greiner (Cont'd):

Q. Dr. O'Reilly, this so-called study of studies, I believe you did say that you looked at the data that was compiled in each of those studies, is that correct? A. Yes.

Q. And you made an independent evaluation of that data? A. Yes, I did.

Mr. Greiner: We offer 508, Your Honor.

Mr. Ris: Same objection.

The Court: I think you ought to tell me what the [614] purpose of this offering is besides proving your thesis, of course. But what particular use do you want to make of it?

The Witness: In New York State—

The Court: I want him to tell me.

Mr. Greiner: Your Honor, it's really not offered in a testimonial manner but it does give a full indication of this man's in-depth consideration of compensatory education programs.

The Court: You're just offering it as a basis for his opinion?

Mr. Greiner: That's correct.

The Court: To qualify him?

Mr. Greiner: If you will recall, Dr. Coleman from the stand the other day called Exhibit 508 the most comprehensive study in existence of compensatory education.

The Court: Well, I'm going to reserve a ruling on this for a while. He can express his opinion. Go ahead.

By Mr. Greiner:

Q. Now, these study programs—

The Court: We may get confused if we have too many of these, too much of this.

Mr. Greiner: I guess we're always giving something to the Court to read.

The Court: This is a real hazard.

Q. Dr. O'Reilly, these compensatory education programs which you have studied and evaluated, I'd like for you to [615] describe some of the elements which they typically contain. For example, do they contain programs directed toward adding additional teaching staff to the segregated schools? A. That is a typical characteristic.

Q. And a low range of pupil-teacher ratios? A. Yes.

Q. The use of paraprofessionals? A. Yes.

Q. The use of teacher aides? A. Yes.

Q. Diagnostic laboratories to try to determine quickly what the deficiencies of the minority child were? A. There are some studies that have included that.

Q. Did it also include, typically, some sort of increased group counseling?

Mr. Ris: If the Court please, I don't think any of these have any evidentiary help and—he ought to just say some of these studies contained some of these things. Unless we know what studies contain what and what he is relying on—

The Court: Well, let's get to his conclusions. Then I think we can evaluate it thereafter. Go ahead.

Mr. Greiner: Well, Your Honor, the point of these questions, of course—

The Court: Go ahead. You do whatever your program is. We will check it out as you go along. You go ahead and [616] carry out your list as to what he considered and we will see what they look like.

Q. Did these programs also typically call for the addition of psychologists to the local school staff? A. Yes.

Q. Did they have programs directed toward cultural understanding? A. Yes.

Q. At below the teacher and student level? A. Yes.

Q. Were there programs directed towards improving the child's self-image? A. Yes.

Q. What about directed toward improving parental involvement in the educational process? A. This has been tried many times.

Q. And I assume that these programs also contained remedial efforts? A. Typically.

Q. And in such skilled areas as language and mathematics? A. Yes.

Q. And social science? A. Not social science.

Q. Were these programs directed towards objectives of trying to motivate the minority child? [617] A. Yes.

Q. Did they involve efforts to make the curriculum more relevant to the minority child? A. That is an implied assumption in most studies, that relevance is being increased.

Q. And were efforts also directed toward teaching teachers how to teach minority children? A. Yes.

Q. Did the evaluation include evaluation of the early childhood programs such as Head Start? A. Yes.

Q. Was tutoring also one of the methods adopted in these compensatory programs? A. Yes, it was.

Q. The use of multimedia teaching aids? A. You would find that in compensatory education programs, but it's a peripheral kind of surface component.

Q. Did it include such things as field trips designed to remove at least temporarily the minority child from his local environment? A. Yes, this has been tried both generally and in components of preschool programs and has also been a component of elementary programs and secondary programs.

Q. Now, after considering these compensatory programs, Dr. O'Reilly, did you come to a conclusion and view and [618] opinion as to the efficacy of these compensatory programs in these segregated schools? A. Yes.

Q. Does the efficacy insignificantly raise the minority child's achievement? A. Yes.

Q. What is that opinion?

Mr. Ris: Objection, lack of foundation again.

The Court: Overruled.

A. Our opinion is, after—

The Court: Whose opinion? Yours?

The Witness: My opinion, sir. Sorry.

My opinion is, after reviewing the studies and their results that there are no general practical effects accruing to students' educational development as a function of compensatory education programs which typically include these kinds of components.

The Court: Are you saying that the system based upon these components is valueless?

The Witness: Yes.

The Court: And the individual elements in it—in its totality has no value whatsoever?

The Witness: I don't think so. They constitute basically giving the minority, the disadvantaged—

The Court: Don't even the psychologists help at [619] the local level?

The Witness: No, not typically.

The Court: Amazing.

The Witness: I was going to say—you see, these things have already been done by the schools. They have been done for years. And what this really constitutes is giving the minority child more of what the schools already have. It's nothing particularly new about any of these things.

The Court: But none of it has any value?

The Witness: No, sir. Not only do I have this opinion but—

The Court: Are you saying it's not any value in combination with integration?

The Witness: There is no indication that these particular kinds of approaches would necessarily

work in an integrated setting. The evidence is just not generally available on that area on that question.

The Court: And it's valueless at every level?

The Witness: Equally valueless from a practical point of view, yes.

The Court: The lack of value is the same at every level?

The Witness: Basically, it has turned out that way. And perhaps I should define what I mean by practical value. We mean that—rather, I mean that the studies result in [620] differences as a function of compensatory education programs which would indicate that they have some potential in improving the—some real potential in improving educational development among minority students relative to those who don't get this kind of compensatory education. The gap between blacks and whites or Puerto Ricans and whites is just hardly affected or is not affected at all.

Q. Well, these programs then do not succeed in teaching a child to read?

The Witness: Generally not.

The Court: Or to express himself?

The Witness: I would have to qualify that, now. It's not minority students don't learn to read—it's the level of reading capability that they show. Typically the minority child is one to two years behind his age mates.

The Court: We've heard that before.

The Witness: Now, these programs just generally do not have much of an affect or a sense of affect on

the gap between whites and blacks or whites and Puerto Ricans or Mexican-Americans and whites.

The Court: Well, what about whites who are in the same condition?

The Witness: Under the same conditions? Most of the studies that we are talking about here that I reviewed have been done on minority students. Most typically whites [621] are not included. Although there are studies with whites in them. And—or they are included as parts of the group of disadvantaged children. That is more typical than anything else. We really couldn't say too much about the effects on whites.

The Court: Well, you recommend that, if they are integrated in these white schools, that they get any special attention?

A. Yes, sir, but I wouldn't go about it this way.

The Court: Pardon?

The Witness: I wouldn't go about it in this particular way. I would recommend special attention, yes.

The Court: In other words, you have some remedial plans, then?

The Witness: We have identified some tentatively that we feel have potential for—

The Court: But they have never proven themselves?

The Witness: They are experimental programs. They have not been tried with large numbers of students. We don't really know their potential nor how well they would operate in a broad-scale school sys-

tem. And the field really is—of compensatory education is really quite unsettled. For example, in the area of language development, we did a very intensive review—excuse me now. We did not do this review, but I have—a friend of mine in Syracuse University [622] who is an expert in the field of language development, and we commissioned him to carry out a detailed comprehensive review of compensatory education programs in the area of language development. As a result of this study which covers most of what is available in the field, we were not able to make any really strong recommendations about what ought to be tried in the schools. We were only able to say that—well, here's two or three programs which look like they might have some potential. But then a few weeks later we received a study on one of those programs and it had been validated and studied and tested out in a very small test setting with about 15 kids. Then another fellow tried the program out after a two-year period in the schools and we received that report after this report was written up and it turned out that when it was tried out in the schools it had no effect whatsoever.

So, what I'm trying to communicate to you, I guess, is that this is a very unsettled field. There are no hard and fast rules to go on. It's very unlikely that anybody is ever going to come up with a treatment that is going to be generally effective with minority students at all. What has to be done is basically many, many years of experimentation in which we slowly and carefully identify and develop specific programs designed for specific groups, specific minority groups. Because they differ so greatly.

The Court: Well, then, you're not recommending any [623] doctrinaire approach to this problem at all?

The Witness: No, sir. The work that has been done in the field doesn't allow it.

The Court: But you are convinced that there is no validity to anything that has been tried so far?

The Witness: Basically, what the schools have tried—

The Court: I just can't understand how you can be so sure that it can't be refined or developed.

The Witness: May I explain a little further? The studies in compensatory education can be divided into two groups. One group of studies in development of compensatory education have been those approaches that have been developed basically by school personnel. To some extent they may have been helped by consultants. But, as I mentioned before, what these studies boil down to generally is to give the kids, the minority kids, what the school already has; what it already knows how to do. This is not based on a detailed study of the psychological—

The Court: I don't agree with you at all.

The Witness: Pardon?

The Court: I don't agree with you at all. I would say a person-to-person approach to a child does proceed on a psychological thesis; that the kid has no promise, home. He has no figure to look to and he has got to find some substitutes. Where is he going to find them if he's in a completely impersonal [624] atmosphere of the survival of the fittest?

The Witness: Some of them will. There is no doubt about it.

The Court: What happens to others who are strangers, who are in an atmosphere in which they are inferior and they feel inferior? Where are they going to find some kind of consolation? Have you been through this? I have.

The Witness: I grew up in that situation.

The Court: Now, what does he do? He may fight his way through. It will take a few years. But he may not. The probabilities are that he will drop out and get a job, or worse. You don't think this is true?

The Witness: Well, sir—

The Court: I mean, psychologically, the school is taking over for the family in many instances. It has to. I know this is abhorrent to all of you. You just disregard it all at paternalism. But you can't. I mean, this is the fact of life. The church has fallen down somewhat. The family has collapsed, and there is not much left. And a kid has to relate to something, to an institution, and to people, doesn't he? Where is this substitute? So, you say there is no psychological foundation for this? There is no foundation in experience? That you can just substitute this competitive atmosphere? And this impersonal competitive atmosphere of the integrated school and let him sink or swim?

【625】 The Witness: I think the idea of competition in the integrated school has been overemphasized. That element is there. What I think may be emphasized more than anything else is the fact that the integrated school by itself represents an acceptance of other cultural groups because they are mixed together, because they are living together, working

together towards essentially the same goals. When students are separated in different schools, as they are in Denver Public Schools—

The Court: Well, that's a different matter. We're not talking about this.

The Witness: Well, I though you were—

The Court: Well, I'm talking about— We're not debating whether it's valuable to have them in an atmosphere that is integrated. What I'm questioning is your statement that the integrated setting can be just a substitute for everything else that we have ever learned.

The Witness: I wouldn't say that, sir.

The Court: Well, that is what's implied here. That this is a cure-all.

The Witness: It can help.

The Court: It can help?

The Witness: Yes.

The Court: That's all you're saying?

The Witness: That's all.

[626] Mr. Greiner: May I proceed, Your Honor?

By Mr. Greiner:

Q. Dr. O'Reilly, you stated that you studied some 1,200 different compensatory education programs in segregated schools. In the course of your study represented by Exhibit 508, did you also have occasion to analyze the results of integration programs? A. Yes.

Q. Now, did you have 1,200 integration programs to look at, Dr. Reilly? A. They are not that easy to find. We had the studies that I reviewed on integration cover about 40 individual studies and desegregation was initiated on a local district level. And then the major studies of existing

degrees of racialization in the schools, like the Coleman study, which includes this report, which includes a major re-analysis of the Coleman data.

Q. And that was Plaintiffs' Exhibit 27? A. Yes. And also includes a new study on integration done by Wilson and in Oakland, California.

Q. What was the basis of Wilson's study? A. Oakland, California, is a segregated school district which is somewhat similar to this particular district here, from what I know of both of them. And there are different degrees of racial and social isolation in the schools in Oakland, California.

[627] Q. Is there also integration in Oakland schools? A. When I say different degrees of it, this would mean that schools vary from being virtually segregated schools to schools that are partially integrated.

Q. What did Wilson study? A. Wilson studied the effect of segregation in the schools on achievement, on psychological development, and on delinquency.

Q. Now, with regard to these studies of programs of integration, for example, did you study the Berkeley program? A. Yes.

Q. That Dr. Sullivan has described to us? A. Yes.

Q. What other integration programs did you study? A. We had a program—several programs in Rochester, New York. Two or three programs in Syracuse, New York. The MEDCO project in New Haven, Connecticut. Several other small individual studies of desegregation in the schools.

Q. Now, did these studies also present you with, for example, comparative achievement data, comparing what were—comparing achievement data for minority students before and after, for example, integration? A. Yes.

Q. What did those data show? A. The individual studies generally tend to show that—

[628] Mr. Ris: I object. I'm sorry, Doctor. I object on the grounds of lack of foundation again.

The Court: Overruled.

A. The desegregation studies—these are the small individual studies where a school district has either been ordered to desegregate or at least primarily a school district where they desegregated by themselves, and the results generally show that the educational development of the desegregated minority students tends to be facilitated or tends to improve within a year or two after the desegregation experience is initiated.

Q. Now, is this improvement—can you compare or contrast the degree of improvement under the integration programs with that which you found under the compensatory education program? A. There are fewer studies available on this but there are five or six in which compensatory education has been compared with integration. And the results here tend to show that the integrated students perform at higher levels on achievement tests as compared to students in segregated schools receiving compensatory education.

The Court: This helps, I'm sure, the ideas, at least, of the better students.

The Witness: This is—there is quite a bit of variation, sir. Not everybody experiences or—

[629] The Court: I mean those who have better abilities.

The Witness: I don't believe the question has

been studied of students with different ability levels and who is most affected on it.

The Court: How about the dropout rate? Does it increase?

The Witness: The question of the dropout rate—there is really not that I'm aware of enough evidence on the dropout rate in desegregation studies at this particular point. A great many of them occurred at the elementary school level.

The Court: But there is no evidence as to whether it increases or not?

The Witness: But you could make an inference like this. The dropout rate is related to how well you do in school. If you fail miserably then you tend to drop out of school. Now, if, as the evidence indicates, integration has a facilitating effect on education achievement, this would tend to make—would tend to lower the rate of failure of minority group students. You would then predict from that that the dropout rate would be generally decreased.

The Court: Because they are competing with students who are one to two years ahead of them?

The Witness: More successfully, though.

The Court: Well, that is, the upper level of them, [630] but not necessarily the lower level? They get frustrated and start wearing black leather jackets? I mean, they can't do anything. Then they start acting out?

The Witness: Sir, that may happen to some students but the evidence from the studies, the big studies of integration like Coleman would indicate that the students have developed a more positive attitude towards school; that they begin to develop

a sense that what they are doing has some effect on their future, and I think in general that you could predict more positive effects on psychological development rather than educational development itself. They go hand in hand. If an individual begins to experience success in school then he begins to feel more positive about something.

The Court: Let me ask you this. Do you think the impersonal approach would be preferred, even at the elementary level?

The Witness: No, sir. I think it should be—

The Court: Sink or swim?

The Witness: No, I think it should be as personal as you can make it.

The Court: Well, then, you do have to baby them along to keep them in school and to keep them alive, don't you?

The Witness: I think you have to show basically that [631] you regard them as worthwhile human beings and that, if that kind of baby attitude of respect for a member of another minority group is there, then—

The Court: This means you have to really be geared for it because, if you get teachers who are petty, objectionable personal habits or appearances or things of that sort, or for the individual involved, it can have a traumatic effect?

The Witness: Well, the studies that I reviewed on desegregation didn't take any great pains to do anything really extensive in the school situation to prepare—

The Court: I get letters from these teachers. They say this is an impossible thing. I mean, I

probably shouldn't read them but I have. They say, "He runs down the hall. He can't understand why he should walk. He squirms in his seat." Pretty soon he drops out. But what I'm saying is they encounter oftentimes, I'm afraid, completely unsympathetic receptions.

The Witness: I'm sure there are people who are—

The Court: How are you going to combat this kind of thing? If it isn't on a personal approach, I mean?

The Witness: I agree with you that these represent problems.

The Court: They are formidable problems.

The Witness: Yes, but I think they can be handled.

[632] The Court: Well, then you are not saying that ipso facto that we can cure everything by simply—

The Witness: No, I'm not.

The Court:—by simply integrating the schools?

The Witness: No, I think you've got to take time to plan it. If you initiate the process, work at it as you go along, try to develop a school in which you have a multi-cultural atmosphere in which mutual respect is possible among the students, I think, you know, these things are required. There are things that have to be done with teachers; things that have to be done with students. There is a great deal that can be done with students and they are—particularly at the elementary school level. The easy things to do are the least expensive.

The Court: Well, what I'm really leading up

to—I suppose that there may be some value in these remedial efforts after all?

The Witness: In a certain context, sir.

The Court: Right.

Proceed.

Excuse me, Mr. Greiner.

By Mr. Greiner:

Q. Dr. O'Reilly, you have also reviewed the plaintiffs' plans for relief in this case, have you not? A. Yes, I have.

[633] Q. Dr. O'Reilly, do the plaintiffs' plans contemplate simply throwing the blacks and whites together and letting the blacks sink or swim? A. No, they do not.

Q. And have there really been, for example,—the Berkeley program which Dr. Sullivan described to the Court the other day—now, in Berkeley they attempted to change teacher attitudes, did they not? A. Yes.

Q. And had programs of cultural understanding, minority history? A. Yes.

Q. And they had programs directed towards helping the teacher to cope with some of the peculiar problems of the minority child, is that right? A. Yes.

Q. Now, these programs were continued in Berkeley, were they not, in an integrated setting? A. Yes, they were.

Q. And is Berkeley one of the success stories of integration in the United States? A. It's probably the most well known at this point.

Mr. Greiner: We have no further question, Your Honor.

Robert O'Reilly—for Plaintiffs—Cross

[634] *Cross-Examination by Mr. Ris:*

Q. Are compensatory education programs in progress in New York City at the present time, this school year? A. Yes, they are.

Q. And throughout New York State? A. Yes, they are.

Q. And in—are there such programs evaluated yearly in New York State? A. Yes.

Q. Insofar as federal government participation and funding is concerned, are evaluations submitted to federal agencies annually? A. Yes, they are.

Q. Requests for funding for the following years are based upon those studies? A. Funding in Title I, ESEA, is virtually automatic. It depends on how many disadvantaged students are in the school of your state.

Q. Is it contemplated in New York State that these programs will continue next year? A. Yes, but it's not contemplated about how much longer it's going to last.

Q. But they are going to be continued next year? A. So far.

Q. And that has been determined by those who make the [635] policies? A. Yes, it has.

Q. How much was spent during or contemplated to be spent during the school year 1969 and '70 in New York State compensatory programs? A. This year, Title I, ESEA, was about $170 million and the state's assistance from local state tax money was about $52 million for urban educational programs which are directed toward the disadvantaged children.

Q. And how much was spent during—or will be spent before the end of this current school year on programs other than Title I? A. Well, we have $7million for integration programs. The state provides money for desegregation, for busing and so on.

Q. I'm asking about compensatory purposes. A. That's considered compensatory.

Q. That has been considered compensatory, also? A. Yes.

Q. All right. A. We have some more, if you would like to know them.

Q. Some more dollar expenditures? A. Yes.

Q. What are they? A. We have $3 million, prekindergarten program.

[636] Q. Do you know what has been budgeted for next year throughout the state? A. Roughly.

Q. What is it? A. I think the Title I, ESEA, program is $183 million. Urban education will be exactly the same as before; it is 52 million— Excuse me. I said seven million for integration. It's three million. The prekindergarten program has been reduced from seven million requested to three million. And that would constitute the major efforts for the state.

Q. Now, with respect to the studies you made of the studies on desegregation in the various school districts, could you give us any statistics either numerically or percentagewise as to which of those desegregation plans were voluntary as contrasted to mandatory? A. The desegregation programs?

Q. Yes, sir. A. What do you mean by voluntary versus mandatory?

Q. Well, whether the desegregation plans were on a voluntary basis of the students or the parents requested transfer, or whether—such as under the Denver VOE which you have heard while you have been in court, or whether they are mandatory comparable to Plan 1 or Plan 2 submitted by the plaintiffs here. A. The decisions to desegregate the

schools are really [637] not typically made at the community level. They are made as a function of the arrangements between school boards or is directly a decision between school boards or, in the case in New York State, we have some instances where in one case where a school superintendent led the battle in a very peculiar way and desegregated the whole school system in White Plains, New York.

The Court: Where was that located?

The Witness: White Plains.

The Court: We have heard about White Plains quite a bit.

A. We have other instances where the Commissioner of Education in New York State has ordered schools to desegregate and they have consequently desegregated. Some of these being actions brought by the N.A.A.C.P.

Q. Have you correlated whether these were mandatory or voluntary? A. No, we haven't, because the mandatory versus voluntary concept is just not—it isn't—this isn't a mandatory or voluntary— It's a very—an extremely complex thing.

Q. But you made no study of that? That's my question. A. No.

Q. To what extent, Doctor, are you segregated in New York City? [638] A. New York City is very highly segregated. There have been some few programs in New York City, school pairing, for example, where some sort of pilot program of integration has occurred. But New York City is—the problem there is extraordinarily complex in terms of size; 1.2 million kids in New York City, and 55 percent of them are Negro and Puerto Ricans and they live in areas in the city where there just aren't any white kids.

Q. And so I take it that you're using remedial approaches there? A. That's exactly what is being tried and where the complexity of the problem is as bad as it is in that particular place and where there hasn't been any legal action at this point—

The Court: In Harlem, for example, do all the students have to go to school in Harlem who live there?

The Witness: They have to go to school.

The Court: In Harlem?

The Witness: Yes.

The Court: Do you move any of them out?

The Witness: No. Typically, in New York City, students aren't really—the neighborhood school concept is still viable there.

The Court: Would this be true in other boroughs? All of the boroughs of New York City?

[639] The Witness: Basically.

The Court: Well, then, when you get out, do you have any other place where you have integrated?

The Witness: Yes.

The Court: Where?

The Witness: Rochester had some pilot integration programs which have encouraged a lot of people. Syracuse has had some pilot integration programs that have encouraged people. The White Plains—the one I already mentioned. And this moves on in different places in the state to desegregate local cities. A good example of that is Rochester, in which they are still, you know, this movement has been going on in Rochester for a considerable period of time. They haven't achieved success yet but I'm sure they will continue to work.

The Court: Well, is there any city in the United States or in the Northwest, the Middle West, East, where they have a complete program of integration?

The Witness: Integration program?

The Court: From your studies have you found any?

The Witness: No cities that I am aware of at this particular time have an extensive integration program in which they have integrated the whole city. But I can't recall the details now of other places, but I do recall that there are some movements on at some places in the country for a [640] program that may affect large numbers of students.

The Court: We have read about some of them recently.

The Witness: Yes.

The Court: But, so far, it has not been accomplished or really tried out on any broad scale anyplace.

The Witness: Well, the broadest-scaled one, in which the program has been studied reasonably well —in fact, quite well in terms of most of the studies, is Sullivan's program in Berkeley, which is—well, a city of 100,000.

The Court: But, Boston apparently hasn't done it, really.

The Witness: No.

The Court: They've got a voluntary program up there. That's what I assumed from what he said.

The Witness: Yes.

By Mr. Ris:

Q. Dr. O'Reilly, in White Plains, wasn't the technique there used to close one black school and transport the children then to other schools? A. As I recall, that was a technique.

Q. Now, with regard to school desegregation, I believe the title of your work is Racial and Class Isolation. And throughout your work you lay great stress upon the social class of minorities, do you not? A. Yes.

[641] Q. So it is not merely the color that you're primarily concerned with in your conclusions—it's a matter of social class? A. Doesn't make any difference.

Q. It doesn't? You don't have social class even in the minorities? A. In places—let's see, from the data I have examined in Denver on the economical levels, there is a little bit—this is a little bit old data—

Q. 1960 data? A. Yes, but from what I have heard from talking to other people, you know, it's not, you know, the greatest kind of basis for this kind of thing. Denver is probably very much like Oakland. In fact, it may even be more so in terms of the correlation between race and social class, in which case, if you desegregate the schools, you automatically bring out the condition that Dr. Coleman talked about.

Q. So are you acquainted with the Northeast section of Denver? A. I think that's what I—I guess that's the area I saw, over by Manual High School. I'm not sure of the directions.

The Court: This has been called the core city area in this trial.

The Witness: Over by Manual High School?

[642] The Court: Yes. It's part of it.
The Witness: That's what I saw.

Q. How long have you been in Denver? A. Since Sunday night.

Q. Have you ever been here before? A. No.

Q. Well, in your work you do agree that you stated that school desegregation is no panacea leading to disappearance of the existing education gap existing between members of the advanced majority student population and disadvantaged minority students? A. Yes, I said that because I basically agree with what Judge Doyle has said, and that is that integration should be accompanied by additional efforts.

Q. You say under certain conditions school desegregation may result and work—

The Court: Where are you reading from?
Mr. Ris: I'm reading from Page 3.
The Court: We haven't progressed that far. I think we'll take a short recess.

(Whereupon, the trial recessed at 10:50 a.m. and resumed at 11:06 a.m.)

By Mr. Ris:

Q. Dr. O'Reilly, I have had a request from some spectators here that, if you would please raise your voice a bit, they would appreciate it. They can't hear [643] you back there.

The Witness: I'll do my best.

Q. Referring to Page 39 of your work, Dr. O'Reilly, it says, "Examination of current guidelines for school deseg-

regation indicates a failure to give adequate emphasis to the importance of social class consideration in planning integrated schools." And you have said, "Guidelines have focused on the concept of racial balance with result in ambiguous . . ."

Must the social class of the students both being transported into a school and the social class of the students that are already there be coordinated, then, in some manner? A. Yes, they should.

The Court: Are you still on Page 3?

Mr. Ris: Beg your pardon, Your Honor. This is Page 39.

The Court: Are you finished with Page 3? Did you ask him about this statement, "There is no panacea . . ."?

Mr. Ris: I'll come back to that, if I may. This again goes to the social class matter that I asked him about before.

The Witness: Yes. I'll explain that. As you will remember, as I remember, anyway, from Dr. Coleman's testimony, he talked about social class being a primary consideration. Now, what I have done in my report is to translate that into [644] arranging a condition for the poor integration. This is one of the initial conditions. The basic idea there is to make sure that the school ends up as a predominantly middle-class school which, from what I know about Denver, seems to be generally possible. The other conditions are—the other basic condition is that the school also reflects somewhat the ethnic composition of the community, but there can be certain variations there. In other words, the particular pro-

portions, they should never be low. But there is a range of variation in which you can work and the criteria there in a plan for a well-integrated school is to insure that there is enough representation so that the different ethnic groups in the community are well represented in the school and can interact with each other. A school in which you have like four or five blacks, you know—it is not an integrated school under a criterion like that; or, if an area like Denver—it would mean that you would do your best to represent not the blacks and the whites, but the Hispanos.

Q. So when you're talking about social class, are you using the same criteria as Dr. Coleman did when he talked about socioeconomic class? A. Yes, but I have added an additional condition which relates social class and race. Because there is not just one objective for integration, not just entirely the objective of improving educational achievements. An additional [645] objective—and this is related to—

The Court: What you're saying is that the middle class and the upper middle class in the integrated school ought to be predominant? I mean, if they're going to exert any influence?

The Witness: Yes.

By Mr. Ris:

Q. So social class must be considered and not merely numbers of blacks, numbers of whites, numbers of Hispanos. Right? A. Yes, in most cases the consideration of the racial or the ethnic factor is automatically a consideration of the social class factor.

The Court: I don't see what you are—I'm still not certain as to what your goal is. It's to make the minority group more articulate and more knowledgeable as to what's going on in society? What the values are of the kinds of society we have?

The Witness: Well, that's certainly part of it, sir. But I think to be articulate as I can about it there are two basic goals. One of them if ignored represents, I think, a tremendous danger to this society in which we live. And that is the isolation of groups of students in schools.

The Court: Well, then, you're trying to develop a single culture, is that right?

The Witness: No, sir. I think that's what we have; [646]is a predominant kind of subrogating culture which feels pretty indifferent about other cultures. The plans that we have discussed with respect to integration take into account the representation of each culture in the school so that the school becomes multicultural and not homogeneous culture. In fact, I think this is one of the conditions for the success for integration programs, which isn't really all that hard to get at; is to recognize the contributions of the groups that are existing in school, and this apparently is recognized in the Board's plan. However, that plan does not bring together people, and it assumes by reading a book or something, that that will develop. But I think that's quite doubtful.

The Court: Well, what influence, then, does the so-called middle class or upper middle class—what great contribution do they make, do you think, to integrated settings?

The Witness: I think part of the contribution is the exposure of the minority group student to a more different level of language, a more complex level of language, a more abstract use of language which is more typical of middle-class Anglos. But it is not necessarily untypical of middle-class blacks. It is a function of social class. Another contribution, I think, that is made by the integrated program is that when you do mix students together, particularly if you start when they are young at the elementary school, you create an opportunity for mutual respect between cultures and [647] this kind of thing is really the direct reverse of the segregated school where these segregated students must obviously conclude from the fact that they are alone that, since he is segregated, he must be regarded as inferior. So this certainly removes that source of feeling of inferiority, low self-esteem.

The Court: Brings about insight and perhaps understanding between the groups, you're saying?

The Witness: Yes, I think mutual respect.

The Court: Anything else?

The Witness: Yes. Irrespective of social class, not—I'm not necessarily speaking of Denver now, that is, the correlation between what I'm about to say in Denver is up to some other people to judge.

Mr. Ris: I'm sorry, Dr. O'Reilly. I can hardly hear you.

The Witness: The question was, are there any other things that occur as a function of the social class composition of the school in the integrated school. When you group lower-class students together, predominantly lower-class students together,

you tend to get generally a higher level of disorder, a generally lower level of academic motivation, and the approaches to instruction to typically include even small groups are very, very susceptible to the influence of the group, and if the predominant aspect of the group is in [648] disorder, not caring about the school, not caring about achievement and so on, this has a highly interfering affect on the effectiveness of instruction. It cuts down on the efficiency of a teacher; cuts down on information transmitted. There are additional effects, too, that have been stated which I have stated in my report and other reports have, too, on the teacher. Teachers come to regard the students as being incapable, and there are indications that they actually regard them as inferior. Possibly culturally inferior. That is even an assumption in some compensatory education programs. These attitudes of teachers are highly negative and from my point of view as a psychologist can exert damaging effects on an individual's psychological development. All of this is much more likely in a school which consists primarily of poor students from a single culture or from an instance like this where you have two cultures or like in New York City where we have Puerto Rican students and Negro students who are primarily segregated from the whites. So there are psychological effects.

Wilson's report is one of the ones, I think, that gives us one of the indications of the danger to social development represented by the segregated school. For example, after accounting for family background, father absences, individual social class, he found that it was the extent to which the school was

segregated which appeared to [649] cause the frequency of juvenile delinquency among Negro adolescents. And that, if those students went to upper-middle-class schools where the education environment was different, that they were less likely to become delinquents and their effect was twice as great for blacks as it was for whites. And that is understandable because there are a lot more blacks in segregated schools than in integrated schools.

The Court: You heard Mr. Ward testify yesterday? He said that he has great concern for the black student who has not fared well on the achievement tests but who, nevertheless, has great ability, probably, if he can be discovered and it is brought out.

The Witness: Yes. I remember him saying that.

The Court: This is a person who is apt to be lost if somebody doesn't take an interest in him and develop him. What is he going to do in an integrated atmosphere?

The Witness: Sir, a person's educational development particularly at the junior high school and high school level is less determined by his parents than by his peers.

The Court: At junior high school?

The Witness: Yes, among the ethnic minority, the effect of the peer group is twice as great as it is for whites. This has been brought out in Coleman's study. Also been brought out in Wilson's study.

The Court: That's because the parental influences [650] are declining as you get to that age?

The Witness: Possibly. It's also because of relative deprivation in terms of the qualities of one's family background that these students are more responsive to qualitative differences in school.

The Court: As to what?

The Witness: They are more responsive. You take the disadvantaged Negro student and put him in an atmosphere in which the environmental quality of that atmosphere has been increased, the extent to which he will improve is more rapid and greater than the general effect on white students put in that same environment. Now, this is a definite finding of integration studies and Coleman study and the Wilson study in Oakland, California. Now, put in the context of what I said about the peer group, if you segregate students in schools like this, the peer group's influence is primarily negative, and this is a time of their lives when they are most susceptible to that influence. So long as you continue racially-isolated schools and the pattern I see in this particular case is isolation from elementary through secondary, you have virtually programmed the student into something that, through his adulthood and possibly into juvenile delinquency certainly an increase in the level of social acts displayed by these minority students. And it's predictable. My opinion on this is that we know enough about this so that, if we do [651] this, that these are the likely effects, and we therefore have to take responsibility for it.

By Mr. Ris:

Q. But if we have a school with highly-motivated teachers, with greater empathy with these minority students, you would say they wouldn't progress? A. Would you repeat the question?

Q. If you had a school in which there are highly-moti-

vated teachers, with greater emphathy for these disadvantaged students—Let's take Manual High School. A. I can't generalize on the basis of Manual High School.

Q. So you think Manual is not providing anything for them that hasn't been provided for these children before, from what you have heard from Principal Ward yesterday? A. From my reading of the Board's plan, I don't think there is any hard evidence which would indicate from my point of view, as a person in this field, as an educational researcher, when I read this plan on Manual High School, when I read the language of the Board—

Q. I'm asking about Mr. Ward's testimony yesterday. Do you think what he is doing is being done without any substantial benefit to those children? A. I don't think you can judge from what a person has to say about his opinions. Teachers typically and school administrators typically think what they're doing is great.

[652] The Court: I wish you would keep your voice up, please. The reporter is having difficulty hearing you. Speak as if you're making a speech, you know, to a large group.

The Witness: Yes, sir.

Teachers and school administrators—

The Court: You want the people in the back benches to hear every single word you say.

The Witness: Teachers and school administrators where their opinions of the effects of programs have been evaluated, are typically positive, but when we look at the programs they are typically negative.

Q. I see. So, in the case of Manual, you just look at the program and not with the results then? A. We look at the—

Q. Unless they were on standardized achievement test scores? A. That's not the only thing I would look at.

Q. What else would you look at in Manual? A. I would look at, for example, students' opinions. I would look at how many of these students go to college as compared to how many went to college before the program was started. There are many, many indicators of the effectiveness of the school that are not necessarily achievement test data. I wouldn't rely on a single indicator. That would be an [653] evaluation of the program.

Q. Then all these 1,200 programs in compensatory education which you relied on, you were relying there on standard achievement test scores, were you not? A. No, sir. Most of these programs include several indicators of effectiveness.

Q. What other tests? A. Sometimes they include psychological tests.

Q. How many of the 1,200? A. Well, that would be extremely difficult to say at this point.

Q. Go ahead. What other tests? A. Let's take Head Start, for example. Head Start included a measure of self-concept. How the individual felt about himself, and also included a measure of the student's attitude towards education, towards school.

Q. These were subjective things from the three and four-year-olds? A. Sometimes they are subjective. Sometimes they are relatively objective, in which the student is given a questionnaire.

Q. Let me ask you this. In going back to Page 3 of your report, you say—and you can state if this is correct—"However, knowledge of the process of integration is not yet so complete nor is what is known of the process so systematically [654] applied that any startling changes

in educational development should generally become evident in desegregate minority group students." It that your opinion today? A. It certainly is, but I would like to qualify that opinion, if I may. That is a preliminary statement preceding my analysis of the conditions that are likely to make desegregation—the integration program effective. For example, if it were started at the elementary level it is much more likely to be successful than at the secondary level. And there are other conditions that I indicate in there and basically the proposition that I am making there is that people have to plan and work this thing out in accordance with what is known about the process in order to make it effective. That statement also communicates that we can do a much better job with integration than we have done before because of what we do now with it and, if we continue to work on it and continue to integrate the schools, that we will know more about it and be able to do a better job yet.

Q. Page 20, did you make this statement: "It is evident from the results of all studies reviewed that the achievement levels of disadvantaged minority group students still remain substantially below that of the advantaged whites . . . in schools."

The question is, what that your statement? A. Yes. May I qualify that?

[655] Q. Well, may I ask you if that is your statement? A. Yes.

Q. Now, basically, what you're talking about again here is achievement levels of the minority who were transferred to another school? Right? A. Yes.

Q. And right down the line, all of your reports indicate that the minority students and disadvantaged students, when they are moved into the integrated setting, generally

remain behind? They never do catch up, isn't that correct? A. Oh, I don't think the latter part of that statement is correct.

Q. Well, Page 27. You said, "Even though the studies often indicate superior achievement on the part of the integrated Negro student, it must still be noted that the integrated Negro students generally remain behind achievements . . . displayed by white majority." A. Yes, but you said they always remain behind, and—

Q. Well, generally?

Mr. Greiner: If the witness would be allowed to finish his response, Your Honor—

The Court: Yes.

Go ahead, Doctor.

A. There aren't enough studies at this particular time on desegregation in which the process has been initated on [656] a district level that have gone over a long enough period of time, and that have been, you know, effectively planned from my point of view, that would indicate whether we can wipe out that difference. We just don't know yet. We do know that—

Q. With respect to the—to Page 36, did you make this statement: "Despite the appearance of superiority of the integration approach . . . it is evident that in the Berkeley study that the disadvantaged Negroes, even when they are in an integrated setting, achieved at considerably lower levels than more advantaged whites." A. Really, the same statement. We did—I did make that statement.

Q. So, merely by integration in and of itself, you're not going to cure all evils? A. No, but it's relative to compensatory education.

Q. But generally, as to the ultimate fact of the evidence—the evidence is just not sufficiently conclusive or there haven't been enough analyses to know what its effect is? A. That's not true.

Mr. Ris: That's all.

Mr. Greiner: We have no further questions of Dr. O'Reilly, Your Honor.

The Court: Where do you think the Spanish-origin or [657] Spanish-speaking people fit into this desegregation program? Have you made any particular studies along this line?

The Witness: The only really big study available on the effects of integration on the Mexican-Americans is the Coleman report and that report shows the effect of integration is as large or larger—maybe slightly larger on their achievement levels in school as it is for Negroes, which would indicate that there are expectations in relationship to how well the Negro is going to do in an integrated setting and how well the Mexican-American is going to do in that setting, should be roughly the same.

The Court: Well, I take it that, in view of what you say, that you feel that there is value in having an ideal integrated setting, in having a mixture of Negroes and Mexicans, as well as Anglos, is that correct?

The Witness: Yes, sir. And I feel that is really—surely dictated by a multicultural region like Denver or other regions where there are more than two ethnic groups.

The Court: Have you conducted any studies as to whether this integration affects the so-called su-

perior group? Does it lower their standards, their levels of achievement?

The Witness: Now, I have rather reviewed studies of principals and I think, if this is what you're asking, principals' attitudes, school administrators' and teachers' attitudes in relationship to the question of, did integration [658] lower the standards of the school? With very few exceptions, the opinions of these people are in the districts where desegregation had occurred, have been positive, and in some instances—it's not infrequent—that they felt the program had enriched them and had a better program than they had before with a greater variety.

The Court: These are general approaches, I take it? The individual problems you are not concerned with?

The Witness: With individuals?

The Court: Individual desegregation problems. I noted in going over the plans of the plaintiffs' program that they will pair the best facility in town with the worst. Would this be desirable? They will take the newest facility in town and they will bus them to the oldest facility in town because of geographic proximity.

The Witness: It could be, but I would have no problem about the two schools.

The Court: Well, the latter is the lowest in achievement, probably, that you could imagine; 20th percentile.

The Witness: Well, if the two schools end up—if they are both predominantly middle-class, as a function of this transfer, you would predict that they would both work out pretty well. In no cases do we have any—

The Court: Is there any adjustment period?

The Witness: Well, sir, the studies that we have [659] got don't indicate that the general approach to school integration has involved any extensive planning. They have taken a relatively short period of time. They haven't done any tremendous amount of work at their school to prepare for it. Most of what they did, they did as they went along.

The Court: You mean in the South?

The Witness: No, I'm talking about the studies that I have reported in here in Chapters 5 and 6.

The Court: These are pilot programs, though, that you're talking about?

The Witness: Yes, and most of them were initiated—well, some were in preparation, but it's not extensive. They did not make extensive changes in the school program. They didn't send the teachers to school for any lengthy period of time nor were their in-service training programs particularly lengthy. In some cases they did almost nothing and in some cases the results almost tend to be positive.

The Court: Would you at least recommend that these exchanges be worked out on a carefully-planned basis and not be the result of computer print-outs?

The Witness: Well, I think the computer-print-out-type orientation that we have seen here is fine for planning, you know, how are you going to mix the students in the schools. But then the human element must come in there. I think that you can do this in a matter of a few months in terms of [660] preparation that the rest of the effort should

be devoted toward working with it as you go. Because some schools just—they typically don't have the kinds of funds; the kinds of additions to the program that they can make, to go all-out on this. But they can make efforts from studies I have reviewed that can work and, you know, it isn't all that extensive, what has been done. Particularly, if you do it at the elementary level. It's a lot less of a problem there than potentially—with the opportunity once these kids have learned to interact, it's much easier to do when you're younger and when you are less rigid. Desegregation can then continue as the students move up.

The Court: What about this specialty school? What about the value of that? That has been recommended by both sides, really, by the plaintiffs as an alternative and the defendants as a proposal, in regard to Manual High? Have you studied this type of thing?

The Witness: I'm not sure I'm familiar with the concept involved here, specialty school.

The Court: Well, it would be geared to training people from the intercity in particular trades and—or in particular occupations.

The Witness: A job-oriented program?

The Court: In part. But also it would have, as I understand it—it would be devoted to preprofessional [661] training, premedic, prelaw, and preengineering, for example, and programs for college preparatory training as well. In addition, specialized courses in such things as cosmetology and building construction; all this kind of thing. And perhaps plumbing. I don't know. Plumbing isn't a bad job nowadays.

The Witness: No, it pays pretty well. Well, I think if the school expands its organization and allows people to go into other kinds of things that may be more suited to their particular needs, that is basically a good idea and a good approach.

The Court: Well, they're doing this at both Manual and Cole. They're making more or less specialized schools out of them and programs they have never done before. This is in self-defense.

The Witness: Well, this kind of thing really goes back over a hundred years. In a situation like this, why, where mostly black and Hispano students are getting that kind of program and whites are getting another kind of program—and you have a system where grouping occurs into special programs from the elementary on up through the secondary level, it finally ends up in vocational training. And amounts to, in my opinion, programming students into basically lower occupations than the whites are programmed into. The whites are programmed into another environment. And, you know, I [662] don't know whether this is planned this way, that is my feeling.

The Court: This is a danger, you say?

The Witness: I think it's a very clear danger.

The Court: But the program they have prepared would be for this school to be a citywide school so as to eliminate its segregated character. And turn it into a specialty school that would accommodate people from every—

The Witness: It could work out that way.

The Court: Anybody else want to ask anything?

Mr. Greiner: Nothing further from us, Your Honor.

Cross-Examination by Mr. Ris (Cont'd):

Q. Dr. O'Reilly, you previously testified that you recognize the significance of community support in any operation of the school system, did you not? A. Yes.

Q. Dr. Sullivan discussed that the other day. You heard his testimony? A. No, I did not hear Dr. Sullivan's testimony but I have read his book and that is his opinion.

Q. Weren't you here when he testified? A. No.

Q. I'm sorry. I thought you were.

The Witness: No, I had some homework to do.

[663] Q. Well, he testified that it took him two years to get things lined up in Berkeley to go into a desegregation plan other than their original pilot plan. A. He is a pioneer.

Q. Pardon? A. He's a pioneer.

Q. Well, he was working with the community. He had the feel of the community and he said it would take a minimum of that time, and that community is a lot smaller than Denver, isn't it? A. Did he say that it would take a minimum of that amount of time in Denver?

Q. That was the testimony as I remember.

The Court: Well, he said this: that you can't completely disregard community acceptance as a factor; that you've got to educate the people who are making the sacrifice, not only them, but all making sacrifices in a way. The people who are allegedly getting the benefit. They all want to be educated so that they have some motivation for this and some spirit for it if it's going to succeed. I gleaned this from remarks; that you can't just leave it up to the forces

of nature or you might run into trouble. I thought he conducted a community education program.

By Mr. Ris:

Q. With regard to an expression of your opinion that this could be done in a couple of months or a [664] few months, I believe your phrase was, you don't know of any experience of any community the size of Denver, with the problems of Denver, that has done this, have you? A. No, but I don't think you can lay down and—

Q. Then you are just—

Mr. Greiner: Could the witness be allowed to finish his response, Your Honor?

The Court: Sure. Go ahead, if you've got something else to say.

A. Yes. First of all, Dr. Sullivan is a pioneer in the field and he worked out many of the techniques for gaining community support in the school. They exist now. It takes a lot of time to work those out. Just to work out the procedures, not to get them going. Now, those procedures, those plans, that experience now exists. The people can take advantage of that. I don't see why it has to take two years.

Q. You think you could take the Berkeley experience and come to Denver and do the Denver job in a couple of months? A. I really couldn't tell that, but I do think that the timetable certainly has been shortened as a result of the things that are now available.

Q. And what other community the size of Denver has used the Berkeley plan to cut down the time? [665] A. I don't know of any other community.

Mr. Ris: That's all.

Mr. Greiner: Nothing further, Your Honor.

The Court: Do you have anything else that you wish to add? We have been picking your brain here. Maybe you've got something we haven't probed.

The Witness: No, sir. I think I have talked enough, and I'm kind of run down a little bit.

The Court: Well, we will be glad to hear you if you think there is.

The Witness: There is one thing I might add that would be—

The Court: Keep your voice up, though.

The Witness: In this particular book that has been offered into evidence with the Court—

The Court: We will take that in evidence. That's 508. I doin't guarantee we will get through all of it.

(Whereupon, Plaintiffs' Exhibit 508 was received in evidence.)

The Witness: There is a chapter in there which I wrote on planning the desegregated schools. Some of the considerations that have to be made and so on. This might be a —of particular interest if this is the kind of thing that happens in Denver, which I don't know what it is. But there are other sources, too, that can be very helpful [666] in planning desegregate programs in the schools. This is one offering here. There are lots of other things available. We do have a lot of information from research, from what people have done in integrating schools that enhance the chances of achieving a successful integration program in other places. They don't

apply necessarily directly and can't be transferred, you know, just like that. But certainly they can be helpful. I think that's all I would have to add.

The Court: Anything else?

By Mr. Ris:

Q. Have you prepared such a plan for any city? A. No, I haven't prepared such a plan.

Mr. Ris: Thank you.

Redirect Examination by Mr. Greiner:

Q. Would you like to? A. I'd love to.

The Court: Well, good luck to you.

(Witness excused.)

Mr. Greiner: Your Honor, the plaintiffs rest at this point.

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1969a

Decision Re Plan or Remedy by District Court

(Dated May 21, 1970)

Reprinted in Appendix to Petition
for Certiorari, pp. 99a-121a

See 313 F. Supp. 90

Final Decree and Judgment

(Entered June 11, 1970)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. C-1499

WILFRED KEYES, individually and on behalf of CHRISTI KEYES, a minor; CHRISTINE A. COLLEY, individually and on behalf of KRIS M. COLLEY and MARK A. WILLIAMS, minors; IRMA J. JENNINGS, individually and on behalf of RHONDA O. JENNINGS, a minor; ROBERTA R. WADE, individually and on behalf of GREGORY L. WADE, a minor; EDWARD J. STARKS, JR., individually and on behalf of DENISE MICHELLE STARKS, a minor; JOSEPHINE PEREZ, individually and on behalf of CARLOS A. PEREZ, SHEILA R. PEREZ and TERRY J. PEREZ, minors; MAXINE N. BECKER, individually and on behalf of DINAH L. BECKER, a minor; EUGENE R. WEINER, individually and on behalf of SARAH S. WEINER, a minor,

Plaintiffs,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO; THE BOARD OF EDUCATION, SCHOOL DISTRICT NO. 1, DENVER, COLORADO; WILLIAM C. BERGE, individually and as President, Board of Education, School District No. 1, Denver, Colorado; STEPHEN J. KNIGHT, JR., individually and as Vice President, Board of Education, School District No. 1, Denver, Colorado; JAMES C. PERRILL, FRANK K. SOUTHWORTH, JOHN H. AMESSE, JAMES D. VOORHEES, JR., and RACHEL B. NOEL, individually and as members, Board of Education, School District No. 1, Denver, Colorado;

Final Decree and Judgment

ROBERT D. GILBERTS, individually and as Superintendent of Schools, School District No. 1, Denver, Colorado,

Defendants,

MR. AND MRS. DOUGLAS BARNETT, individually and on behalf of JADE BARNETT, a minor; MR. AND MRS. JACK PIERCE, individually and on behalf of REBECCA PIERCE and CYNTHIA PIERCE, minors; MRS. JANE WALDEN, individually and on behalf of JAMES CRAIG WALDEN, a minor; MR. AND MRS. WILLIAM B. BRICE, individually and on behalf of KRISTIE BRICE, a minor; MR. AND MRS. CARL ANDERSON, individually and on behalf of GREGORY ANDERSON, CINDY ANDERSON, JEFFERY ANDERSON, and TAMMY ANDERSON, minors; MR. AND MRS. CHARLES SIMPSON, individually and on behalf of DOUGLAS SIMPSON, a minor; MR. AND MRS. PATRICK MCCARTHY, individually and on behalf of CASSANDRA MCCARTHY, a minor; MR. RICHARD KLEIN, individually and on behalf of JANET KLEIN, a minor; MR. AND MRS. FRANK RUPERT, individually and on behalf of MICHAEL RUPERT and SCOTT RUPERT,

Intervening Defendants.

THIS CAUSE, having been tried on its merits before the Court, and the Court having made and filed its Memorandum Opinion and Order dated March 21, 1970, and its Decision re Plan or Remedy dated May 21, 1970, and having therein made its Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

A. The Preliminary Injunction of this Court entered August 14, 1969, shall continue in full force and effect until September 1, 1970.

B. Effective September 1, 1970, the Preliminary Injunction shall be and is hereby amended as follows:

1. Resolution 1520 of the Board of Education of School District No. 1 in the City and County of Denver and State of Colorado, insofar as it applies to East High School, and Resolution 1524 insofar as it applies to Cole Junior High School, are hereby included in said Injunction;

2. The Board may permit pupils entering their senior year of high school in September of 1970, and who reside in the senior high school attendance areas changed by Resolution 1520 to have the option of attending the senior high schools of the attendance area in which they continue to reside or the senior high school which they attended at the close of the 1969-70 school year;

3. Pupils who reside in the attendance areas detached from Cole Junior High School and made a part of the attendance areas of Byers, Kunsmiller, Rishel, and Kepner Junior High Schools by Resolution 1524, and who are currently enrolled in other junior high schools under the District's voluntary transfer plan may continue attending the junior high school which they attended at the close of the 1969-70 school year;

4. All that portion of the area described in paragraph 1 of Resolution 1524 as detached from Smiley Junior High School attendance area and made a part of the Merrill Junior High School attendance area which lies east of Colorado Boulevard shall be made a part of the Byers Junior High School attendance area instead of Merrill Junior High School attendance area;

5. The area described in Resolution 1531 as detached from Park Hill Elementary School and made a part of

the Steck Elementary School attendance area, beginning September 1, 1970, shall be made a part of the Ellsworth Elementary School attendance area instead of the Steck Elementary School attendance area; and

6. All pupils residing in the attendance areas changed by the implementation of Resolutions 1520, 1524 and 1531 hereunder shall not be eligible for the District's voluntary open enrollment program.

C. As so amended, said Injunction shall become permanent on September 1, 1970, and continue in full force and effect until and unless otherwise modified by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant School District shall:

A. Continue its program of voluntary open enrollment as an interim measure between now and the fall of 1971; except that it shall be modified in accordance with the Defendants' proposed plan, Exhibit "V-A", and shall guarantee space in predominantly Anglo schools for all Negro and Hispano pupils in the 17 Court-designated schools commencing January 1, 1971, with transportation provided for by the District to all participants.

B. Commencing in September, 1970, implement the compensatory education programs described in its Exhibit "V-A" which, as a minimum, shall include the following:

1. Integration of teachers and administrative staff;
2. Encouragement and incentive to place skilled and experienced teachers and administrators in the core city schools;
3. Use of teacher aides and paraprofessionals;

4. Human relations training for all School District employees;

5. Inservice training on both district-wide and individual school bases;

6. Extended work years for certain teachers on a voluntary basis;

7. Programs under Senate Bill 174;

8. Early childhood programs such as Head Start and Follow Through;

9. Classes in Negro and Hispano culture and history; and

10. Spanish language training.

Those programs which are already in effect should be continued in the 1970-71 school year, with any modifications which the Board deems necessary in order to carry out this Order.

C. Desegregate grades one though six of the 14 Court-designated elementary schools, as follows:

1. Seven of such elementary schools shall be desegregated by September, 1971;

2. The remaining seven of such elementary schools shall be desegregated by September of 1972.

Desegregation shall mean that each of said schools shall have an Anglo pupil composition in excess of 50 percent.

D. Desegregate Baker Junior High School as follows:

1. Substantial progress shall be made in desegregating Baker Junior High School by the fall of 1971, along the lines set forth above for elementary schools.

2. Desegregation of Baker Junior High School shall be completed by the beginning of the school year in the fall of 1972.

E. Desegregate Cole Junior High School along the lines set forth above for Baker Junior High School or, in the alternative, establish Cole Junior High School as an open school for special education and other special programs now in effect or which the Board may wish to put into effect in the future by the school year beginning in the fall of 1971, at the option of the Board of Education.

In the event the Board chooses the second alternative, the Cole Junior High School subdistrict boundaries established for the year 1969-70, shall remain in effect but pupils living therein may transfer to other junior high schools within the school district on a space-guaranteed basis without regard to the effect on the racial composition of Cole Junior High School.

F. Establish Manual High School as an open school for the continuance and expansion of the vocational and pre-professional training programs which have been instituted by the principal, the faculty and staff. The Board shall retain the present subdistrict boundaries of Manual High School but pupils living therein may transfer to other senior high schools within the school district on a space-guaranteed basis without regard to the effect on the racial composition of Manual High School.

G. Between now and the beginning of school in the fall of 1971 and continuing through the fall of 1972, the Board shall institute an intensive program of education within the community, teaching staff and administration orienting teachers in the field of minority cultures and how effectively

to deal with minority children in an integrated environment and educating the community as to the educational benefits and values to be derived from desegregation and integration.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this shall constitute a Final Judgment in the case and shall be entered as such provided, however, the Court shall retain jurisdiction for the purpose of supervising its implementation and modifying its provisions as may be necessary from time to time. In any event, there being no further substantive matter to decide there is no just cause for delay and the entire matter can now be appealed.

DATED at Denver, Colorado this 8th day of June, 1970.

BY THE COURT:

/s/ WILLIAM E. DOYLE
United States District Judge

APPROVED AS TO FORM:

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Defendants', etc. Notice of Appeal

(Filed June 16, 1970)

NOTICE is hereby given that all Defendants herein except James D. Voorhees, Jr., John H. Amesse, and Rachel B. Noel, as individuals, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Final Decree and Judgment entered in this action on June 11, 1970.

BENJAMIN L. CRAIG
Benjamin L. Craig
1415 Security Life Building
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Attorney for Defendants, except James D. Voorhees, Jr., John H. Amesse and Rachel B. Noel, as individuals.

Plaintiffs' Notice of Appeal
(Cross-Appeal)
(Filed June 24, 1970)

Notice is hereby given that all plaintiffs herein hereby appeal to the United States Court of Appeals for the Tenth Circuit from that portion of the final judgment entered in this action on the 11th day of June, 1970, relating to:

1. The Court's failure to grant relief to those schools whose combined Negro and Hispano enrollment was in excess of 70%;
2. The Court's failure to find that the attendance area boundaries of certain schools were intentionally gerrymandered to isolate and confine Negro and Hispano children and that such acts constitute *de-jure* segregation;
3. The Court's failure to find that the neighborhood school system is unconstitutional where it in fact produces segregated schools, regardless of the intent of the Board;
4. The Court's failure to require that all desegregation and integration be accomplished by September, 1971.

Plaintiffs' Notice of Appeal

Dated this 24th day of June, 1970.

/s/ Gordon G. Greiner
Gordon G. Greiner
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292-9200

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Attorneys for Plaintiffs

Decision by Court of Appeals: 10th Circuit on Motion for Stay, etc.
Nos. 336-70 and 337-70

(Filed March 26, 1971)

MARCH TERM—MARCH 26, 1971

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

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WILFRED KEYES, *et al.*,

Plaintiffs,
Appellees in No. 336-70
Appellants in No. 337-70

v.

SCHOOL DISTRICT No. 1,
Denver, Colorado, *et al.*,

Defendants,
Appellants in No. 336-70
Appellees in No. 337-70

Heretofore, and on March 2, 1971 the Defendants, Appellants-Appellees, School District No. 1, Denver, Colorado, et al., filed a motion for a stay of the final decree and judgment of the United States District Court for the District of Colorado entered in the captioned cases. A response on behalf of Plaintiffs, Appellees-Appellants, Wilfred Keyes, et al., was requested by the Court and such response has now been filed.

The Court, after considering the motion and response, determines that because of events which have occurred

since July 28, 1970, when this Court denied a similar motion for stay, the motion should now be granted.

As urged in the motion, at the time the cases were submitted upon their merits the Court indicated a desire to reach an early decision in the cases on the merits and it was felt by the members of the Court that, because of the anticipated early decision, a stay was not necessary. Thereafter, the United States Supreme Court announced that it would hear oral arguments on October 12, 1970 in *Swann* v. *Charlotte-Mecklenburg Board of Education*, No. 281, and several other school desegregation cases. Such arguments were heard and this Court then determined that a decision in the captioned cases should be withheld until this Court had the benefit of the anticipated Supreme Court decisions in the *Swann* and combined cases. Decision in these have not been announced.

By reason of the fact that the original decree provided three steps in the Plan for desegregation of Denver Public Schools, step one has been carried out; the School District is about to finalize the implementation of step two; and we are convinced that it would be unfair to the School District to compel it to take further steps in the implementation of the total plan until this Court and the party litigants have the benefit of the United States Supreme Court decisions in the *Swann* and combined desegregation cases, above mentioned, which are expected to be announced in the near future.

Therefore, the requested stay is granted until further order of this Court, and all further proceedings pertaining to such portions of the plan as have not heretofore been implemented, shall be, and the same hereby are, stayed.

This stay is prospective only in its application and it shall not require the undoing of any steps of implementation which have heretofore been taken to carry out the orders of the United States District Court for the District of Colorado herein.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

/s/ (Illegible)
Deputy Clerk

Decision by U. S. Supreme Court on Stay, etc.

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C.

(April 26, 1971)

No. ..... WILFRED KEYES v. SCHOOL DISTRICT NUMBER ONE, DENVER, COLORADO

PER CURIAM

The sole basis for the Tenth Circuit's action in granting the stay of the District Court's order in this case was the view "that it would be unfair to the School District to compel it to take further steps in the implementation of the total plan until (the Tenth Circuit) and the party litigants have the benefit of the United States Supreme Court decisions in the *Swann* and combined desegregation cases. . . ."

The decisions in those cases having now been announced, it is proper to vacate the stay and remit the matter to the Court of Appeals freed of its earlier speculation as to the bearing of our decision in the *Swann* cases.

We, of course, intimate no views upon the merits of the underlying issues.

Mr. Justice White took no part in the consideration or decision of this matter.

Opinion of Court of Appeals

(Dated June 11, 1971)

Reprinted in Appendix to Petition
for Certiorari, pp. 122a-158a

See 445 F.2d 990

Judgment of Court of Appeals

(Dated June 11, 1971)

Reprinted in Appendix to Petition
for Certiorari, pp. 159a-160a

Decision by Court of Appeals for "Clarification of Opinion"

(Filed August 30, 1971)

JULY TERM—AUGUST 17, 1971

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

Nos. 336-70 and 337-70

WILFRED KEYES, etc., *et al.*,

Plaintiffs-Appellees,

v.

SCHOOL DISTRICT NUMBER ONE, DENVER, Colorado, *et al.*,

Defendants, Appellants,

and

MR. AND MRS. DOUGLAS BARNETT, etc., *et al.*,

Intervening Defendants.

Appellees-plaintiffs in the captioned appeal have filed what they denominate as a "Motion For Clarification Of Opinion." As pointed out in that motion, both the Trial Court and this Court have determined the Hallett and Stedman schools to be *de jure* segregated schools. Under authority of our opinion, immediate steps should be taken to formulate and carry out a plan of desegregation for such schools. We do not deem this action to be a proper function of an Appellate Court.

Decision by Court of Appeals for "Clarification of Opinion

The authority of the Trial Court to hear these matters and to determine the proper relief to be granted is clearly set out in the last sentence of our opinion.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

Order Granting Certiorari

January 17, 1972

The petition for a writ of certiorari is granted. Mr. Justice White took no part in the consideration or decision of this petition.

Supreme Court of the United States

No. 71-507 ~~, October Term, 19~~

Wilfred Keyes, et al.,

Petitioners,

v.

School District No. 1, Denver, Colorado, et al.,

ORDER ALLOWING CERTIORARI. Filed January 17 , 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

Mr. Justice White took no part in the consideration or decision of this petition.

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(Denver Public Schools Policy 5100)

DPS Policy 5100

DENVER PUBLIC SCHOOLS POLICY 5100

Subject: Equality of Educational Opportunity

Reference: Minutes of the Board of Education, May 6, 1964.

1. POLICY

"This Board of Education recognizes that all children within the District, regardless of racial or ethnic backgrounds, are equally entitled to the benefits of good education and that to secure such benefits the needs and aspirations of all children must be considered.

Barriers of prejudice, discrimination, and of ignorance impede equality. Individuals, schools, and community need to work together to help to overcome these barriers. Equality of educational opportunity can be achieved most readily when school and community provide conditions which enable each child to develop to his full potential.

Because individuals differ greatly in their backgrounds, their capacities, and their motivations, equality of educational opportunity must not be conceived as the same opportunity for each person; that is, for example, as schools with the same curriculum, guidance, and instruction.

The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentration and the establishment of more heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity. This does not mean the abandonment

of the neighborhood school principle, but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees.

The individual group contributions of ethnic and racial minorities, as well as those of the majority, must become increasingly notable in the school through educational opportunities in human and intercultural relations, both for pupils and for school employees.

Finally, this Board recognizes that full realization of equality of educational opportunity involves programs which include some tried and some untried practices."

2. EFFECTIVE DATE. This policy is effective on May 6, 1964.

Distribution
All schools
and departments

August 24, 1964

Plaintiffs' Exhibit 2

(Resolution Number 1490)

Part I

Policy 5100, Denver Public Schools, recognizes that the continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools and that a reduction of such concentration and the establishment of an intergrated school population is desirable to achieve equality of educational opportunity.

Therefore, in order to implement Policy 5100, the Board of Education hereby directs the Superintendent to submit to the Board of Education as soon as possible, but no later than September 30, 1968, a comprehensive plan for the integration of the Denver Public Schools. Such plan then to be considered by the Board, the Staff and the community and, with such refinements as may be required, shall be considered for adoption no later than December 31, 1968.

Part II

1. The Board of Education is faced with a serious social crisis. We believe a majority of citizens of Denver have confidence in the ability of this Board to meet the complex, difficult and controversial issues involved in this crisis. However, the Board is aware of wide and deep distrust of its motives and actions by certain racial and ethnic groups, and individuals within those groups. It is accused of injustice, of perpetuating, without concern, the educational and social evils occurring with de facto segregation in schools. These groups have been promised much by society in general. Repeated failures of performance have alienated good friends, have created wide distrust of motives and have created an atmosphere where responsible leadership

and concerned citizen support are being lost to the schools and to the community. We are increasingly aware of feelings of antagonism, of isolation, of hopelessness, of deep and unyielding bitterness, real and intense. These feelings are strongly held and are not subject to easy communication to those who do not have a similar background. The Board now states that its policy will be to eliminate distrust of its motives and performance by the minority community.

2. Also, the Board is aware of a different and widespread community distrust of Board motives and actions. This is evidenced by a substantial credibility gap, based on the fears of many citizens that their freedom of choice of home location and concurrent school selection is or will be threatened by proposed Board actions, particularly actions in the solution of the educational problems of de facto minority ethnic and racial segregation. The words "bussing", or "reverse bussing" (meaning the transportation of white children into minority populated schools), express the undefined fears of large numbers of Denver citizens that somehow the Board and its policies threaten deeply felt sensibilities. Here there is abroad in Denver a degree of distrust that is frightening in its intensity and has many ramifications. Expressions of such feelings are frequently prefaced by express denials of prejudice, racial or otherwise, and the Board accepts such denials at face value and as evidence of the existence of good will towards the minority communities of Denver. The Board recognizes that the voluntary support of citizens who presently hold such views is necessary to the proper functioning of the school system.

3. A third source of distrust of Board motives and performance is that body of citizens of all races, including many whites, who recognize and accept that segregated education

is harmful to both minority and majority children and who now insist that the Board increase its efforts to eliminate the educational evils of de facto segregation. The Board has obviously failed to convince these people that its past actions, and particularly the recent approval of major junior high school construction and the proposed voluntary movement of elementary minority pupils represent good faith efforts in this area. The confidence of these citizens must be restored and the Board proposes to seek their active support.

4. A fourth force presently apparent and widely communicated to the Board is a reluctance throughout the city to see the tax load—primarily the real estate tax load—increased in any degree. In this area, the Board has apparently failed to communicate to the community the validity of the financial needs of the District. Increased State aid, if and when forthcoming, will be welcome but realistically can do little to reduce the real estate tax levy and will; in the long run, create a further class of concerned taxpayers to whom the function, purpose, method and objectives of the school system must be explained and whose understanding of such matters must be obtained. The Board states that its policy is and will be to foster such understanding.

5. The death of Dr. Martin Luther King has focused the attention of concerned people of good will upon the deep and festering injustices of modern urban existence with its contradictions of opportunity and achievement, in an America dedicated, at least in theory, to the equality of opportunity for all men. Particularly in the area of public education, Dr. King's death has caused thoughtful persons of all races, particularly whites, to reassess beliefs long

and dearly held and to question the pace of change and even its direction.

A. The Board is resolved to act as a unifying agency for Denver in these times. To this end, it requests the Superintendent in implementation of the purposes of Resolution No. 1490 and in response to the community concerns stated above, to include within the plan required by Resolution No. 1490, or to submit separately but at the earliest practical time or times, a further plan, or a series of plans, including specific timetables, to accomplish the following:

1. The reduction of concentrations of minority racial and/or ethnic groups in schools and the integration of school populations.

2. The actual existence of equality of educational program in all schools, regardless of location, including, without limitation, faculty quality, training, experience and attitude, course offerings, equipment and facilities.

3. The active participation in programs within the metropolitan Denver area to establish more diverse or heterogeneous racial and/or ethnic school populations.

4. The emphasis at all instructional levels of the individual and group contributions of ethnic and racial minorities.

5. The maximum involvement, consistent with maintenance requirements, of the school plant in the community activities of the Denver metropolitan area, to commence during the forthcoming summer.

6. Human relations and sensitivity training for all teaching and administrative personnel and assurance that

personnel recruitment and assignment policies are consistent with the realities of our multiracial and multiethnic world.

7. The establishment of citizen community support to accomplish the widest possible community understanding of the aims, purposes, motives and affairs of the School District.

B. To consider, among such other factors as appear proper, the following:

1. The use of transportation and the degree to which transportation should be mandatory or voluntary.
2. The desirability of temporary or permanent closing of certain schools.
3. The existence of community attitudes and opinions.
4. The requirement for all children of course offerings in minority group cultural, historical, social and economic contributions to our society and of qualified minority group member teachers.
5. The development of "magnet" or "laboratory" schools in core areas, including attendance policies for such schools.
6. The use of community resources and resource people.
7. The availability to all children at all levels of textbooks and other instructional materials which fairly and favorably represent minority groups and individuals.
8. The availability for use by persons in all parts of the the District of school facilities for extracurricular educational, recreational and community purposes.

Plaintiffs' Exhibit 2

9. The feasibility of some form of extended school year.

10. The degree to which present vocational, technical and job oriented course offerings meet the needs of the children of this District.

11. The active extension of intercultural and interracial experiences for children, including the expansion of the cultural art center program and similar programs.

C. The Board is impelled by a sense of urgency in these matters. To this end, it has requested the Superintendent to submit his plan responsive to Part I of this resolution within the periods therein provided. The plans required by Part II should be submitted as and when prepared for Board and public consideration and for adoption at the earliest possible time. As an example only, plans for the fullest use of school facilities for community summer programs are obviously needed now. Also, preliminary plans for community organizations can properly be expected shortly. In any event, the Board requests the Superintendent to present plans responsive to Part II of this resolution not later than the regular meeting of the Board in September 1968 and periodically thereafter until complete plans are forthcoming.

Plaintiffs' Exhibit 20

(Excerpts from Report and Recommendations to the Board of Education, School District No. 1)

Report and Recommendations
to the
Board of Education
School District Number One
Denver, Colorado
by
A Special Study Committee
on
Equality of Educational Opportunity
In the Denver Public Schools

James D. Voorhees, Chairman
Irving P. Andrews, Vice-chairman
Earl Rinker, Vice-chairman

James A. Atkins
Miss Mildred Biddick
Mrs. Lyman Blackwell
G. Keith Bogert
Alfred G. Brown
Ronald E. Carlson
Roger Cisneros
Milton A. Davidson
Miss Mary C. Doremus
Mrs. W. Ross Ewing
Thomas Faxon
Mrs. Edward J. Fikany
Mrs. James C. Flanigan
Harry D. Hawkins
Mrs. Lloyd M. Joshel
Raymond A. Kimball
Andrew J. Konersmann
L. Edward Lashman, Jr.
Cletus Ludden
Mrs. Donald C. McKinlay
Mrs. Edmond F. Noel
Mrs. L. Joseph Pittroff
Mrs. Clyde W. Preston
Lloyd M. Schmidt
Pete Shannon, Jr.
Bernard Valdez
Mrs. Franklin P. Wherry
Miss Vivienne S. Worley
Minoru Yasqui

March 1, 1964

Established by the Board of Education
School District Number One
Denver, Colorado
1962

Plaintiffs' Exhibit 20

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In The City And County Of Denver
And State Of Colorado

Plaintiffs' Exhibit 20

INTRODUCTION

THE PROBLEM

The Special Study Committee on Equality of Educational Opportunity is pleased to submit this Report and Recommendations. It was charged to study and report on the present status of educational opportunity in the Denver Public Schools, with attention to racial and ethnic factors, and to make recommendations. This it has done. The Committee's report is presented to the Board of Education and through the Board to the people of the Denver community in the hope that its findings and recommendations will be accepted in the constructive spirit in which they are made.

The members of the Committee brought with them the diverse attitudes of various segments of the total Denver community—geographic, ethnic, racial, economic—ranging from pride in the status quo and objection to any change, through various shades of interest without particular opinion, to feelings that real inadequacies exist, with strong desires for change. Over the period of its work, however, and when facts were fully known and freely discussed, the Committee has gradually found substantial areas of agreement as to principles, findings and recommendations. The extent of agreement within and by a group as diverse as this suggests that when facts are known and freely considered, with mutual respect for apparently conflicting attitudes, solutions can be found to sensitive problems which at first seem insoluble. In this the Committee sees reason to expect substantial acceptance of its report by the total Denver community. The approach must be, however, on a level of mutual trust and mutual respect; agreements of substance and purpose can be had only when each group admits the existence of a position other than its own. Happily, in the

Committee's experience, this did occur. Hopefully, in the public consideration of this report, it will also occur.

The Denver community has pride in its schools. There is pride in its programs for meeting the needs of the most able and ambitious; in its programs for the college bound; in the achievements of the "average" pupil who is motivated toward school accomplishments; in the programs for pupils who are physically handicapped; in the programs for pupils of limited ability (although the need is greater than the teachers and facilities available); in the broad offerings of Opportunity School to help adults in search of training and retraining; and in the national reputation of the Denver system as a forerunner in education.

There is also public concern. There is general concern about overcrowding; concern over the needs of pupils not truly interested in academic pursuits; concern about dropouts; concern for the adequacy of opportunity offered to the brilliant student; concern, widely found, that somehow, through the work of the Committee or otherwise, the rights of members of the majority culture freely to live and associate as they wish and to send their children to schools in their own community were in jeopardy; concern that Denver's residential patterns, however caused, result in unequal educational opportunity for minority children, particularly the Negro racial minority and the Spanish surnamed cultural minority.

It is with this last area of concern that the Committee, because of its charge, has been primarily concerned. There are two separate but interwoven problems. One is the problem of the education of the urban disadvantaged child; the other, the problem of the effect of racial segregation on the educational process. They are not the same problem but because of an apparent correlation of proportionately large numbers of minority racial (Negro) and ethnic

(Spanish-American) groups with the other factors which create the class of urban disadvantaged, the two are generally linked. Care must be taken not to confuse available solutions.

In common with every large city in America, Denver has an appreciable number of citizens who, by virtue of the nature of their lives and their environment, probably, under present conditions, will never be able to compete and to succeed in accordance with the standards of the dominant urban middle class culture, although they may have been entirely adequate and successful in their former, often rural, environment. Experience elsewhere would indicate that unless present trends are reversed, this group will increase numerically and will form a caste whose adult members tend to be permanently uneducated, unemployed and unemployable. Not only does this create a financial drain on the entire community, but it represents a tragic loss in human potential and productivity. These people differ totally among themselves in background and heritage but when exposed to the urban, mechanized, automated and competitive society of a metropolitan center, develop certain similar characteristics. They live crowded into the area of lowest real estate values; they lack skills with which to compete and the skills they have are no longer of value; they lack the ability to achieve according to the standards of the dominant culture; they lack motivation for traditional education; they lack satisfaction from personal achievement; they are the last hired and first fired; they are in short, disadvantaged.

In Denver, as in other northern cities, the urban disadvantaged group is made up of all races and ethnic backgrounds. A large part are Negroes from the rural South, who arrive unskilled, partially educated, burdened by traditions of legal inequality and unable to compete success-

fully. In common with most Negroes, they have experienced subtle or overt acts of discrimination throughout their lifetimes, with inevitable damage to the self image in both adults and children. While they have been exposed to the cultural background and standards of the majority, they have not realized its benefits and to them the principles of democracy may be far from its practices.

Perhaps a greater number of the urban disadvantaged are the Spanish surnamed from New Mexico and southern Colorado, brought to the area first as miners and agricultural workers and forced into the city by the closing of the mines, the seasonal nature of agricultural work and the increased mechanization of farms. These people and their ancestors have lived for more than three centuries in the small villages in the valleys and mountains of the upper Rio Grande. They bring to Denver value patterns and cultural characteristics which often interfere with adjustment to urban life and the values now dominant in an urban competitive society. For example, goals based upon the concept that worth depends upon the accumulation of property or money have little meaning to a people whose traditional and most valued characteristic is that of sharing with others what they may acquire.

The urban disadvantaged most frequently move to the older sections of town, where race, ethnic identity, language barriers, lack of motivation factors, lower educational standards, lack of skills and chronic unemployment combine to create a "culture of poverty" from which escape becomes most difficult. A child of whatever racial or ethnic background in such a culture, without fault of his own, usually adapts to the value characteristics of his neighborhood. While these value concepts are not generally the accepted values of the middle class majority culture, they do have strengths and characteristics upon which much can be built.

Plaintiffs' Exhibit 20

However, the public schools, basically reflecting the interest of the majority culture, have established standards, methods, vocabulary and procedures based upon the experiences and value characteristics of that culture, and with these the urban disadvantaged child cannot achieve. Predictably, unless the educational system to which this child is inducted recognizes and compensates for the factors which since his birth have affected him, he will inevitably be behind when he enters the system, will get further behind as he attempts to progress through it, will achieve significantly less from it, and in a disturbingly high percentage of instances will never complete the secondary educational program. Because of the Committee's particular charge and because of the high incidence of minority racial and ethnic composition in the urban disadvantaged in Denver, this report will necessarily deal at some length with the problems of this group.

Entirely apart from the problem of the disadvantaged child, there is in Denver real possibility of unequal educational opportunity because of the existence of clusters of minority racial (Negro) and ethnic (Spanish surnamed) groups within the city.

In a "neighborhood" school system one inevitable result of concentrations of races and ethnic groups because of housing patterns is concentrations of children in the schools into the same groups. There is abundant authority to the effect that such "de facto" separation in schools may result in educational inequalities, and there is in Denver wide belief among the racial and ethnic minorities that the schools to which their children go are in some way unequal. In addition, however, there is the fact that there is not available to many children (perhaps a majority of the total school population, regardless of race or ethnic background) the democratic experience of education with members of

other races and groups with which they will have to live and compete. The responsibility to eliminate or reduce this result where possible and to compensate for it where elimination is not possible by the removal of prejudice (whether based on color, ethnic or religious background, false values, or any other cause) must be the responsibility of the school to its pupils. This report will suggest ways in which this may be done.

Denver retains two major assets: Effective leadership still within the community and a framework of public opinion which has not yet polarized into opposite camps. These assets have been lost to other cities to the east and west where similar problems have existed and have not been met firmly and openly. So far, perhaps because of the relative smallness of the numbers involved, or perhaps because of the initiative taken by various local groups, there has not yet been the massive flight to the suburbs which has so often occurred and is now occurring in other major population centers. This has resulted in the retention within metropolitan Denver of responsible leadership in all of the various groups which make up the population of the City. Also, while areas of tension exist, the people of Denver are still communicating. There is time in which to find and apply reasonable solutions.

The Committee hopes that what follows will be of help in reminding Denver that while it has a fine school system it also has problems, in common with all other large urban areas, the solution of which must be accepted as the responsibility of the total community. As a functioning part of the total community, the schools will have a part to play.

THE COMMITTEE

The Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools was created by resolution of the Board of Education on June 27, 1962.

Plaintiffs' Exhibit 20

Members of the Committee were selected by the Board from more than 500 names submitted by interested citizens and organizations and were formally appointed on November 7, 1962.

Formation of the Committee stemmed from proposals included in the School Administration's February 1962 Report to the Board on Pupil Population, School Boundaries, Pupil Transportation, and School Buildings to construct a new junior high school at 32nd and Colorado Boulevard and to continue certain optional boundary lines in the East-Manual high school area. Because the population which lives within the boundaries proposed for the school at 32nd and Colorado Boulevard is predominantly Negro, these proposals led to statements by some citizens that any such action by the Board would constitute "de facto" segregation of pupils and that this was forbidden under the United States and Colorado constitutions.

At several of its meetings in March, April and May, 1962, the Board of Education was urged to consider racial-ethnic factors in determining school boundaries, in locating new schools, and in other aspects of school operation. In addition, other evidence had reached the Board that throughout certain areas of Denver there was public concern over the educational opportunity offered to pupils of minority racial and ethnic groups. Appointment of a special study committee to include citizens of the community, was urged by groups representing many segments of the community, not only those immediately affected.

In creating the Special Study Committee, the Board of Education affirmed in its resolution that "all children within the District, regardless of racial or ethnic background, are equally entitled to the benefits of good education, and that to secure such benefits, the needs and aspiration of all children must be considered."

Plaintiffs' Exhibit 20

The Committee was charged to "study and report on the present status of educational opportunity in the Denver Public Schools, with attention to racial and ethnic factors in the areas of curriculum, instruction and guidance; pupils and personnel; buildings, equipment, libraries and supplies, administration and organization; school-community relations, and to recommend improvements in any or all of such specific areas."

The Committee which made this study and prepared this report was composed of a chairman, two vice-chairmen, three residents, not employed by the Denver Public Schools, from each of the eight high school areas of the District, and six professional staff members from the Denver Public Schools.

The members of the Committee, in addition to geographic diversity, also brought with them attitudes of the varied racial, ethnic, cultural and economic groups which form the total Denver community.

In the course of its study, the Committee invited all school employees and any interested organizations and citizens to write suggestions and comments relative to its area of inquiry. Nearly 200 letters were received and thoughtfully considered. Interviews were conducted with administrative personnel, with principals, teachers and non-teaching personnel, with parents, students and interested citizens. Elementary, junior and senior high schools were visited (including classroom visits) in all six general areas of the Denver school system. Reports from other cities where similar surveys had been conducted were studied. Consultants in the field, from Denver and from other parts of the country, spoke to and counseled with the Committee as a whole and with small groups. The school curriculum, its modifications, current pilot projects in instruction, text-

books and teaching materials and equipment were studied. Pertinent data in many areas were gathered and analyzed by the Committee. Open meetings were held in the eight high school districts in Denver, at which in excess of 2300 citizens expressed their views. A professional opinion research firm was employed to obtain information on community attitudes toward the schools. A summary of this report will be found commencing on Page 38 of the Appendix. Twenty-five meetings of the full Committee were held; 30 meetings of the steering committee were held; 132 meetings of individual subcommittees were held (not including countless interviews by individual members); and 87 visits in 62 different schools were made.

The Planning Services Department of the Denver Public Schools divides the school district into six areas. To compare data the same six areas have been used by the Committee. It must be noted that these area boundaries are based on elementary school districts so that, while junior and senior high schools are included in the areas where they are located geographically, such schools may draw pupils from beyond the area in which they are situated. Page (1) of the Appendix shows a map of these six areas and a detailed description of them commences at Page (9) of the Appendix.

The Committee is deeply grateful to the Denver Public Library and to the very many individuals and organizations who so unselfishly made available their help and counsel, without which this report would not have been possible.

In this area of the Committee's investigation, it has reviewed the principle of the "neighborhood" school and its application in the Denver school system; the method by which fixed but not unchangeable boundaries are established; the existence of optional areas of attendance; the

transfer of pupils; and the use of pupil transportation at School District expense.

BOUNDARIES — As used in this report, the "neighborhood school" is a school which is more or less centrally located within an area bounded by definite lines which children within that area are expected to attend. The report will discuss the policies which in the past have governed the establishment of school boundaries and the location of schools in Denver and will suggest additional policies which now are applicable. However, the basic principle of neighborhood schools is the prescribing of a clearly defined *geographic* area, determined by considerations which best serve the interests of all of the pupil population. The neighborhood school principle should not, however, be used to freeze school boundaries and changing conditions will require periodic review and revision of established boundaries.

The Committee generally endorses the application of the neighborhood school concept in the organization of the Denver school system, not because it is traditional in the American school system or because it has been adhered to in the past in Denver but because in the Committee's opinion an objective evaluation of the benefits and predictable results outweigh deficiencies when compared with other methods of assigning pupils to schools. Among such benefits are rational distribution of the school population, convenience to the child in getting to and from the school, a close home and school relationship between parents and teachers, placement of pupils in relation to maximum use of school plants.

The Committee is fully aware that the composition of the school population within any attendance areas tends to be

homogeneous in all American cities, and its investigations confirm that in Denver this occurs in a substantial number of individual school areas, particularly at the elementary level. In approving the continued adherence to the neighborhood school principle, the Committee emphasizes that it should never be used deliberately as a device to contain or restrict any ethnic or racial group.

In administering the allocation of pupils to schools under a neighborhood school plan, it is axiomatic that the reasons and policies which dictate how boundaries are drawn and maintained are all important. The Denver Board of Education has no written policy governing the setting of boundaries; however, the Committee was given the following unofficial summary of rules and procedures which currently govern decisions regarding boundaries and which are apparently well known to and followed by those charged with this duty:

There is every evidence that these rules and procedures have been followed carefully and without prejudice in the granting of transfers. Approvals are granted only where exceptional circumstances, within these rules, permit an exception to the principle that each student should attend his own neighborhood school. Once such a transfer has been approved, the circumstances are reviewed annually to verify that the condition which resulted in transfer still applies.

During 1963, 122 transfers to a school other than the one in the district in which they live were approved for elementary school pupils (less than 2/10 of one per cent of the total pupils); 29 for junior and senior high school students (less than 7/100 of one per cent of the total pupils).

The Committee finds itself generally in accord with the rules governing pupil transfer which are being followed by Denver school administrators. It recognizes fully the need

for keeping tight control of any exceptions to the rules which govern the administration of the neighborhood school principle.

Nevertheless, there appears to be a possibility of continuing firm control of transfers while permitting a flexibility of individual choice.

The open enrollment plan as recommended would provide that at stated intervals (probably annually toward the close of the school year in the Denver system) all schools would be reviewed to determine their student population as compared with their student capacity. Those schools having a previously stated percentage (90% is working well in Detroit) of population to capacity would be declared as open schools. Such a plan of open enrollment has been used in other communities, with reported success.

The names and location of the open schools would be publicized widely before the end of the current school year, giving the number of enrollments outside its own boundaries which would be permitted for each school. Children from any place within the Denver School District would be permitted to request enrollment in those schools, with acceptance on a first-come, first-served basis. Such transfers would be permitted for each school until its previously established quota had been met, or until a previously announced date in the new school year had been reached.

Under this type of transfer, and this type only, no reason for the requested transfer would be expected or required. Students taking advantage of this open enrollment would be required to furnish their own transportation.

Recommendation On Pupil Transfers

The Board of Education should supplement its present transfer policy by the adoption of a plan of limited open

enrollment generally in accordance with the procedures discussed above. The plan adopted by the school system in Detroit is suggested as a model.

TRANSPORTATION OF STUDENTS

At the present time, students are transported at District expense only under certain circumstances.

The extent of transportation of students in the current year, together with the reasons for such transportation, is given in the following summary. Except for students at Boettcher School, no high school students are transported:

Reason	No. Elementary Pupils	No. Junior High Pupils
From overcrowded schools to those with available capacity	183	0
From newly annexed areas which do not have any schools	1,552	436
From Lowry Field	331	129
From within own school sub-district where required traveling distance (possibly allowing for unusual safety hazards) is over ¾ mile for elementary pupils or 1½ miles for junior high pupils	1,493	3,270
To Boettcher School	102	59 (senior high pupils included)

The Committee believes that the transportation of students is sometimes necessary but is never desirable because, among other disadvantages, it involves considerable added costs, inconveniences to pupils and parents, particularly in emergency or illness, inability of the pupil to enter into extra-curricular activities, and difficulty in promoting close contacts with parents.

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Transportation of pupils for the sole purpose of integrating school populations is regarded by the Committee as impractical.

RECOMMENDATION ON PUPIL TRANSPORTATION

Transportation of pupils should be regarded as an expedient rather than as a solution to problems, including the problem of racial imbalance in the schools.

OPTIONAL AREAS

Optional Areas are defined as specific geographic areas in which the students who reside therein have a free choice to attend either one or the other of two schools designated to serve such area. The Committee finds that optional areas, once established for whatever reason, have a tendency to continue after the reasons which caused them to be formed cease to exist. In recent years, however, existing optional areas have been reduced and at the present time, after the boundary changes which were made effective in September, 1962, only the following optional areas remain:

A. *High Schools**

Manual-North, Manual-East (two areas), East-Washington

B. *Junior High Schools***

Smiley-Cole

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* Appendix page 7. Map of Senior High School Boundaries and Optional Areas.

** Appendix page 6. Map of Junior High School Boundaries and Optional Areas.

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C. *Elementary Schools****

Columbine-Harrington, Park Hill-Stedman, Lincoln-McKinley

The advantages of establishing fixed geographic areas for all schools have been discussed and are recognized by the Committee, subject only to the adoption of a limited open enrollment policy and the continuation of the transfer policies now in effect. The use of optional areas forms no part of rational administration of the system for fixing boundaries which the Committee has recommended.

RECOMMENDATION ON OPTIONAL AREAS

All optional areas should be fully eliminated at the earliest possible date.

* * * * *

2. The Board should adopt a written policy recognizing that the Denver school system necessarily deals with pupils of different racial, ethnic, economic and cultural backgrounds. To accomplish equality in the application of the education process, sensitivity to, and the practice of, good human relations at all levels is required.

3. The administration should formulate by the end of the current school year a program of inservice human relations training, making use of applicable and available resources, both in the community and from outside.

4. All teachers and all other school personnel should complete such program without delay, with priority

*** Appendix Map 1. Six Areas Based on Elementary School Boundaries.

to be given to personnel assigned to schools containing substantial numbers of culturally disadvantaged pupils.

5. The administration should continue to cooperate with universities and colleges in promoting seminars in the field of human relations for teachers and other school personnel. These seminars should include materials drawn from intergroup relations, sociology, anthropology, psychology and other behavioral sciences.

ASSIGNMENT AND TRANSFER OF TEACHERS

Teachers employed by the Denver Public Schools are on probationary status for the first three years. After three years of successful experience, teachers achieve tenure status. During the probationary period the teacher's services are appraised twice each year, and if during this period a teacher is found to be unsatisfactory, he is "counseled out" and the usual result is that such teachers leave at the end of two years. The administration does not assure any particular assignment and reserves its prerogative to place the new teacher where it deems advisable.

Changes of assignment (transfers) are now governed by Policy 1617A effective April 1, 1963 (Appendix pages 31-34).

The Committee has seen no evidence that the administration has made any effort to appeal to qualified teachers to consider assignment or transfer to schools in areas largely populated by culturally disadvantaged children. It does appear that the percentage of teachers on probationary status in such schools may be higher than the percentage of such teachers in other areas.*

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* Appendix page 35, Study of Teacher Status—Elementary and Secondary Schools.

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In the earlier part of this section of its report, the Committee has discussed various means to make more effective the educational process in schools largely attended by culturally disadvantaged children. These practices (small class sizes, use of teacher aides, reduction in administrative duties and human relations training) appear to the Committee to be incentives which should be used to implement the challenge to professional teachers to succeed in such assignment, so as to induce qualified teachers to seek assignment to such schools. An affirmative recognition of the value of such service by the Board and the administration would also help.

While precise statistics are not available, the Committee believes that almost all of Denver Negro teachers were initially assigned to schools having a high proportion of Negro students. A few have been transferred to other schools. There is now at least one Negro teacher in each senior high school except for Manual which has eleven. Nine out of thirteen junior high schools have one or more Negro teachers, and Cole has thirty-three. One or two Negro teachers have been placed in each of seven elementary schools other than those which contain large numbers of Negro children.*

Spanish surname teachers are fewer in number than Negro teachers and the housing pattern of people of Spanish-American background is more dispersed. However, it does appear that relatively few Spanish surnamed teachers have been assigned to areas where there are few or no residents with Spanish-American background.

As a result of its interviews the Committee is convinced that race has been relevant in the assignment of teachers.

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*Appendix page 36, Estimate of Distribution of Teachers of Minority Background.

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It appears that the administration has been extremely reluctant to place Negro and Spanish-American teachers in predominantly white schools because of concern with a possible lack of acceptance on the part of a white neighborhood and a realistic assessment of the possible lack of support by some principals and faculties.

The Committee also has found evidence that some teachers are assigned and transferred without regard for their training for the particular grade. Because secondary teaching calls for certain definite skills and elementary teaching for others, the teaching process at all levels can suffer from this practice. This would be particularly true in the education of culturally disadvantaged children.

Recommendations As To Teacher Assignment and Transfer

1. The Board of Education should establish and enforce a policy that qualified teachers of minority background will be assigned throughout the system.
2. The constructive policy of the Superintendent's office in establishing written transfer policies should be continued.
3. All transfer policies should be reviewed annually by the Board and by the administration.
4. School principals should communicate with the particular administrative official who actually makes assignment decisions in regard to transfer and assignment of teachers into and out of their schools. Teachers should be encouraged to undertake the same type of conference with such administrator. Principals, however, should not have final authority to accept or reject any teacher assignment or transfer.

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5. After a transitional period during which the other recommendations of this Committee are implemented, particularly with respect to training in human relations, no teacher (probationary or permanent) should be assigned to teach in a school containing substantial numbers of culturally disadvantaged children unless his preparation, experience, and/or personal qualifications demonstrate the probability that he will be successful in teaching culturally disadvantaged children.

6. A systematic program should be established by the administration to encourage teachers to teach in schools attended by culturally disadvantaged children and to emphasize affirmatively the personal rewards and satisfactions gained by teachers who work in such schools.

7. In policy statements adopted by the Board and by the administration, it should be made clear that teacher preference as to assignment is subordinate to other criteria and that each qualified teacher in the system is expected to be able to teach and to be prepared to teach in any school where the administration thinks he can be most effective.

8. Teachers should be assigned or transferred to the elementary or secondary schools with major consideration given to their qualifications for teaching at a certain level.

9. So that this will not be used as an excuse for careless placement or perpetuation of assignments contrary to these recommendations, the residence of a teacher should have nothing to do with his assignment except in unusual cases.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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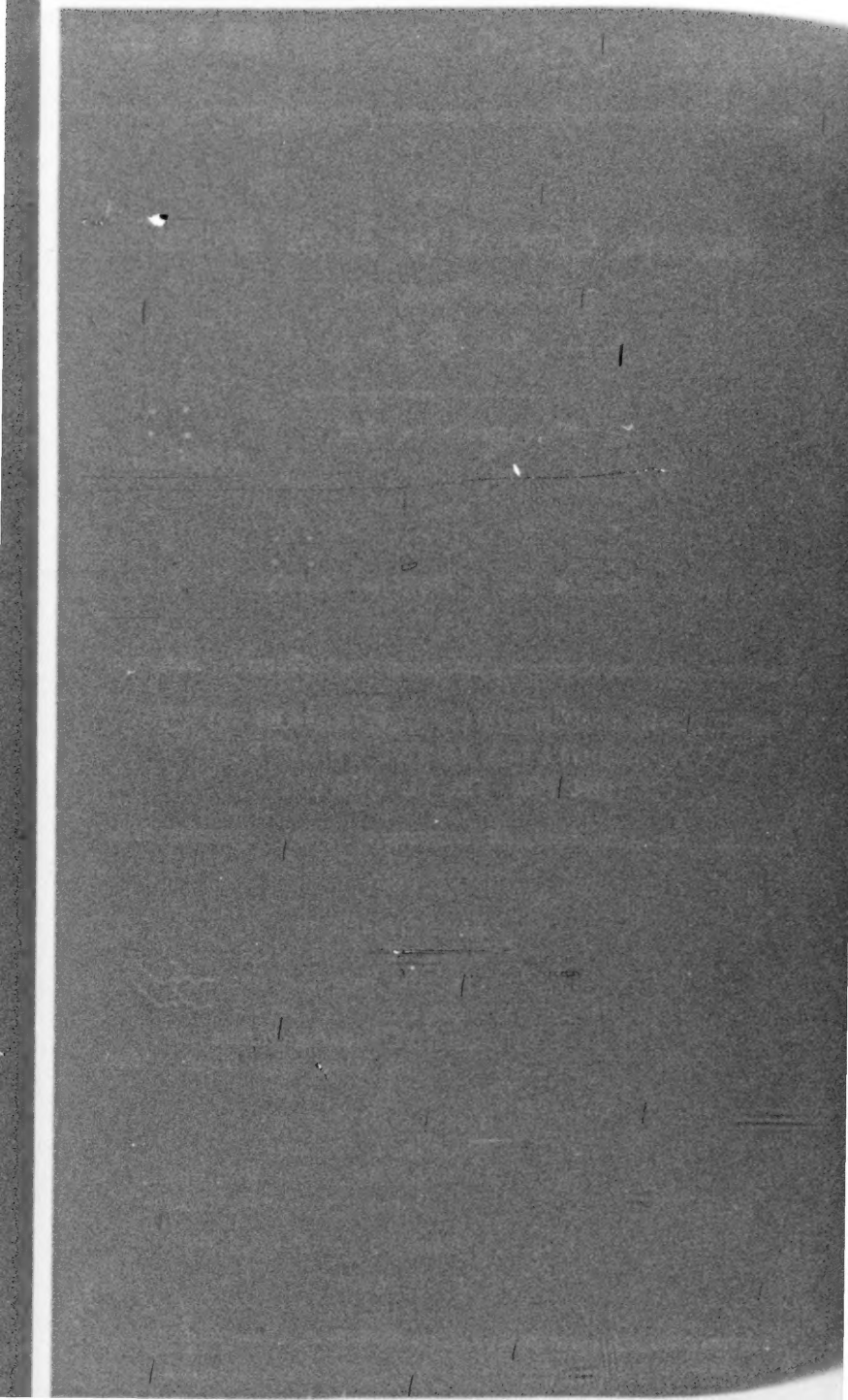

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

WILFRED KEYES, *et al.*,

Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on June 11, 1971.

Opinions Below

The June 11, 1971 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 445 F.2d 990 and is reprinted in the separate Appendix to this Petition, pp. 122a-158a. The prior opinions of the United States District Court for the District of Colorado, also reprinted in the Appendix, are reported as follows: (1) July 31, 1969, granting petitioners' motion for preliminary injunction, 303 F. Supp. 279 (Appendix, pp. 1a-19a); (2) August 14, 1969, on remand to make preliminary injunction more specific and consider applicability of portion of Civil

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(Map)

(See Opposite)

Rights Act of 1964, 303 F. Supp. 289 (Appendix, pp. 20a-43a); (3) March 21, 1970, opinion on merits granting permanent injunction, 313 F. Supp. 61 (Appendix, pp. 44a-98a); and (4) May 21, 1970, opinion on relief or remedy, 313 F. Supp. 90 (Appendix, pp. 99a-121a).

Jurisdiction

The judgment of the Court of Appeals was entered June 11, 1971. On September 8, 1971, Mr. Justice Marshall entered an order extending the time for the filing of this petition to and including October 9, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Question Presented

Whether school authorities who have over several decades created and aggravated school segregation and minimized school integration, and whose policies and practices systematically afford white students greater educational oppor-

tunities than black or Spanish-surnamed students attending segregated schools, must take all possible affirmative steps to eliminate segregation throughout their school system and otherwise equalize educational opportunity.

Statement of the Case

This is a school desegregation action brought by Denver schoolchildren and their parents on June 19, 1969 pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4). While the litigation followed a newly elected school board's cancellation of a partial desegregation plan adopted by the predecessor board, the complaint sought the complete desegregation of the Denver public school system and provision of equal educational opportunities to all Denver schoolchildren.[1]

The Denver School District

The respondent school district is coterminus with the City and County of Denver, Colorado. During the 1968-69 school year—immediately preceding this lawsuit and prior to implementation of the preliminary injunction (303 F. Supp. 279, 289)—the school district operated 118 schools[2] serving 96,577 children. Denver students include significant

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[1] Petitioners' Complaint alleged, *inter alia* (First Count, Second Cause of Action) (emphasis supplied):

> B. By the following described acts, *among others*, defendants and/or their predecessors have over the years and are at present deliberately and purposefully attempting to create, foster and maintain racial and ethnic segregation within the School District; . . .
>
> C. These various actions of said defendants have effected in the School District a significant segregation of pupils by race and ethnicity. . . .

[2] Nine senior high schools, 17 junior high schools and 92 elementary schools.

numbers of Negro (12.0-15.2%) and Spanish-surnamed (15.2-23.1%) children.[3]

During the 1968-69 school year (prior to this suit) there was substantial segregation of students in the Denver public schools, as shown by the following table:

Students Attending Schools:	*White Students*		*Black Students*		*Spanish-surnamed Students*	
	No.	*%*	*No.*	*%*	*No.*	*%*
0-25.0% white	1778	2.8%	10110	74.2%	6174	31.6%
25.1-50.0% white	2931	4.6%	797	5.8%	3885	19.9%
50.1-75.0% white	12075	19.0%	1848	13.6%	5469	28.0%
75.1-100% white	46635	73.5%	877	6.4%	4001	20.5%
	63419		13632		19529	

The Evidence

This pattern of segregated schooling had persisted for a considerable time in Denver.[4] Much of the evidence demon-

[3] The following table shows the distribution of Denver schoolchildren by race and grade level:

	White		*Negro*		*Spanish-surnamed**	
	No.	*%*	*No.*	*%*	*No.*	*%*
Sr. High (10-12)	14,852	72.8	2,442	12.0	3,091	15.2
Jr. High (7-9)	14,855	68.8	2,898	13.4	3,858	17.8
Elementary (K-6)	33,678	61.7	8,304	15.2	12,594	23.1

* Statistics include children of "Other" races in this category; such children constitute 1% of total student enrollment in school district.

[4] Perception of the problem led previous school boards to appoint two committees to recommend solutions, see n. 8 *infra*, and to adopt the plan to desegregate several Denver schools which was annulled by the new board on June 9, 1969 and then reinstated by the district court's preliminary injunction. The district court's order was itself vacated by the United States Court of Appeals for the Tenth Circuit and subsequently reinstated by order of Mr. Justice Brennan. *See Keyes* v. *School Dist. No. 1, Denver*, 396 U.S. 1215 (1969).

strated Denver's use of the now familiar galaxy of techniques by which boards and administrators have sought to preserve school segregation.

Prior to 1950, almost every secondary school and several elementary schools in Denver had "mandatory" attendance zones immediately surrounding them and larger "optional zones" between them; students living in an "optional zone" were permitted to attend either school serving it (PX 20 at p. A-12).[5] While there are no records in evidence showing the use made of this device prior to 1950, thereafter it caused continued attendance of minority-race students at predominantly minority-race schools and avoidance of such schools by white students (H. 63, 78, 112-14; PX 401, 406).

Before 1950, the black and Spanish-surnamed population of Denver generally occupied older portions of the central city.[6] Negroes were concentrated in a well-defined area surrounding the "Five Points," 303 F. Supp. at 282, Appendix at p. 4a. Most of the public schools located within this area were predominantly, if not completely, Negro. *Ibid.* Virtually all of the city's Negro high school students attended Manual High School although their numbers were small enough that the high school was not majority-black; the school also enrolled many Spanish-surnamed students but at that time was the only high school in the Denver

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[5] Citations to the transcript of the hearing on preliminary injunction held in July, 1969 will be given as "P.H. ——." Citations to the transcript of the February, 1970 hearing on the merits will be given as "H. ——." Citations to the transcript of the May, 1970 hearing on relief will be given as "R.H. ——." Exhibits will be identified by reference to the party below introducing them; i.e., "PX ——" and "DX ——" for plaintiffs' and defendants' exhibits, respectively.

[6] Prior to this Court's decisions in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) and *Barrows* v. *Jackson*, 346 U.S. 249 (1953), Colorado courts enforced racially restrictive covenants. *E.g.*, *Chandler* v. *Ziegler*, 88 Colo. 1 (1930); *Steward* v. *Cronan*, 105 Colo. 393 (1940).

school system with a minority of white students (H. 78, PX 401).

At the same time and until at least 1964, it was the policy of the Denver school authorities to assign black and Spanish-surnamed teachers to the schools in which black and Spanish-surnamed students were concentrated.[7] The result was that while no school had a majority of black or Spanish-surnamed teachers, almost all of these teachers were concentrated in a few schools, while most schools had no minority-race teachers (H. 2011-14). This concentration in fact continued through the 1968-69 school year just prior to the institution of this suit (PX 254, 256, 258).

Following 1950, Denver's population increased markedly. Undeveloped areas were settled and new territory added to the city by a large number of annexations. Schools were constructed in these areas; they opened as and have remained virtually entirely white. Both the Spanish-surnamed and black communities expanded, the latter along a narrow corridor eastward from the "Five Points" area. 303 F. Supp. at 282, Appendix at p. 4a.

Respondents' school construction policies traced these patterns and accelerated the isolation of students into racially identifiable schools: In 1953 the system replaced Manual High School—already minority-white and enrolling almost all of the city's Negro high school students—with a new facility located two blocks away, serving the

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[7] The school district defended this policy, despite its segregation of school faculties, on the ground that it furnished successful "role models" for minority race students to emulate (H. 2013-14). The district court found, however, that the system's faculty assignment policies were generated by a fear that the white community would not accept the placement of minority-race teachers in white schools, 303 F. Supp. at 284, Appendix at p. 9a-10a. On appeal, the Tenth Circuit ignored this finding and instead accepted the school district's justification. 445 F.2d at 1007, Appendix at p. 150a.

same mandatory attendance area and limited in size to serve only the black and Spanish-surnamed students in that area or anticipated to be added thereto by population growth (H. 78, 296; PX 401). In 1960 the Barrett Elementary School was built in a black neighborhood at the extreme eastern edge of the Negro residential area but its size was restricted and its boundaries manipulated—its easternmost boundary ran along its playground—to conform to existing residential patterns and insure that it would be a black school from its opening (303 F. Supp. at 282; Appendix at p. 5a). The Manual and Barrett sites were selected and constructed over the opposition of representatives of the black community.[8]

Changes in attendance areas of Denver public schools, for the ostensible purpose of relieving overcrowding at various schools, also resulted in maintaining or exacerbating segregations: In 1952, optional areas were instituted between an overcrowded, increasingly black elementary school (Columbine) and adjacent, underutilized, totally white facilities (Harrington and Stedman)—relieving the overcrowding slightly by permitting the white students at Columbine to withdraw (H. 106-07, 112-14; PX 406). In 1956 overcrowding at East High necessitated adding part of the Manual-East optional area to the mandatory zone for a still-under-capacity Manual. However, the change in-

[8] Similar opposition to the announced 1962 plan to build a junior high school at the Barrett site, in fact, led to the appointment of the first of two committees to investigate "the present status of educational opportunity in the Denver Public Schools, with attention to racial and ethnic factors. . . ." That committee, reporting in 1964, "criticized the Board's establishing of school boundaries so as to perpetuate the existing de facto segregation 'and its resultant inequality in the educational opportunity offered'." 303 F. Supp. at 283, Appendix at p. 6a. The second group made its report in 1967 and "noticed the intensified segregation in the northeast schools and recommended that there be no more schools constructed in northwest Denver." *Ibid.*

corporated only the established black residential portion of the optional area (H. 291, 296) although enlarging the Manual High zone still more would have better utilized both schools' capacity, made better use of public transportation lines (which ran directly from the remaining optional area to Manual) and also resulted in desegregation (H. 281-86). A change similar in operation and effect was made the same year between the two feeder junior high schools for Manual and East: Cole (black)[9] and Smiley (white), respectively. Both proposals were resisted before the school board by representatives of the black community because they would segregate.[10] Similarly, in 1962 and 1964, boundary changes for Stedman Elementary School (where Negro enrollment was increasing) were made, purportedly to relieve overcrowding. But only predominantly white areas of the Stedman zone were shifted to white schools; alternative rezoning plans which would both have avoided concentration of black students at Stedman as well as have relieved its capacity problem were rejected (303 F. Supp. at 285, Appendix at p. 11a). Finally, Boulevard Elementary School was turned into a school enrolling a majority of Spanish-surnamed students in 1961 when, in

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[9] As in the case of Manual, Cole enrolled almost all of the school system's black junior high school students at this time.

[10] The school district had previously constructed an addition to relieve overcrowding at Smiley in 1952 rather than adjust its boundary with Cole, which was then underutilized (PX 215, 215A). The same thing occurred in 1958 when Smiley was again enlarged (PX 215).

Overcrowding at East High School was relieved by the construction of a new George Washington High School in 1960, while Manual remained underutilized (PX 210). The new George Washington High attendance boundaries took only whites from East (PH 547-49; PX 20, Map No. 7). In 1964 the adjustment in the East-George Washington boundary, supposedly made to create a more heterogeneous school population at George Washington (PH 547-49), took 200 white students and only 9 black students from East (PX 585-86).

response to a decrease in capacity caused by the demolition of an older section of the facility, a white portion of its attendance area was transferred to the adjacent and overwhelmingly white Brown Elementary School (H. 115-26).

There were also boundary alterations apparently unrelated to any pressing capacity problems. For example, in 1962 all optional zones surrounding Morey Junior High School were eliminated. White portions of the former optional zones between Morey and Byers, to its south,[11] were added to the Byers zone; black areas between Cole[12] or Baker[13] (to the north) and Morey were added to Morey, resulting in the immediate transformation of the school enrollment from majority- to minority-white (313 F. Supp. at 71-72, Appendix at pp. 63a-64a). Similarly, Anglo areas were transferred from Hallett to Phillips in 1962 and 1964; in the latter year, this was accompanied by the transfer of a black area from Stedman to Hallett (PX 75, 76). Again, the effect was to accelerate and emphasize the rapid transformation of Hallett into a racially isolated minority school.

When Denver first utilized mobile classrooms in 1964, 28 of 29 such portable buildings were located in the increasingly black Park Hill area,[14] where they effectively contained an expanding black population (303 F. Supp. at 285; Appendix at p. 11a). At the same time, overcrowding in other (but predominantly white) schools in Denver was met by school board transportation of students—sometimes

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[11] At this time Byers was an all-white junior high school while Morey, prior to the changes discussed in text, was predominantly white.

[12] See n. 9 *supra*.

[13] Baker was predominantly white but with a significant minority-race enrollment.

[14] The remaining portable was placed at a school attended by a majority of Spanish-surnamed students (PX 101).

across the width of the school district—to other (white) schools where capacity was available (P.H. 540-41)[15] despite somewhat closer available capacity at (predominantly minority) schools in the central or core city (P.H. 544). The school district's excuse for busing whites to only white schools was its desire to maintain low pupil-teacher ratios at minority schools in order to offer compensatory programs; its explanation for the creation of extra capacity for black students in black Park Hill schools by the addition of portables was that black parents surveyed at the time preferred it to one-way busing back to the core city area (H. 479-81).

Finally, when in 1964 the district eliminated all optional attendance zones (in accordance with the recommendation of the committee investigating educational opportunity for minority students, see n.8 *supra*, which found that optional areas intensified segregation), it substituted a "limited open enrollment" policy. The only limit of this policy was the availability of space in the various schools; it was the equivalent of free choice and under it Denver permitted wholesale minority-to-majority transfers until it was finally repealed in 1969 (H. 126-32; PX 99, 100).

The result was a school system marked by intense racial and ethnic separation.[16] The proof also demonstrated to the satisfaction of the district court that the Denver public schools were also systematically disadvantaging their black

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[15] Much of the overcrowding was due to annexations of additional areas contiguous to existing schools. But, even after new schools were constructed in the annexed territory, the space in the former receiving schools was not used to accommodate—and integrate—the overcrowding in the Park Hill schools. Thus, whereas prior to the construction of the Traylor Elementary School, some 400 white students were bused across the district to the University Park School, after Traylor was completed, only 36 Park Hill students were transferred to University Park (PH. 543).

[16] *Cf.* p. 4 *supra*.

and Spanish-surnamed students educationally. Most of these students attended all- or predominantly minority schools which lacked various tangible measures of educational quality. The facilities themselves were generally among the oldest and smallest in the district, the faculty generally had less teaching experience in the system than faculties at white schools, and the faculty turnover rates at these schools were highest (303 F. Supp. at 284-85; 313 F. Supp. at 79-80; Appendix at pp. 9a-10a; 80a-81a). At the same time, various objective measures of educational attainment indicated that the students in these schools were suffering: they had higher dropout rates and consistently (and drastically) lower mean achievement test scores than other schools. Finally, expert testimony offered by plaintiffs explained these results not just in terms of the tangible differences among the schools, but the intangible effects of school board policies—such as the concentration of the less-experienced minority-race teachers in these schools—as well: low pupil and teacher morale, feelings of isolation and inferiority affecting motivation, etc.

The Rulings Below

The district court ruled, 303 F. Supp. 279, 289, Appendix, pp. 1a, 20a, that the respondents had acted unconstitutionally in cancelling their prior desegregation plan, and that schools in the northeast Denver (Park Hill) area which would have been affected by the plan were segregated because of the school district's "segregation policy." The court, therefore, preliminarily enjoined respondents to implement the terms of their original plan, as originally scheduled, commencing with the 1969-70 school year.[17, 18]

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[17] However, the district court stated explicitly that the school board could still adopt and implement another plan "embodying the underlying principles" of the withdrawn plan, if it so desired.

[18] See n. 4 *supra*.

These findings were carried forward in the district court's opinion on permanent relief, 313 F. Supp. 61, Appendix, p. 44a. However, as to other Denver schools, the district court ruled that there had been no sufficient showing of a segregation policy, although the court admitted that "[a]s to these schools, *the result* is about the same as it would have been had the administration pursued discriminatory policies. . . ." 313 F. Supp. at 73; Appendix at pp. 66a-67a (emphasis supplied). The same practices regarding school construction, boundary changes, additions to existing schools, minority teacher assignments, optional areas and open enrollment which led the court to conclude that a "segregation policy" was enforced in the Park Hill area were nevertheless viewed by the district court, in their application to other Denver schools, as isolated individual occurrences not demonstrative of a pattern nor indicative of any policy.

The Court of Appeals agreed with the district court both as to segregation policy in Park Hill and as to the lack thereof affecting other Denver schools. 445 F.2d at 990-1002, 1005-07; Appendix, pp. 122a-139a, 147a-150a.

The district court also found that schools which had in excess of 70% black or 70% Spanish-surnamed student enrollments[19] were failing to offer their students educational opportunities equal to those afforded white students in other Denver public schools. 313 F. Supp. at 83, Appendix at p. 89a. Both because the court concluded that the segregated character of the school was the basic (but not exclusive) cause of this unequal offering, 313 F. Supp. at 81, Appendix at pp. 86a-87a, and also because the court found (after a further hearing on the question of remedy alone) that *desegregation* was an *essential* element of any adequate

[19] Some in the Park Hill area and some not.

remedy for these conditions, 313 F. Supp. at 96-97, Appendix at p. 112a, the district court enjoined respondents to desegregate and otherwise equalize the educational offering at these schools.

The Court of Appeals apparently expressed no disagreement with the district court's *findings*, but balked at approving its order because to do so would, it said, amount to requiring desegregation of schools which the district court found had not been segregated by official policy. This, said the Court of Appeals, would require that it overrule *Downs* v. *Board of Educ. of Kansas City* 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), and it declined to do so.[20]

[20] The Court of Appeals accepted the lower court's finding that leaving the schools segregated would mean continued lack of educational opportunities for their students, as well as the finding that to achieve equal opportunities would require desegregation as well as compensatory programs (both of which the district court ordered). But it then held that since desegregation alone would not suffice, it should not be required at all. (445 F.2d at 1004, Appendix at p. 144a).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Resolve Conflicts in Principle Among the Lower Courts.

The issue in this case is not *de facto* versus *de jure* segregation.[21] Whatever the term "de facto" may mean, this case involves a school district in which segregation has been brought about by regular, systematic and deliberate choice of the school authorities.

This is the first case of this sort before this Court from an area where officially required segregation was not previously authorized by statute. *Cf. Gomperts* v. *Chase*, No. A-245 (September 10, 1971) (Mr. Justice Douglas, Circuit Justice). But the lower courts have had a significant amount of litigation involving segregation imposed by government —but not by State law. *E.g., Taylor* v. *Board of Educ. of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y.), *appeal dismissed*, 288 F.2d 600 (2d Cir.), 195 F. Supp. 231 (S.D.N.Y.), *aff'd* 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); *Clemons* v. *Board of Educ. of Hillsboro*, 288 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501 (C.D. Cal. 1970); *Davis* v. *School Dist. of Pontiac*, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971); *Bradley* v. *Milliken*, 433 F.2d 897 (6th Cir. 1970), 438 F.2d 945 (6th Cir. 1971), Civ. No. 35257 (E.D. Mich., September 27, 1971); *Johnson* v. *San Francisco Unified School Dist.*, Civ. No. C-70-1331 SAW (N.D. Cal., July 9, 1971), *stay denied sub nom. Guey Heung Lee* v. *Johnson*, —— U.S. ——, No. A-203 (August 25, 1971) (Mr. Justice Douglas, Circuit Justice);

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[21] In *Swann*, this Court referred to "so-called 'de facto segregation.'" 402 U.S. at 17.

Soria v. *Oxnard School Dist.*, 328 F. Supp. 155 (C.D. Cal. 1971); *Oliver* v. *Kalamazoo Bd. of Educ.*, No. K88-71 (W.D. Mich., August 19, 1971) (oral opinion), *aff'd*, No. 71-1700 (6th Cir., August 30, 1971); *cf. United States* v. *Board of School Comm'rs of Indianapolis*, Civ. No. IP-68-C-225 (S.D. Ind., August 18, 1971).

Such cases are, of course, different from the so-called "de facto" suits. *See Bell* v. *School of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *cf. Downs* v. *Board of Educ. of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).[23]

The cases in which the lower courts have determined that a school district has maintained a policy of segregation should be governed by the same rules, regardless of geography or the source of the official segregation, as cases where the initial source was State law. But there is a division among the lower courts; and this is reflected in

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[23] These suits involved a variety of different claims—including, in some of them, a claim not raised here and expressly reserved in *Swann* (402 U.S. at 23): "whether a showing that school segregation is a consequence of other types of state action, without *any* discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree" (emphasis supplied). The reference in text is to that claim, rejected by the Courts of Appeals, and not to the factual claims—also rejected on the records in those cases—that a segregation policy was enforced by the school board.

We submit parenthetically that *Bell* and *Downs*, which involved the disestablishment of relatively recent prior state-imposed dual school structures, would probably have been decided differently in light of *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968) and *Swann*. *Compare Bell* v. *School City of Gary*, 324 F.2d 209 (7th Cir. 1963) *with United States* v. *Board of School Comm'rs of Indianapolis*, Civ. No. IP-68-C-225 (S.D. Ind., August 18, 1971); *compare Downs* v. *Board of Educ. of Kansas City*, 336 F.2d 988 (10th Cir. 1964) *with United States* v. *Board of Educ., Tulsa*, 429 F.2d 1253 (10th Cir. 1970).

the opinions of the courts below in this case, applying different rules to different geographical parts of the same school system. Whereas this Court and the lower courts require desegregation throughout a southern school district where segregation was imposed by law (even though it persists only in certain portions of that district), the lower courts here (and in some other places) have confined desegregation to discrete areas where particular segregating deeds have been uncovered and identified.[13]

Consideration of the Park Hill area schools separately from the rest of the Denver school system resulted from the lower courts' insistence that petitioners demonstrate a segregating act at every school in order to justify relief.

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[13] A similar position has been taken by some lower courts in interpreting *Swann's* directive that "[t]he court[s] should scrutinize such [remaining black] schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26. See, e.g., *Mapp* v. *Board of Educ. of Chattanooga*, Civ. No. 3564 (E.D. Tenn., July 26, 1971); *Calhoun* v. *Cook*, Civ. No. 6298 (N.D. Ga., July 28, 1971). But we do not understand *Swann* to require a complex sociohistorical analysis of residential patterns by district courts in order to determine the relative impact of segregated schools' influence upon segregated housing patterns, and segregated housing patterns' influence upon school segregation. If that were indeed necessary, there would be no need of the presumption against one-race schools which *Swann* announces—and announces precisely for the reason that the school-related and other influences upon housing patterns in a school district cannot be neatly separated and evaluated as independent causal factors. The inquiry is whether the effects and vestiges of segregation were ever disestablished with the thoroughness required by the remedial principles announced in *Swann;* if not, then all remaining vestiges must be eliminated. We submit that the District Court stated the correct rules in *Mannings:*

> There is no evidence of any substantiality in the record supporting the position that segregation in Hillsborough County is attributable in any measurable degree to voluntary housing patterns or other factors unaffected by school board activity. As indicated earlier, the record makes plain that prior to and since 1954 certain schools in Hillsborough County have been

This narrow focus facilitated compartmentalized consideration of different areas of the district.[24] But the court's concern should have been school authorities' actions anywhere in the district creating or maintaining racial and ethnic segregation. As the Court of Appeals for the Sixth Circuit said—correctly, we submit—in reviewing a similar case, *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573, —— (6th Cir. 1971), *aff'g* 309 F. Supp. 734 (E.D. Mich. 1970):

> We observe, as did the District Court, that school location and attendance boundary line decisions, for the past 15 years, more often than not tended to perpetuate segregation. Attempted justification of those decisions in terms of proximity of school buildings, their ca-

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set aside for black students and others for white students. With exceptions these schools remain racially identifiable. Over the years defendants have submitted numerous plans for desegregation, not one of which has altered the naked fact that most blacks attend schools which are inordinately black whereas most whites attend schools in which there are no blacks or only miniscule numbers of blacks. The Court has been unable to locate a single instance in the record where defendants took positive steps to end segregation at a black school and thereafter segregation returned fortuitously. Indeed, no serious attempt has ever been made to eliminate the many black schools. Based on experience, the Court concludes that what resegregation there has been is a consequence of the continued existence of schools identifiable as white or black.

Mannings v. *Board of Public Instruction of Hillsborough County*, Civ. No. 3554-T (M.D. Fla., May 11, 1971) (slip opinion at p. 39).

Where a policy of segregation is established for which the constitutionally required corrective action has not been taken, the presumption against one-race schools is not rebutted by a claim that, independent of the discriminatory school board action, other factors might have produced the segregated situation.

[24] Just as in *Davis* v. *Board of School Comm'rs of Mobile*, 402 U.S. 33 (1971), this Court indicated that the scope of the inquiry into remedy should be system-wide, so we submit should the scope of the inquiry into the matter of constitutional violation be system-wide.

pacity, and safety of access routes requires inconsistent applications of these criteria. Although, as the District Court stated, each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial discrimination has existed in the Pontiac school system for at least 15 years.

Accord, United States v. *School Dist. No. 151*, 286 F. Supp. 786 (N.D. Ill. 1967), *aff'd* 404 F.2d 1125 (7th Cir. 1968), *on remand*, 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd* 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *Taylor* v. *Board of Educ. of New Rochelle, supra.*

In finding actionable segregation in the Park Hill schools, the courts below applied the rule declared in *Brewer* v. *School Bd. of Norfolk, Virginia*, 397 F.2d 37 (4th Cir. 1968), enforced in, for example, *Davis* v. *School Dist. of Pontiac, Michigan*, 309 F. Supp. 734 (E.D. Mich. 1970),[25] and accepted by this Court in *Swann*, 402 U.S. at 7, 20-21, that school officials may not through school construction and the drawing of attendance boundaries which follow racial residential patterns, create segregated schools. Erroneously, however, the lower courts did not apply that rule when they considered other Denver schools, but excused segregatory acts on the grounds that they were "remote in time" and that intervening population shifts, not such acts, resulted in the present racially or ethnically identifiable status of affected schools. 313 F. Supp. at 75, 445 F.2d at 1006, Appendix at pp. 71a-72a, 148a-149a. *Cf. Calhoun* v. *Cook, supra.* While population shifts are of course a factor, so also are the school authorities' dis-

[25] See, *e.g.*, *United States* v. *Board of Educ., Tulsa*, 429 F.2d 1253 (10th Cir. 1970).

criminatory practices, see *Indianapolis, supra*—and no court is equipped to make (nor are litigants equipped to present a sufficient basis for) the fine sociological judgment as to the relative influence of the two factors upon the present racial complexion of a school.[26]

During the 1950-1960 period, the school district was locating and constructing new schools on the expanding periphery of the district, away from black population centers, and thus providing easy refuge for white students who desired to avoid attendance at the minority schools the district was helping to create. When both aspects of the policy are considered, we think it hard to imagine that the school district's segregatory acts did not play a role, perhaps the major role, in creating the existing segregated schools in Denver.

The courts below also excused segregation in the Denver core city area because they held that while the *effect* was clear, petitioners had failed to prove *intent*. 313 F. Supp.

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[26] As the district court in the Detroit (*Bradley* v. *Milliken*) case recently put it:

> We recognize that causation in the case before us is both several and comparative. The principal causes undeniably have been population movement and housing patterns, but state and local governmental actions, including school board actions, have played a substantial role in promoting segregation. . . .
>
> 6. Pupil racial segregation in the Detroit Public School System and the residential racial segregation resulting primarily from public and private racial discrimination are interdependent phenomena. The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation. The Board's building upon housing segregation violates the Fourteenth Amendment. See, *Davis* v. *Sch. Dist. of Pontiac, supra*, and authorities there noted.

Bradley v. *Milliken*, Civ. No. 35257 (E.D. Mich., September 27, 1971) (typewritten opinion at pp. 22, 24).

at 75, Appendix at p. 71a, 445 F.2d at 1006, Appendix at p. 149a. See Petition for Writ of Certiorari, *Wright* v. *Council of the City of Emporia*, O.T. 1970, No. 70-188. This is an obvious failure to apply the traditionally stringent equal protection doctrine that the state must justify, by showing a compelling interest,[37] conditions amount to racial classifications, regardless of intent. *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Kennedy Park Homes Ass'n, Inc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (per Mr. Justice Clark), *cert. denied*, 401 U.S. 1010 (1971); *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) (*rehearing en banc granted*); *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1969); *Lee* v. *Macon County Bd. of Educ.*, No. 30154 (5th Cir., June 29, 1971); *Stout* v. *Jefferson County Bd. of Educ.*, No. 29886 and 30387 (5th Cir., July 16, 1971). No specific intent was required by the courts below in finding that respondents had caused the Park Hill area segregation.

Finally, we submit, and in clear contradiction to established law, the Court of Appeals chose to ignore (despite F.R. Civ. P., Rule 52) the deliberate pattern and policy of the school district, continuing until at least 1964, of assigning minority race teachers to schools in which minority students were concentrated because it gave minority students role models to emulate. 445 F.2d at 1007, Appendix at p. 150a. Other courts have long rejected any such proposed educational justification for unconstitutional segregation. *E.g.*, *Dove* v. *Parham*, 282 F.2d 256, 258 (8th Cir. 1960). And it is clear that such faculty assignment practices are violative of the Fourteenth Amendment. *Swann*, *supra*, 402 U.S. at 18; *Bradley* v. *School Bd. of Richmond*,

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[37] We doubt that any such interest exists to justify segregation in the public schools. *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). *Compare* 445 F.2d at 1006, Appendix at p. 148.

382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Green* v. *County School Bd.*, 391 U.S. 430, 435 (1968). Indeed, a school district's faculty assignment policies are a reliable indication of its overall policy goals since there can be no independent justification (such as that claimed for "neighborhood schools") for a pattern of racial assignments, all teachers being subject to assignment by the district at its discretion. *See, e.g., United States* v. *School Dist. No. 151, supra; Davis* v. *School Dist. of Pontiac, supra; Meredith* v. *Fair*, 305 F.2d 360 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

The simultaneous application of contradictory standards by the courts below leads to anomalous results. Thus, for example, both Manual and Barrett were built in black neighborhoods at the extreme eastern edges of their mandatory attendance zones, which zones were drawn so as to exclude white residential areas. Barrett Elementary School opened all black; Manual High (a larger facility) enrolled nearly all the city's black high school students and was the only minority-white school in Denver when it opened. Yet the tests of intent, remoteness and intervening cause, and popular consensus, were deemed relevant only to Manual but not to Barrett.

To desegregate a few schools but leave others as they are, against the background of segregation brought about by the school authorities, will do nothing to assuage the difficulty. Instead, this partial solution, like the partial solutions of free choice and limited rezoning, will result only in further impaction of the existing segregation. *Mannings* v. *Board of Public Instruction of Hillsborough County, supra*, n. 23.[21]

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[21] See, *e.g.*, *Racial Isolation in the Public Schools*, A Report of the U. S. Commission on Civil Rights (1967); *Report of the National Advisory Committee on Civil Disorders* (1968); Coleman, *Equality of Educational Opportunity* (1966).

The courts below limited the remedy by applying to the same lawsuit conflicting rulings of other courts which have passed upon similar matters. Thus this case is affected more than any other by those conflicts, which should be resolved by this Court in order to establish a uniform approach to school desegregation, North and South.

II.

Other Inequalities in the System, Coupled with Racial Segregation, Provide Further Reason for Requiring the Only Workable Remedy: Racial Integration.

Moreover, here the harm of segregation is compounded by educational inequality of other sorts. The district court found that the educational opportunities available to minority race students relegated to predominantly minority schools in Denver were far below the general level of education in the district. The court applied traditional equal protection analysis and found this practice created a racial classification of students in Denver for which no compelling justification could be demonstrated. Therefore, the court required both desegregation and provision of special programs at these schools in order to equalize educational opportunity for their students. The district court took this step not on the basis of any untested assumptions but after careful consideration of the testimony offered by the parties at a hearing directed toward establishing the appropriate remedy for the constitutional deprivation.

The Court of Appeals reversed this part of the district court's order. We think the Court of Appeals misconstrued the basis of the district court's ruling, but, moreover, its own opinion drains the concept of equal educational opportunity (recognized by this Court in *Brown*) of its meaning by declaring segregation-related inequalities irremediable

in the federal courts unless that segregation is proved to have been caused *entirely* by school authorities.

We have argued above that both the Court of Appeals and the district court applied erroneous legal principles in ascertaining the existence and extent of state-imposed segregation in the Denver public schools, and what remedy must follow. If we are correct, then the schools which were ordered desegregated by the district court because they were failing to offer an equal educational opportunity must be desegregated anyway. We believe, however, that irrespective of the Court's conclusion on that subject, the district court's order—that tangible inequalities should be remedied by desegregation—was otherwise proper and should have been affirmed.

The district court's finding of unequal educational opportunity rested upon petitioner's demonstration that (a) there were certain tangible, measurable differences in the school system's allocation of resources to predominantly minority schools, e.g., teacher experience differentials in favor of white schools and generally older and smaller facilities at minority schools; (b) there were as well tangible, measurable differences in educational outcome measures between the same two groups of schools, e.g., characteristically lower achievement test scores and higher pupil dropout rates at minority schools and a progressive regression in the academic progress of the minority child from lower to higher grade levels in the minority schools; and (c) the weight of expert opinion was that measured differences in educational outcomes of the sort found in Denver were not the result of differences in innate ability but of the composition of the student body at predominantly minority schools. Petitioners' expert witnesses[21]

[21] Dr. Dan Dodson, Dr. Neil Sullivan, Dr. James Coleman and Dr. Robert O'Reilly.

testified at length about the *intangible*[30] educational disadvantages which result from racially concentrated minority group schools. In sum, petitioners' expert witnesses testified that the observed inequalities were due to factors *within the control of the school system*, including the composition of the student bodies at various schools.

The district court concluded that no compelling justification for the systematic deprivation of educational opportunity[31] to minority race students[32] had been

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[30] The testimony was undisputed that segregation produces feelings of isolation, inferiority and powerlessness in the minority children; produces low academic expectancy among teachers which then becomes a self-fulfilling prophecy of low achievement; produces low morale among both pupils and teachers, and a high rate of teacher turnover as most teachers sought to escape these schools at the first opportunity.

[31] Petitioners have never claimed nor did the district court's decision in any way rest upon some notion that educational opportunity was solely related to, or demonstrated by, an equivalent performance by every student. Obviously students will have, on an individual basis, different aptitudes and will perform, ideally, to the full extent of their varying capabilities. What is significant about the tangible measures of output here, such as achievement test scores, is two things. *First*, they establish a consistent and systematic differential between white schools and minority schools of such magnitude as to vitiate any suggestions that the observed pattern is merely the result of the interplay of different individual capacities. *Cf. Stell* v. *Savannah-Chatham Board of Education*, 318 F.2d 425 (5th Cir. 1963), 333 F.2d 55 (5th Cir. 1964). *Second*, they confirm the testimony of petitioners' expert witnesses that such segregated schools characteristically produce educationally undesirable effects upon the children and the teachers and can be expected to adversely affect the educational opportunity afforded the students.

[32] The "70%" limitation of the district court as well as his refusal to require relief to schools which had less than 30% white students but also less than 70% black or 70% Spanish-surnamed students, were of the court's own fashioning. Although petitioners raised the combined minority-race school issue on appeal to the Tenth Circuit, that court did not pass upon it and a remand for that purpose upon disposition of this cause upon this Petition would be appropriate.

shown,[33] and the court, therefore, ordered corrective measures—including desegregation (which petitioners' expert witnesses had testified was essential if the major cause of the inequality—segregated schools—was to be eliminated).

Thus, the district court's order gave substance to the constitutional guarantee of equal educational opportunity. *Cf. McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). The Court of Appeals, however, imposed a purely extraneous limitation upon this remedy for a constitutional deprivation. To some extent, the Court of Appeals' ruling is based upon a misconstruction of the district court's ruling but, even accepting its reading of the lower court opinions, the Court of Appeals has plainly held that there is no remedy for the unconstitutional deprivation of educational opportunity to minority race students if execution of that remedy would conflict with a school system's adherence to the "neighborhood school" assignment policy.

On either ground, the decision is wrong and ought to be reviewed by this Court because of the national implications of a ruling that the Constitution provides no remedy for the racially unequal provision of education by the state.[34]

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[33] *Cf. Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1963); *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), aff'd *sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969). See also *Gomperts* v. *Chase*, —— U.S. ——, No. A-245 (Sept. 10, 1971) (Mr. Justice Douglas, Circuit Justice).

[34] But see *Serrano* v. *Priest*, No. L.A. 29820 (Supreme Ct. Cal., August 30, 1971) (*en banc*).

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-.....

WILFRED KEYES, *et al.*,

Petitioners,

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*

APPENDIX TO PETITION FOR CERTIORARI
OPINIONS BELOW

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Opinion of District Court of July 31, 1969

UNITED STATES DISTRICT COURT

D. Colorado

Civ. A. No. C-1499

July 31, 1969

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor, *et al.*,

Plaintiffs,

—v.—

School District Number One, Denver, Colorado, *et al.*,

Defendants.

Memorandum Opinion and Order

William E. Doyle, District Judge

I. Jurisdiction

This is before us on a motion for temporary injunction. Examination of the complaint reveals that jurisdiction is invoked by reason of Title 28 U.S.C. § 1343 (3) (4), which authorizes the Court to entertain suits which seek to redress injuries resulting from violations of the Constitution of the United States. Although the Declaratory Judgment Act has been invoked, this does not of itself confer any independent jurisdiction. The Civil Rights Act is also drawn into play, Title 42 U.S.C. §§ 1983, 1985. It is alleged that the State of Colorado, acting through its agents, violated plaintiffs' constitutional rights. By reason of the allega-

tions of the complaint and the facts which have been presented, it is determined that there is subject matter jurisdiction to hear the cause.

The plaintiffs, who are school children, allege through their parents that their rights have been violated and continue to be violated through acts that have been described. Consequently, they are aggrieved persons. There is no dispute about their identity or their interest in the case, nor is there any question raised as to the propriety of a class action on behalf of all persons similarly situated. Consequently, there does not appear to be any problem about jurisdiction, personal or subject matter, to entertain the cause. Both sides have conceded that it is a matter that needs immediate attention and that it should be disposed of without delay.

II. The Issues

The pleadings describe alleged injuries resulting from the plaintiffs having been subjected to unequal treatment with respect to their right to an education. They seek to enjoin the implementation of a resolution of the School Board passed on June 9th of this year which would have rescinded previous resolutions which had made some effort to mitigate or reduce segregation which allegedly had existed in schools in the northeast part of Denver. The defendants deny that there has been any actionable segregation. Although no answer has been filed, they maintain that segregation, if any, exists by reason of maintaining neighborhood schools and natural migration, and that no action on their part has brought this about or intensified it. Basically, this is the issue which has been tried here, and has been tried rather extensively.

Opinion of District Court of July 31, 1969

The complaint herein contains several causes of action and counts. At this stage of the proceedings we are concerned only with the first cause of action and the counts which are related to it. All of these allegations pertain to the rescission of School Board Resolutions 1520, 1524 and 1531, which resolutions made changes in the attendance areas of certain high schools, junior high schools and elementary schools in northeast Denver, and undertook to desegregate these schools, all of which had become or were becoming predominantly Negro schools. It is alleged that on June 9, 1969, the newly elected School Board, by motion, rescinded all three resolutions. The complaint alleges that the action of the Board was in violation of the plaintiffs' Constitutional rights—the Fourteenth Amendment—and seeks a decree reinstating Resolutions 1520, 1524 and 1531.

The motion for preliminary injunction which is now before us seeks to enjoin the implementation of Board Resolution 1533 which would adopt and follow the policy which would carry out the practices which existed prior to the Board's adoption of Resolutions 1520, 1524 and 1531. The temporary injunction seeks maintenance of the status quo and, specifically, an order enjoining the School Board from modifying the purchase order for school buses, destroying documents relating or pertaining to the implementation of Resolutions 1520, 1524 and 1531 and, thirdly, from taking any action or making any communications to faculty, staff, parents or students during the pendency of the suit which would make it impossible or more difficult to proceed with the implementation of Resolutions 1520, 1524 and 1531. The defendants have not filed an answer. However, at the hearing they denied that any of their acts were invalid and generally maintained that they had made good faith efforts to integrate the schools in question to the extent that it was

possible to do so considering the geographic circumstances. They further maintained that the segregation, if any, was merely de facto growing out of the neighborhood character of the schools, and that the acts of the School Board do not amount to actionable or de jure segregation.

III. The Evidence of the Case

Attention at this hearing has focused primarily on the schools in northeast Denver, and particularly on the area which is commonly called Park Hill. The alleged segregated schools, elementary and junior high schools in this area, have acquired their character as such during the past ten years. The primary reason for this has been the migration of the Negro community eastward from a confined community surrounding what is commonly called "Five Points." Before 1950 the Negroes all lived in a community bounded roughly by 20th Avenue on the south, 20th Street on the west, York Street on the east and 38th Avenue on the north. The schools in this area were, and are now, largely Negro schools. However, we are not presently concerned with the validity of this condition. During this period the Negro population was relatively small, and this condition had developed over a long period of time. However, by 1960 and, indeed, at the present time this population is sizable. As the population has expanded the move has been to the east, first to Colorado Boulevard, a natural dividing line, and later beyond Colorado Boulevard, but within a narrow corridor—more or less fixed north-south boundaries. The migration caused these areas to become substantially Negro and segregated.

The trend of the population was apparent long before the migration of the Negro population eastward to Colorado Boulevard was completed. Notwithstanding this fact, the

Barrett Elementary School was built in the late 1950's for the purpose of serving a residential area west of the school, which area was destined in a short time to become populated by Negro families. When this school was completed and opened, its population was predominantly Negro. In a few years it became overwhelmingly Negro in its composition.

In the early 1960's Colorado Boulevard was somewhat of a dividing line and the area east of Colorado was for the most part Anglo. Thus Stedman School, which was a few blocks east of Colorado Boulevard, was almost entirely Anglo, while Barrett was predominantly Negro. The migration soon continued across Colorado Boulevard and within a very short time not only was the Stedman School predominantly Negro, the other elementary schools in that area, including Hallett at 2950 Jasmine Street, Smith at 3590 Jasmine Street and Phillips at 6550 East 21st Avenue (to a lesser degree) were also predominantly Negro. The single junior high school, Smiley, at 2540 Holly Street, also became predominantly Negro. Since these students attend East High School, this development threatened to result in East becoming a Negro school as well.

It is noteworthy that notwithstanding that Barrett and Stedman Schools were close to one another, no effort was made by the School Board to incorporate any part of the Stedman district into Barrett. The latter had been constructed as a small school tailored to accommodate the segregated population west of Colorado Boulevard only. None of Stedman's overcrowded white population were diverted to Barrett, and, of course, none of the Barrett students were diverted to the white Stedman.

It is also noteworthy that Negro children who had, prior to the construction of Barrett, attended Park Hill School

which had been substantially integrated, were, after the opening of Barrett, required to attend the latter school thus further assuring that Barrett would be black and Park Hill predominantly white.

Notwithstanding the Barrett experience, a recommendation was made in 1962 to construct a junior high school at 32nd and Colorado Boulevard near the Barrett School. This project was rejected after much debate and following public protest that it would be a racially segregated junior high school.

After this junior high school experience, a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools was created. Its mission was to "study and report on the present status of educational opportunity in the Denver Public Schools, with attention to racial and ethnic factors in the areas of curriculum, instruction and guidance; pupils and personnel; buildings, equipment, libraries and supplies, administration and organization; school-community relations, and to recommend improvements in any or all of such specific areas." The report of the Committee criticized the Board's establishing of school boundaries so as to perpetuate existing de facto segregation "and its resultant inequality in the educational opportunity offered." It recommended that the Board policy consider racial, ethnic and socioeconomic factors in establishing boundaries and locating new schools so as to minimize the effects of de facto segregation. It also recommended that boundaries be set so that the neighborhood established represent a heterogeneous school community.[1]

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[1] In consideration of school-community relations, the Report stated:

> In its study of the Denver community, the Committee finds that de facto segregation exists in Denver, especially in re-

Following the finding of the Study Committee Report, the Board adopted Policy 5100 which called for changes or adaptations which would result in a more diverse or heterogeneous racial and ethnic school population. However, during the years following the adoption of Policy 5100, although there was debate, there was no effective effort in the way of implementation. Finally, another Study Committee was appointed for the purpose of examining existing conditions and recommending specific procedures and guidelines to be taken. At this time there was a proposal to build an addition to the Hallett School and, indeed, it was built over the protest that it would result in intensified segregation. The final report of the second Study Committee was filed on February 23, 1967. The report of the Committee also noticed the intensified segregation in the northeast schools and recommended that there be no more schools constructed in northeast Denver. Finally, on May 16, 1968, the Board adopted the so-called Noel Resolution. This noted that the continuance of neighborhood schools had resulted in the concentration of minority and ethnic groups and

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gard to Negro citizens. Even though the Denver Public Schools have not created this pattern of residential segregation, the concentration of certain racial and ethnic groups in certain parts of the city does impose on the schools the same community pattern of de facto segregation.

The Committee agrees with the statement of the U.S. Supreme Court in 1954 in Brown v. Board of Education that segregated education is inherently unequal education. The Committee further believes that this community pattern of racial and ethnic concentration which produces racially and ethnically concentrated schools adversely affects equal educational opportunity. It further strongly believes that both school and community have a responsibility to minimize the effects of segregation if the principles of the *Declaration of Independence* and the *Constitution* are to be a reality growing out of the daily living experience of all children in the Denver community.

called for the establishment of an integrated school population so as to achieve equality of educational opportunity.

On or about January 30, 1969, following the presentation of a plan of integration by the superintendent of schools, the Board adopted Resolution 1520 which made changes in attendance areas of certain secondary schools in the school district, and on March 20, 1969, Resolution 1524, also having to do with secondary schools and junior high schools, was adopted. Resolution 1531, on the other hand, sought to change attendance areas of the elementary schools. In essence, each of these resolutions sought to reverse the segregation trend in some of the segregated schools by boundary changes which would have resulted, had they become effective, in segregated schools becoming predominantly white. It sought to spread the Negro populations of these schools to numerous other schools, thereby achieving what has been described as racial balance in all of them so that their predominantly Negro populations would become roughly 20 percent and white students from other areas would produce an Anglo population in each school of about 80 percent. At least preliminary efforts had been made by the superintendent and his staff to implement these resolutions. However, on June 9, 1969, following a School Board election and a change in the composition of the Board, the resolutions were rescinded following what was regarded as a voter mandate. Two new Board members were elected and two who had supported the integration policies were defeated. The rescission was by specific motions, and there followed a new Resolution, 1533, which undertook to restore the old order.

IV. Additional Findings

The important facts adduced at the hearing deserve special mention as circumstances which serve to show clear

patterns of segregation reinforced by official action, and which also show knowing and purposeful conduct.

1. All of the actions of the School Board here under consideration occurred during the last ten years. Thus, they took place long after the decision of the Supreme Court in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

2. The School Board Study Committee of 1964 and 1968 warned the members of the Board concerning the segregation trends and strongly recommended measures which would avoid or remedy these conditions. The recommendations contained in the 1964 report[2] were, for the most part, ignored, and this led to the appointment of a second implementation Committee which once again was positive and specific in its recommendations.

3. During the entire decade there was regular debate and although resolutions were adopted, no effective action occurred, and many of the actions which were taken had the effect of intensifying rather than alleviating the segregation problem.

4. *Assignment of Teachers.* Schools with predominantly minority student populations were shown to be staffed by a greater proportion of teachers on probationary status, teachers with less than ten years experience and minority group teachers than were schools with a predominantly Anglo student population.[3]

The Board has been reluctant to place Negro and Hispano teachers in white schools because of concern over a possible

[2] Plaintiffs' Exhibit 20.
[3] Plaintiffs' Exhibits 92, 93, 94, 96, 8-G, 8-F, 9-G, 9-H.

lack of acceptance by the white community and because of a fear of lack of support by some faculties and principals.[4] The Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools (March 1, 1964) recommended that minority teachers be assigned throughout the system. This recommendation was never adopted by the Board.

By established Board policy (Policy No. 1617A) seniority of service is given consideration in making transfers, and teachers on probationary status are not to be transferred except in unusual situations. Thus, teachers on probation or with less seniority became entrenched in the minority schools where they currently serve.

This tendency to concentrate minority teachers in minority schools has helped to seal off these schools as permanent segregated schools.

5. *Establishment of Barrett School.* Plaintiffs' Exhibits 40 and 41 show that Barrett was opened in a segregated area in 1960; that it was located with conscious knowledge that it would be a segregated school; that it has remained segregated to the present date; and that the school would have been desegregated under Resolution 1531. At the time Barrett was built Stedman School, in a predominantly white area, and located a few blocks east of Barrett, was operating at approximately 20 percent over capacity. Yet Barrett was built as a relatively small school and was not utilized to relieve the conditions at Stedman.

6. *Boundary Changes.* In 1962, Superintendent Oberholtzer recommended certain boundary changes to the Board. The Board refused to adopt a change which would

[4] Plaintiffs' Exhibit 20, Pg. D-13.

have affected the overcrowded conditions at Stedman. The failure to make this proposed change tended to "aggravate and intensify the containment of the Negro population in Stedman at that time."[5] Those boundary changes which were made pertained to areas with Negro populations of less than 3 percent. Other boundary changes not only failed to alleviate Negro concentration; they added to it. In some instances the changes resulted in transfer of white students to white schools.

7. *Concentration in Existing Schools.* In June 1965, the Board considered the addition of eight classrooms at Hallett School. Hallett was at the time overcrowded and had a predominantly Negro student population. Objection was made to the additions on the grounds that they would increase segregation at Hallett.[6] The Board nevertheless proceeded with the additional classrooms. The additions were built despite Paragraph 1b (6) of Board Policy No. 1222C and Paragraph 4 of Policy No. 5100, which provided that ethnic and racial characteristics of a school population should be considered in determining boundaries and that steps should be taken to achieve more heterogeneous school populations.

8. *Mobile Classrooms.* The building of 28 mobile units in the Park Hill area in 1964 (at the time there were only 29 such units in all of Denver) resulted in a further concentration of Negro enrollment in Park Hill schools. The retention of these units on a more or less permanent basis tended to continue this concentration and segregation.

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[5] Transcript, Pp. 180-81.

[6] Transcript, Pg. 37.

9. *Effect of Resolutions 1520, 1524 and 1531.* Had the rescinded resolutions been implemented, Dr. Bardwell estimated (based on 1968 enrollment figures) that the "segregation index" in senior high schools would have decreased from 50 to 28; that the index in junior high schools would have decreased from 65 to 35; and that the decrease in the index for elementary schools would have been from 60 to 43 which, he testified, would approximately result in desegregation of elementary schools.

10. The above noted Board actions must be considered in the light of the trend toward increased segregation in northeast Denver schools (for example, between 1960 and 1966 Stedman increased from 4 percent Negro to 89 percent Negro; in that same period Hallett increased from 1 percent Negro to 75 percent Negro).

11. The climactic and culminative act of the Board was the June 9 rescission of Resolutions 1520, 1524 and 1531. Four members of the Board voted to rescind the resolutions and adopted Resolution 1533, which embraced policies in derogation of the previous policies as expressed in the mentioned resolutions. The majority of the Board (Board members Voorhees, Noel and Amesse voted against it) acted officially to reject the integration effort and to restore and perpetuate segregation in the area. Although this was carried out in response to what was called a voter mandate, there can be no gainsaying the purpose and effect of the action as one designed to segregate.

We do not find that the purpose here included malicious or odious intent. At the same time, it was action which was taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially

certain. Under such conditions the action is unquestionably wilful.[7]

V. The Applicable Law

The foundation stone in any case involving discrimination in public schools is the Constitution of the United States and, in particular, the Equal Protection Clause of the Fourteenth Amendment to the Constitution. That Clause, in guaranteeing to every citizen the equal protection of the laws, forbids state action which results in unreasonable classifications and deprivations. It prohibits arbitrary classifications which bear no rational relation to any valid governmental purpose.

The history of modern case law dealing with the invalid discrimination resulting from school segregation dates from 1954, the year in which the Supreme Court handed down Brown v. Board of Ed., 347 U.S. 483, 74 S.Ct. 686. The Supreme Court there held that segregation in public schools violated the Equal Protection Clause. However, the case certainly went much further than this. The Court plainly stated that segregated schools are incapable of providing quality education and also said that the effect of segregation in the school system was to place an indelible stamp of inferiority on those Negro children who were compelled to attend "Negro" schools. Thus, the clear import of the *Brown* decision is that neither a state nor its agencies may establish, maintain or lend support to a system of segregated public education. Furthermore, if the state or any of its agencies prior to or after *Brown* take any action which creates or furthers segregation, a positive duty arises to remove the effects of such de jure segregation.

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[7] Restatement of Torts, § 500, comments f and g at 1296 (1934).

Admittedly, the facts of the case at bar are different from *Brown*, but the legal implications of the *Brown* case are fully applicable here. These legal implications have been considered in two opinions of our Court of Appeals. The first of these cases, Downs v. Board of Ed., 336 F.2d 988 (10th Cir., 1964), dealt with the Kansas City school system. Until 1951 this school system had been segregated by law and, at the time that *Brown* was decided, the schools remained substantially segregated. Thereafter, the school board took affirmative steps to alleviate the situation created by the prior policy of segregated schools. The trial court found that the board had acted in good faith to remove segregation in the school system and that the minimum requirements of *Brown* had been met. The board had also undertaken to change certain school district boundaries and these changes had the effect of aggravating segregation in at least one of the city's junior high schools. The trial court held that the board's action did not violate the Fourteenth Amendment since the boundary change was made in good faith and not for the purpose of promoting or maintaining segregation.

In affirming the district court, the Court of Appeals laid down guiding principles to be applied in future cases. It distinguished two factual situations: (1) Where the school board takes affirmative action which has the effect of promoting or maintaining segregation; and (2) Where because of population shifts and housing patterns certain schools have become segregated—so-called de facto segregation. As to the former, the Court said that it must appear that the board's action not only resulted in aggravating segregation, but also that the board acted purposefully with this object in mind. As to the latter, the Court said that the better rule was that there is no affirmative duty to integrate

races in the public schools.[1] The trial court in *Downs* had found that the school board in that case had made a good faith attempt to conform to the law. The Circuit Court was reluctant to overturn these findings since the district court had heard the evidence.

In Board of Ed. of Oklahoma City Public Schools, etc. v. Dowell, 375 F.2d 158 (10th Cir. 1967), the Tenth Circuit Court of Appeals affirmed the decision of the District Court of Oklahoma, which Court had ordered the school board of Oklahoma City to undertake a plan for desegregation, which plan had been formulated by experts appointed by the Court. Thus, in reality it was the Court's plan. Prior to *Brown* the Oklahoma City school system was segregated pursuant to constitutional and statutory mandate. Both the

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[1] Whether the Court would now give broad effect to this is, of course, irrelevant in the present case, but in view of later developments in the law, the question arises as to whether it would say the same thing today since the cases which it cited in support of this proposition have been largely overruled. Thus, in United States v. Jefferson County Bd. of Ed., 380 F.2d 385 (5th Cir. 1967) (en banc), the Fifth Circuit Court of Appeals overruled four of the opinions cited in support of the statement in *Downs* that "the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools * * *." (Evers v. Jackson Municipal Separate School Dist., 328 F.2d 408 (5th Cir. 1964); Stell v. Savannah-Chatham County Bd. of Ed., 333 F.2d 55 (5th Cir. 1964); Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960); and Avery v. Wichita Falls Independent School Dist., 241 F.2d 230 (5th Cir. 1956)). The *Jefferson County* opinion states:

> The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. (Footnotes omitted).

380 F.2d at 389.

trial court and the Tenth Circuit read the *Brown* decision as requiring affirmative action to remove segregation which had been purposefully caused by prior actions of the school board. The opinion by Judge Hill saw nothing new in a court of equity taking positive steps to integrate the schools.

It is sufficient to say that we are not here faced with the kind of simple or innocent de facto segregation which was found to exist in *Downs*. We have seen that during the ten year period preceding the passage of Resolutions 1520, 1524 and 1531, the Denver School Board has carried out a segregation policy. To maintain, encourage and continue segregation in the public schools in the face of the clear mandates of Brown v. Board of Ed. cannot be considered innocent. The many cases decided subsequent to *Brown*, including our own Circuit's Board of Ed. v. Dowell, impose an affirmative duty on the School Board to take positive steps to remove that segregation *which has developed as a result of its prior affirmative acts*. In response to this duty, the Denver School Board passed Resolutions 1520, 1524 and 1531. In light of *Brown* and *Dowell*, the effort of the Board to renounce this constitutional duty by rescission must be rejected as arbitrary state legislative action.

The defendants have alluded to the fact that Resolution 1533 represents the will of the people, and that any action taken by this Court which would adversely affect the Resolution would frustrate that will. But as we have seen Brown v. Board of Ed. and all of the subsequent cases hold that equal protection of the laws is synonymous with the *right* to equal educational opportunities and that segregated schools can never provide that equality. The constitutional protections afforded by the Bill of Rights and the Fourteenth Amendment were designed to protect fundamental

rights, not only of the majority but of minorities as well, even against the will of the majority. The effort to accommodate community sentiment or the wishes of a majority of voters, although usually valid and desirable, cannot justify abandonment of our Constitution. Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967);[9] Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964).

It is to be emphasized finally that this present case, except for the presence of clear evidence of purpose manifested by the precipitate rescission, is by no means novel. The right to equality in education has, since *Brown*, become recognized as a sensitive constitutional right. Courts throughout the country have taken positive, affirmative steps in order to uphold these rights. In our own Circuit, both the *Downs* and *Dowell* opinions have clearly identified and explained the governing legal principles. In other jurisdictions, United States Courts have granted broad affirmative relief in such situations, including orders requiring the adoption of detailed plans for segregation.[10]

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[9] In this case, the Supreme Court struck down a California constitutional amendment on the ground that it was not merely a repeal of a positive action encouraging integration, but that the rejection, in effect, authorized discrimination by turning back to the conditions which existed prior to its adoption. It thus encouraged and in a significant way involved the state in racial discrimination contrary to the Fourteenth Amendment. Hence, it was not an exhibition of complete neutrality.

[10] *See, e.g.*, United States v. School Dist. 151, 286 F.Supp. 786 (N.D.Ill.), *aff'd.*, 404 F.2d 1125 (7th Cir. 1968); Coppedge v. Franklin County Bd. of Ed., 273 F.Supp. 289 (E.D.N.Car.), *aff'd.*, 394 F.2d 410 (4th Cir. 1968); Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969); Blocker v. Board of Ed., 226 F.Supp. 208 (E.D. N.Y. 1964); Taylor v. Board of Ed., 191 F.Supp. 181 (S.D.N.Y.), *aff'd.*, 294 F.2d 36 (2d Cir. 1961).

In the present case, this Court has held only that the Denver School Board may not constitutionally take action which perpetuates segregation, and so it sets no new precedent.

In determining that the plaintiffs are entitled to the preliminary relief sought, we are not to be understood as holding that Resolutions 1520, 1524 and 1531 are exclusive. It is true that the case is extraordinary in that there are only two plans presented, one calling for integration and one for segregation. The status quo has the effect of restoring the integration plan. However, the Board is by no means precluded from adopting some other plan embodying the underlying principles of Resolutions 1520, 1524 and 1531.

VI. Conclusion

Under the Fourteenth Amendment the plaintiffs, as citizens of the United States, have the right to be protected from official action of state officers which deprives them of equal protection of the laws by segregating them because of their race. The denial of an equal right to education is a deprivation which infringes this constitutional guarantee. The precipitate and unstudied action of four of the members of the Board rescinding and nullifying the school integration plan, which plan had been adopted after almost ten years of debate and study, and the adoption in its place of a substitute plan which would have had the effect of

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In our own Circuit, sweeping plans for desegregation were formulated by the United States District Court for the Western District of Oklahoma on its own initiative after the school board failed to act, and these plans were approved by the Court of Appeals. Dowell v. School Board of Oklahoma City Public Schools, 244 F.Supp. 971 (W.D.Okl.), *aff'd.*, 375 F.2d 158 (10th Cir. 1967).

In *Hobson*, Circuit Judge Wright, sitting by assignment in District Court, adopted an intricate and detailed integration plan.

perpetuating school segregation, had not only a chilling effect upon their rights; it had a freezing effect. Under the law of the case, we have no alternative. The action taken must be ruled unconstitutional, and the proposed action must be enjoined.

The case is a proper one for injunctive relief because (1) Plaintiffs have no adequate remedy at law; (2) Plaintiffs would suffer irreparable injury if relief were denied; and (3) Plaintiffs will probably succeed at trial, at least on the cause of action under consideration.

The motion for preliminary injunction is granted.

Opinion of District Court of August 14, 1969

UNITED STATES DISTRICT COURT

D. Colorado

Civ. A. No. C-1499

Aug. 14, 1969.

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor, *et al.*,

Plaintiffs,

—v.—

School District Number One, Denver, Colorado, *et al.*,

Defendants.

Supplemental Findings, Conclusions and Temporary Injunction

William E. Doyle, District Judge.

This case is before the Court following remand issued by the United States Court of Appeals for the Tenth Circuit on August 7, 1969. In its opinion the Court of Appeals (1) questioned the sufficiency in terms of specificity of our injunctive order, and (2) directed that this Court consider Title IV, § 407(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000c-6(a).

A hearing was held on August 7, 1969. The Court, having heard the arguments, does hereby issue a more specific injunctive order. The question of the applicability of the above mentioned statute will be considered in a supplemental opinion. Also, the following supplemental findings

are added to the oral findings of fact given from the bench on July 23, 1969, and the formal findings of fact contained in this Court's opinion issued on the 31st day of July, 1969. The findings hereinafter set forth are directed to the schools which received particular attention at the trial. These findings undertake to describe the special circumstances surrounding these particular schools, and the conclusions which are to be drawn from these findings.

Findings of Fact

Barrett Elementary School (Located at East 29th Avenue and Jackson Street.)

1. Barrett Elementary School was opened in 1960. At that time its student body was 89.6 percent Negro. Presently the racial composition of Barrett is virtually 100 percent minority students (93% Negro, 7% Hispano). Thus, from the time of its establishment until the present Barrett has always been a segregated school.

2. The average percentage of Negro teachers in elementary schools in School District No. 1 as of September 1968 was 8.5 percent. In Barrett school the percentage of Negro teachers is 52.6 percent. This concentration of Negro teachers in a "Negro" school has further contributed to the categorization of Barrett as a segregated school.

3. Between 1950 and 1960 the Negro population, which previously had been concentrated in an area known as "Five Points" began to expand to the east. By 1960 it had moved up to Colorado Boulevard, a natural dividing line. This trend of population was apparent long before the migra-

tion of the Negro population eastward to Colorado Boulevard was completed. With full knowledge of this population trend and the fact that Barrett would be a segregated school from the time of its establishment, the Board proceeded with and carried into effect the plans for the building of that school.

4. At the time that Barrett was built, the School Board created the eastern boundary of the Barrett district along Colorado Boulevard. Thus, the eastern boundary of Barrett school district was made coterminous with the eastern boundary of Negro population movement at that time. This insured the character of Barrett as a segregated school.

5. When Barrett was built, Stedman Elementary School, in a predominantly white area east of Colorado Boulevard a few blocks from the Barrett site, was operating at approximately 20 percent over capacity. Had the eastern boundary of the Barrett district been set to the east of Colorado Boulevard, it would have resulted in some integration of Barrett, while alleviating somewhat the overcrowded conditions at Stedman. By establishing Colorado Boulevard as the eastern boundary of the Barrett district, the Board declined to utilize Barrett to achieve these salutary effects. Furthermore, Barrett was built as a relatively small school (capacity 450) which further prevented its use to relieve overcrowded conditions in the neighboring "white" Stedman. Thus, Barrett was built and opened as a segregated school.

6. In light of the facts as they existed in 1960, there can be no doubt that the positive acts of the Board in establish-

ing Barrett and defining its boundaries were the proximate cause of the segregated condition which has existed in that school since its creation, which condition exists at present.

7. The action by the Board with respect to the creation of Barrett school was taken with knowledge of the consequences, and these consequences were not merely possible, they were substantially certain. Under such conditions we find that the Board acted purposefully to create and maintain segregation at Barrett.

8. The Board maintained the segregated condition which it had created at Barrett by failing to take any action to correct it between 1960 and 1969. On April 24, 1969, the Board passed Resolution 1531 (operative September 1969) which would have desegregated Barrett by altering school district boundaries. Prior to the passage of Resolution 1531, Barrett was 93 percent Negro and 7 percent Hispano. The racial composition in that school subsequent to implementation of 1531 would have been 73 percent Anglo, 24 percent Negro, 3 percent Hispano.

9. On June 9, 1969, the Board, by a 4 to 3 vote, rescinded Resolution 1531 and thereby reaffirmed its prior policy of maintaining and perpetuating segregation at Barrett. Although this was carried out in response to what was called a voter mandate in a school board election, there can be no doubt that the purpose and effect of the action was segregation.

Stedman Elementary School (This school is located at East 29th Avenue and Dexter Street, approximately 8 blocks east of Barrett Elementary School.)

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1. Stedman Elementary School was in 1960 a predominantly "white" school, the student body being only 4 percent Negro. However, as a result of Negro population trends and rigid adherence to school boundaries by the Board, by 1962 Stedman was 50-65 percent Negro.

2. In 1962 and for several years prior thereto, Stedman had been overcrowded. Although Stedman could not be considered a segregated school at that time, it was clear by virtue of area population movement that it would become segregated in the near future if immediate steps were not taken to alleviate the overcrowding and stabilize the racial composition. Seven boundary changes were proposed in 1962, three of which would have relieved overcrowding at Stedman by placing the overflow in Smith, Hallett, and Park Hill, each of which was predominantly Anglo at that time. The Board rejected the three Stedman proposals, adopting the other four which pertained to areas with Negro populations of less than three percent. By refusing to pass the proposed boundary changes for Stedman, overcrowding was perpetuated and Negro students at that school were prevented from attending nearby "Anglo" schools.

3. By 1963 Stedman was only 18.6 percent Anglo and was still overcrowded. In 1964, the Board adopted several boundary changes, two of which had the immediate effect of aggravating the segregated situation at Stedman by transferring predominantly Anglo portions of the Stedman district to other "white" schools in the area. First, a predominantly "white" portion of the Stedman zone was detached to Hallett. Second, the Park Hill-Stedman optional zone was transferred to Park Hill. This area was

approximately 96 percent Anglo, and represented that part of the Stedman district with the lowest Negro population. These changes did not significantly reduce overcrowding at Stedman. Rather, they tended to further segregate Stedman by removing the option open to many Anglo students to attend Stedman and preventing Negro students at that school from attending the predominantly Anglo schools in Park Hill.

4. Between May 1964 and May 1965, four mobile units were placed at Stedman to relieve the overcrowded conditions. This, like the previous actions of the Board with respect to school boundaries in the Stedman district, had the effect of preserving the Anglo character of certain Park Hill schools and the segregated status of Stedman.

5. As of 1968, Stedman was 94.6 percent Negro and 3.9 percent Anglo. On April 24, 1969, the School Board passed Resolution 1531 which was designed to alleviate the containment of Negro students in Stedman which had resulted from the Board's conscious efforts to preserve the Anglo character of other Park Hill schools. While 1531 would not have substantially reduced the *percentage* of Negro students at Stedman, it did provide that an additional 120 Negro children were to be transported from Stedman to predominantly Anglo schools (prior to this time 286 Stedman students were being bussed to Force, Schenck, and Dension schools). This would have provided an additional outlet for Negro children at Stedman, enabling them to attend a racially integrated school, and at the same time would have removed the need for the four mobile units. This was designed to relieve and mitigate the intense segregation condition at Stedman as well as to relieve overcrowding.

6. On June 9, 1969, the School Board repealed Resolution 1531. The natural and probable consequence of the Board's action was to continue the containment of Negro students at Stedman and to reassign Negro children who would have attended an integrated school under Resolution 1531 to the segregated Stedman.

7. The actions of the Board with respect to boundary changes, installation of mobile units and repeal of Resolution 1531 shows a continuous affirmative policy designed to isolate Negro children at Stedman and to thereby preserve the "white" character of other Park Hill schools.

Park Hill and Philips Elementary Schools (Park Hill is located at 5050 East 19th Avenue, which is approximately 8 blocks south and 6 blocks east of Barrett. Philips is located at 6550 East 21st Avenue, which is 7 blocks south and 25 blocks east of Barrett.)

1. In 1960 both Park Hill and Philips Elementary Schools were overwhelmingly Anglo in racial composition. Despite continued Negro population movement into these school districts, Park Hill and Philips presently continue to have a majority of Anglos in the student body. This characteristic of both schools is due at least in part to the efforts of the Board to prevent the use of Park Hill and especially Philips to relieve the overcrowding at Stedman.

2. By 1968 the racial composition of Park Hill was 71.0 percent Anglo. 23.2 percent Negro and 3.9 percent Hispano. The racial composition of Philips was 55.3 percent Anglo, 36.6 percent Negro and 5.2 percent Hispano. The prob-

able result of maintaining rigid school boundaries in these districts combined with the present trend of Negro population movement would be the transition of Philips and Park Hill into substantially segregated schools.

3. On April 24, 1969, the Board passed Resolution 1531 which would have stabilized the racial composition of these two schools (Park Hill would have been stabilized at 79 percent Anglo, 13 percent Negro, 8 percent Hispano; Philips would have been stabilized at 70 percent Anglo, 22 percent Negro, 8 percent Hispano), by a system of transporting some 70 students at Park Hill to Steele and Steck Elementary Schools and 80 students from Philips to Ashley and Palmer Elementary Schools. Also, 80 students would be transported to Philips from Palmer and Montclair Elementary Schools. Resolution 1531 recognized the interrelationship between Philips and Park Hill schools and Stedman, Barrett and Hallett. Thus, even though Philips and Park Hill were not segregated as of 1969, the Board felt that effective desegregation could take place at Barrett, Stedman and Hallett only if other Park Hill area schools were included in a total plan.

4. The School Board repealed Resolution 1531 on June 9, 1969. The effect of this action was to restore the original boundaries in the Park Hill and Philips districts, the probable result of which would be a gradual increase of Negro students into Park Hill and Philips schools ultimately approaching a segregated situation. Furthermore, by repeal of 1531 Park Hill and Philips would be reestablished as buffers against the influx of Negro children into other Anglo schools in the Park Hill area. Stedman, Barrett and Hallett would be returned to their status as over-

crowded, segregated schools with no effective outlet provided into predominantly Anglo schools such as Ashley and Palmer.

5. In light of the natural and probable segregative consequences of removing the stabilizing effect of Resolution 1531 on Park Hill and Philips and reestablishing the original district boundaries, the Board must be regarded as having acted with a purpose of approving those consequences.

6. These boundary changes for Park Hill and Philips are necessary to the success of the entire plan called for in Resolution 1531.

Hallett Elementary School (Hallett is located at 2950 Jasmine Street, 20 blocks east of Barrett.)

1. The Negro enrollment at Hallett Elementary School has increased from approximately one percent in 1960 to 90 percent in 1968.

2. In 1962 several boundary changes in the Park Hill elementary school districts were proposed and all but three were adopted by the Board. One of the three boundary proposals considered but not adopted would have detached part of the Stedman district to Hallett. At that time Stedman was 50-65 percent Negro and was overcrowded, whereas Hallett was operating under capacity and was approximately 85-95 percent Anglo. The adoption of this boundary change would have relieved some overcrowding at Stedman while increasing Negro enrollment at Hallett. By refusing to adopt the change, Negro students were confined in an overcrowded, segregated school and were denied the opportunity of attending an integrated school.

3. One of the 1962 boundary changes which was adopted assigned the Hallett-Philips optional zone to Philips. This reassigned zone was predominantly Anglo and Philips was at this time virtually 100 percent Anglo. There was no problem of overcrowding at either Hallett or Philips. All that was accomplished was the moving of Anglo students from a school district which would gradually become predominantly Negro to one which has remained predominantly Anglo.

4. By 1964 Hallett was 68.5 percent Anglo. A boundary change in that year detached a predominantly Anglo area from the Stedman district to Hallett, and detached an 80 percent Anglo area from Hallett to Philips. This latter area constituted the section of highest Anglo concentration in the Hallett district. After the 1964 boundary changes, Hallett was only 41.5 percent Anglo. This decrease in Anglo enrollment was due in part to the transfer of the predominantly "white" portion of Hallett's attendance area to Philips.

5. In 1965 four mobile units were constructed at Hallett. Shortly thereafter the Board also approved the construction of additional classrooms. At this time Hallett was approximately 75 percent Negro. The effect of the mobile units and additional classrooms was to solidify segregation at Hallett increasing its capacity to absorb the additional influx of Negro population into the area.

6. Resolution 1531, adopted by the Board on April 24, 1969, provided that the Superintendent develop and institute plans to make Hallett a demonstration integrated school by use of voluntary transfer of pupils. The pro-

posed plan would have transferred 500 Anglo students to Hallett while transporting 500 Hallett pupils to predominantly Anglo schools. This would have decreased the Negro concentration at Hallett from approximately 90 percent to about 40 percent.

7. Resolution 1533, passed by the Board after the rescission of Resolution 1531, also provides for a "voluntary exchange plan" for Hallett. Although this latter resolution does not refer to the purpose of integration, as did Resolution 1531, its intention seems to be substantially similar to that of 1531 with regard to the Hallett situation.

Smiley Junior High School (Smiley is located at 2540 Holly Street.)

1. In 1968 Smiley Junior High School was 23.6 percent Anglo, 71.6 percent Negro and 3.7 percent Hispano. The elementary school feeders for Smiley are Hallett (10.1 percent Anglo, 84.4 percent Negro, 3.7 percent Hispano); Park Hill (71 percent Anglo, 23.2 percent Negro, 3.9 percent Hispano); Smith (2.8 percent Anglo, 94.9 percent Negro, 1.6 percent Hispano); Philips (55.3 percent Anglo, 36.6 percent Negro, 5.2 percent Hispano); Stedman (3.9 percent Anglo, 92.4 percent Negro, 2.9 percent Hispano); Ashley (85.8 percent Anglo, 6.4 percent Negro, 5.8 percent Hispano); and Harrington (5.0 percent Anglo, 77.7 percent Negro, 15.2 percent Hispano). Because of Negro population movement into this area, it is substantially certain that continuance of the boundaries as reestablished by repeal of Resolutions 1520 and 1524 will result in Smiley becoming almost completely Negro in the future.

2. Smiley has the second highest number of minority teachers of any junior high school in the city. There are 23 Negro and Hispano teachers at Smiley, while no other junior high school, with the exception of Cole, has more than six teachers from racial minority groups.

3. In light of the racial composition of the Smiley student body and faculty in 1968, the racial composition of the Smiley feeders, and Negro population movement into the area, we find that in 1968 Smiley was a segregated school.

4. In 1969 the School Board undertook to correct the segregated situation at Smiley by the adoption of Resolutions 1520 and 1524. These Resolutions were designed to desegregate Smiley by a substantial alteration of junior high school boundary lines. Had the Resolutions been implemented, the racial composition of Smiley would have been 72 percent Anglo, 23 percent Negro, and 5 percent Hispano.

5. On June 9, 1969, the Board repealed Resolutions 1520 and 1524. The effect of this repeal was to reestablish Smiley as a segregated school by affirmative Board action. At the time of the repeal, it was certain that such action would perpetuate the racial composition of Smiley at over 75 percent minority and that future Negro population movement would ultimately increase this percentage. Thus, the Board acted with full knowledge of exactly what the consequences of the repeal would be. We, therefore, find that the action of the Board in rescinding Resolutions 1520 and 1524 was wilful as to its effect on Smiley.

East High School (East is located at 1545 Detroit Street.)

1. Before passage of Resolution 1520, East High School was approximately 54 percent Anglo, 40 percent Negro and 7 percent Hispano. Resolution 1520 would have reduced the racial minority enrollment at East to 32 percent. Neither before nor after the passage of 1520 could East be considered a segregated school.

2. The boundary changes embodied in Resolutions 1520, 1524, and 1531 would have indirectly affected the racial composition of East through changes in East's feeder schools. Rescission of these Resolutions might, through the feeder system, result in a segregated situation at East in the future.

SUMMARY OF FINDINGS

All of the elementary schools discussed in the supplemental findings set forth above are located in the Park Hill area. There is a high degree of interrelationship among these schools, so that any action by the Board affecting the racial composition of one would almost certainly have an effect on the others. Furthermore, since all of these elementary schools operate as feeders for Smiley Junior High School (with the exception of Barrett), any factors affecting the racial composition of the elementary schools will also have a similar effect on Smiley. It is significant to note that Board actions between 1960 and 1969, such as the 1962 and 1964 boundary changes, dealt with the entire Park Hill area and had some effect on each school in that section of the city. Thus, the Board itself has continuously recognized the interrelationship of schools in northeast Denver.

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Between 1960 and 1969 the Board's policies with respect to these northeast Denver schools show an undeviating purpose to isolate Negro students first in Barrett, and later in Stedman and Hallett while preserving the Anglo character of schools such as Philips and Park Hill. The ultimate effect of the Board's actions and policies in the face of a steady influx of Negro families into the area was to create and maintain segregated situations at Barrett, Stedman, and Hallett which ultimately led to a substantially segregated situation at Smiley.

In adopting Resolutions 1520, 1524 and 1531, the Board recognized its constitutional responsibility to desegregate schools in northeast Denver. These Resolutions were adopted by a five to two majority following the recommendations of both the Special Study Committee created in 1962 and a second committee created in 1966, and recommendations contained in the report of Dr. Gilberts and the Board staff submitted in October 1968. The reports of the 1962 and 1966 committees made clear that the continued rigid adherence to the established school boundary lines had led to segregation in several Park Hill schools. These Resolutions constituted legitimate legislative action designed to remove the segregation in Park Hill schools by means which were both moderate and reasonable in light of existing conditions.

Resolutions 1520, 1524, and 1531 were designed to relieve segregation in Barrett, Stedman, Hallett and Smiley by altering school district boundaries. Among other things these Resolutions would have transferred heavily concentrated Negro portions of the Barrett, Park Hill, Philips and Smiley districts to predominantly Anglo schools, while transporting a substantial number of Anglo students to the segregated schools. Segregation at Hallett and Sted-

man was to be relieved by a vigorous policy of voluntary bussing. Although at the time these Resolutions were passed Philips and Park Hill schools were not segregated, the Board recognized that they were key elements in dealing with the interrelated situation in northeast Denver and that any overall scheme for desegregating Barrett, Hallett, Stedman and Smiley would necessarily require affirmative action with respect to Park Hill and Phillips.

On June 9, 1969, the Board rescinded Resolutions 1520, 1524 and 1531. This action was taken with little study and was not justified in terms of educational opportunity, educational quality or other legitimate factors. The only stated purpose for the rescission was that of keeping faith with the will of the majority of the electorate.

The effect of the rescission was to restore and perpetuate the status quo as it existed in northeast Denver prior to the passage of Resolutions 1520, 1524 and 1531. This status quo was one of segregation at Barrett, Hallett, Stedman and Smiley. As a replacement for proposals embodied in Resolutions 1520, 1524, and 1531, the Board adopted Resolution 1533 which in essence provides for desegregation on a voluntary basis, a program which has been unsuccessful and which furnishes little promise.

Conclusions of Law

1. The policies and actions of the Board prior to the adoption of Resolutions 1520, 1524 and 1531, which conduct is specifically described in the foregoing findings, constitute de jure segregation.

2. The adoption of Resolutions 1520, 1524 and 1531 was a bona fide attempt of the Board to recognize the constitutional rights of the persons affected by the prior segregation.

3. The rescission of Resolutions 1520, 1524 and 1531 was a legislative act which had for its purpose restoration of the old status quo and was designed to perpetuate segregation in the affected area. This act in and of itself was an act of de jure segregation. It was unconstitutional and void.

4. Section 407(a) of the Civil Rights Act of 1964, Title 42 U.S.C. § 2000c-6(a) has been fully considered. It does not apply to a private civil rights action asserting violation of the Constitution. A supplemental opinion will expound the reasons in support of this conclusion.

PRELIMINARY INJUNCTION

This matter having come on for hearing upon remand by the Court of Appeals for the Tenth Circuit on the motion of plaintiffs for a preliminary injunction, and the Court having heard the testimony of the witnesses, having reviewed and considered the exhibits in evidence herein, and having heard the statements of counsel:

The Court finds that:

1. The Court has jurisdiction over the subject matter of this action under 28 U.S.C. Sections 1343(3) and 1343(4). This is a civil action authorized by law and arising under Title 42 U.S.C. Section 1983 and the Fourteenth Amendment of the Constitution of the United States;

2. The Court has jurisdiction over the parties herein;

3. Plaintiffs and the classes which they represent have no adequate remedy at law;

4. Unless this preliminary injunction issues, plaintiffs and the classes which they represent will suffer irreparable injury;

5. Plaintiffs and their classes have demonstrated a reasonable probability that they will ultimately prevail upon a full trial of the merits herein.

Based upon the foregoing findings together with those contained in the opinion heretofore rendered it is

Ordered, adjudged and decreed that the motion for a temporary injunction should be and the same is hereby granted to the following extent:

The defendants, their agents and servants are enjoined and restrained, during the pendency of this action, from any conduct which would modify the status quo as it existed prior to June 9, 1969, in respect to acquisition of equipment, destruction or relocation of documents, writings and memoranda, and are further enjoined and restrained from implementing Resolution 1533, insofar as that Resolution is an integral part of the rescission of Resolutions 1520, 1524 and 1531, and would seek to restore the segregated conditions which existed prior to the adoption of Resolutions 1520, 1524 and 1531.

The defendants, their agents and servants are further ordered to make effective the following integration policies:

Resolution 1520 insofar as it applies to Smiley Junior High School (specifically, paragraphs six and seven of the boundary changes embodied in the said Resolution 1520);

Resolution 1524 insofar as it applies to Smiley Junior High School (specifically, paragraphs one through nine, inclusive, of the boundary changes embodied in Resolution 1524) (paragraphs eight and nine being necessary to the desegregation of Smiley Junior High School). Paragraphs A, B, C, and D of Resolution 1524, which deal with Cole

Junior High School, are not here considered, but nothing herein contained is intended to prevent the implementation of those boundary changes. Ruling on these changes is reserved until the trial.

Resolution 1531 insofar as it applies to boundary changes concerning Barrett, Park Hill and Philips Elementary Schools, and insofar as it directs the Superintendent to establish Hallett Elementary School as a demonstration integrated school through voluntary transportation and to continue the practice of transporting students from Stedman Elementary School to relieve overcrowding and to permit the removal of mobile classroom units at that school.

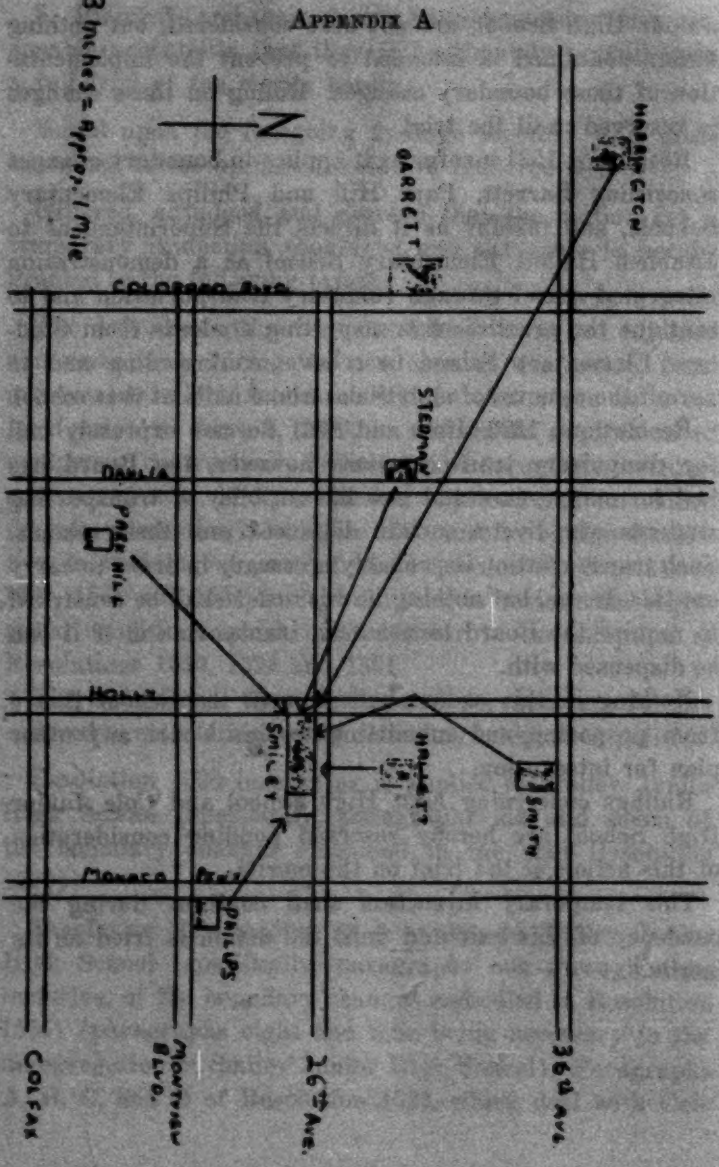
Resolutions 1520, 1524 and 1531 do not expressly call for compulsory transportation; however, the Board has had for many years and now has a policy of transporting students who live a certain distance from their schools. Such transportation is probably necessary in order to carry out this decree, but nothing in this order shall be construed to require the Board to use such transportation if it can be dispensed with.

Nothing in this order shall prevent the School Board from proposing and submitting to this Court any other plan for integration.

Rulings concerning East High School and Cole Junior High School are hereby reserved pending consideration of this action at the trial on the merits.

This temporary injunction shall continue during the pendency of this suit and until the action is tried on its merits.

APPENDIX A


3 Inches = Approx. 1 Mile
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COLORADO BLVD.
GARRETT
HARRINGTON
STEDMAN
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SMITH
MONACO
PHILLIPS
COLFAX
MONTVIEW BLVD.
26TH AVE.
36TH AVE.

Opinion of District Court of August 14, 1969

OPINION AS TO APPLICABILITY OF SECTION 407(a) OF THE CIVIL RIGHTS ACT OF 1964

The Court of Appeals for the Tenth Circuit has remanded this case in part for this Court's prior determination of the applicability and effect of Section 407(a) of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-6(a)), which Section contains the following proviso:

> provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

We have considered the arguments of counsel, both oral and in briefs. We conclude that the above proviso does not limit the power of this Court to direct the School Board to implement Resolutions 1520, 1524 and 1531 to the extent ordered.

Section 407(a) refers to actions brought by the Attorney General of the United States under the authority granted him by that Section. The proviso appears in this context, and thus on its face does not apply to a case such as this, which is not brought by the Attorney General. Defendants call our attention to a comment made by then Senator Humphrey during Congressional debate on the Act to the effect that the proviso applies to the entire 1964 Civil Rights Act. Assuming that construction to be correct, the instant

case is not brought under the 1964 Civil Rights Act but rather under 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

The legislative history of Section 407 (a) indicates that the proviso meant only that Congress was not taking a position on the question of the propriety of transportation to achieve racial balance in a case of *de facto* segregation. *See* United States v. Jefferson County Bd. of Ed., 372 F.2d 836, 880 (5th Cir. 1966), *aff'd on rehearing with order modified*, 380 F.2d 385 (5th Cir. 1967) (en banc).

We have concluded that the instant case is one in which the Board has actively contributed to the segregated conditions found to exist. The act applies, if at all, to a *de facto* segregation situation. The Court of Appeals for the Seventh Circuit made this distinction in United States v. School District 151 of Cook County, Illinois, 404 F.2d 1125 (7th Cir. 1968), where it was held that the proviso in Section 407(a) had no application where transportation was "not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the Board's history of discrimination." 404 F.2d at 1130. Counteracting a legacy is precisely what the order in the instant case is intended to do.

The language of the proviso indicates that its purpose was to prevent the implication that Section 407(a) enlarged the powers of the federal courts. The proviso states that the Section grants a court no power to order transportation to achieve racial balance, nor does the Section "otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The equitable powers of the courts in directing compliance with constitutional mandates exist independent of the 1964 Civil Rights Act. United States v. Jefferson County Bd. of Ed., 372 F.2d 836,

880 (5th Cir. 1966). The proviso merely explains that Section 407(a) is not to be construed to enlarge the powers of the courts; it does not limit those powers.

It would be inconsistent to construe the proviso as a limitation on the power of the courts to correct a deprivation of rights which Section 407(a) itself is intended to remedy. The Congressional policy behind the 1964 Act should not be diluted by such a construction.

In United States v. School District 151 of Cook County, Illinois, 286 F.Supp. 786 (N.D.Ill.1968), the district court considered the instant question and concluded:

> That provision of 42 U.S.C. § 2000c-6 which withholds from the courts the power to require transportation of pupils to overcome racial imbalance in public schools must be construed to relate to so-called de facto or adventitious segregation. It is inapplicable where, as here, the existing segregation of pupils and teachers is inseparable from the practices and policies of the defendants. 286 F.Supp. at 799.

In affirming this construction of the statute the Court of Appeals for the Seventh Circuit used the following strong language:

> Defendants next contend that they have no constitutional duty to bus pupils, in the District, to achieve a racial balance. It is true that 42 U.S.C. § 2000c-6 withholds power from officials and courts of the United States to order transportation of pupils from one school to another for the purpose of achieving racial balance. However, this question is not before us. Although we recognize that past residential segregation itself, in the District, severely unbalanced racially the

school population, the district court's judgment is directed at the unlawful segregation of Negro pupils from their White counterparts which is a direct result of the Board's discriminatory action. Therefore, the district court's order is directed at eliminating the school segregation that it found to be unconstitutional, by means of a plan which to some extent will distribute pupils throughout the District, presumably by bus. This is not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the Board's history of discrimination.

The Constitution forbids the enforcement by the Illinois School District of segregation of Negroes from Whites merely because they are Negroes. The congressional withholding of the power of courts in Section 2000c-6 cannot be interpreted to frustrate the constitutional prohibition. The order here does not direct that a mere imbalance of Negro and White pupils be corrected. It is based on findings of unconstitutional, purposeful segregation of Negroes, and it directs defendants to adopt a plan to eliminate segregation and refrain from the unlawful conduct that produced it. United States v. School District 151 of Cook County, Illinois, 404 F.2d 1125, 1130 (7th Cir. 1968).

Judge Wisdom, writing for the Court of Appeals for the Fifth Circuit in the *Jefferson County* case, also considered the applicability of the statute to a *de jure* case and determined that it did not apply.

The above are the sum total of court decisions on the subject. However, they dispel any doubt as to its applicability.

We add that in reevaluating the case in light of the statute and in reconsidering Resolutions 1520, 1524 and 1531, we determined that the effort in 1520 to desegregate East High School was not within the ambit of a preliminary injunction either because of the statute or for the equally good reason that the evidence as of now fails to disclose a condition at East which merits a preliminary injunction.

Opinion of District Court of March 21, 1970

UNITED STATES DISTRICT COURT

D. Colorado

Civ. A. No. C-1499

March 21, 1970

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor, *et al.*,

Plaintiffs,

v.

School District Number One, Denver, Colorado, the Board of Education, School District Number One, Denver, Colorado, William C. Berge, individually and as President, Board of Education, School District Number One, Denver, Colorado, Stephen J. Knight, Jr., individually and as Vice President, Board of Education, School District Number One, Denver, Colorado, James C. Perrill, Frank K. Southworth, John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, individually and as members, Board of Education, School District Number One, Denver, Colorado; Robert D. Gilberts, individually and as Superintendent of Schools, School District Number One, Denver, Colorado,

Defendants.

Mr. and Mrs. Douglas Barnett, individually and on behalf of Jade Barnett, a minor, *et al.*,

Intervening Defendants.

Memorandum Opinion and Order

William E. Doyle, District Judge.

This is an action in which plaintiffs, parents of children attending Denver Public Schools, sue individually and on

behalf of their minor children. It is also brought on behalf of a class and has proceeded as a Rule 23 class action.

The complaint contains numerous causes of action and counts, but essentially it is complained that

(1) The Board of Education for School District No. One, Denver, unconstitutionally rescinded certain resolutions which were designed to desegregate specific schools within the District;

(2) The named defendants have created and/or maintained segregated student bodies and faculties in many of the schools in School District No. One;

(3) The said School District has provided an unequal educational opportunity to students attending segregated schools within the District.

Plaintiffs pray for a declaratory judgment that the above acts are unconstitutional and also seek broad injunctive relief prohibiting the defendants from continuing their prior policies and requiring them to remove the effects of their unconstitutional acts.

In July 1969, an extensive trial was had on plaintiffs' motion for a preliminary injunction as to their first claim for relief, which claim alleged that the rescission of the remedial School Board Resolutions 1520, 1524 and 1531 was an unconstitutional act. This Court held that this attempted rescission was in fact unconstitutional, and ordered that specified portions of Resolutions 1520, 1524 and 1531 be effectuated pending full trial on the merits. Keyes v. School District No. 1, Denver, Colorado, 303 F.Supp. 279 (D.Colo.), Supplemental Findings and Conclusions, 303 F.Supp. 289 (D.Colo. 1969).

In February 1970, the case was tried on its merits. The plaintiffs, the defendants and the intervening defendants were fully heard. This was a trial which continued for fourteen trial days. It produced over 2,000 pages of testimony and several hundred exhibits. Thus, the case has been fully tried with the exception of submission by the parties of tangible plans. This phase of the case was deferred pending decision on the issues involving alleged discrimination.

Plaintiffs' first claim for relief deals solely with the purpose and effect of the rescission of Resolutions 1520, 1524 and 1531. Plaintiffs' second claim for relief consists of three counts.[1] The first count of the second claim alleges that the Board of Education has purposely created and/or maintained racial segregation in certain schools within the District through boundary changes, school site selection and the maintenance of the neighborhood school policy. The second count alleges that the segregated schools within the District are grossly inferior and provide an unequal educational opportunity for minority students; that these schools do not even meet the separate but equal standard of Plessy v. Ferguson and that the Board is obligated to remedy this inequality regardless of its cause.

Finally, plaintiffs contend that several schools were created and/or maintained as segregated schools by actions of the Board, and that regardless of purpose or intent these acts are unconstitutional. We will deal first with the schools which were the subject of the preliminary hearing, considering the explanatory evidence offered at trial. Secondly, we will consider the evidence which has been offered relative

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[1] The plaintiffs' fourth count of the second claim for relief, based upon maintenance of a "track system," has been abandoned.

to segregation and discriminatory educational opportunity in the core city schools and, finally, we will discuss possible remedies.

I.

Plaintiffs' first claim for relief alleges that the rescission of School Board Resolutions 1520, 1524 and 1531 was unconstitutional because its purpose and effect was to perpetuate racial segregation in the affected schools. This claim for relief was the subject of the hearing on plaintiffs' motion for preliminary injunction.

Resolutions 1520, 1524 and 1531, promulgated in 1969, were designed to relieve segregation and the tendency toward segregation in schools located in the Park Hill area of Northeast Denver. These schools include Barrett, Stedman, Hallett, Smith, Phillips and Park Hill Elementary Schools; Smiley and Cole Junior High Schools; and East High School.

The evidence presented at the preliminary hearing has been fully incorporated in the present record. We deem it unnecessary to describe it in detail since it is fully set forth in 303 F.Supp. 279, 289. A recap will, however, serve to bring those proceedings into context.

Prior to 1950, the Negro population of Denver was concentrated in a portion of the city known as "Five Points," which is located west of Park Hill. Beginning in 1950, the Negro population began an eastward migration which, by 1960, had reached Colorado Boulevard, a natural dividing line. Since 1960, this migration has extended east of Colorado Boulevard into Park Hill. It is the acts of the defendants, taken in the face of this population movement, which plaintiffs contend created the *de jure* segregation complained of in the first claim for relief.

Barrett Elementary School was opened in 1960 at East 29th Avenue between Jackson Street and Colorado Boulevard. The site selected for Barrett, along with the size of the school and its established boundary lines insured that it would be a segregated school from the date of its opening.[1] From these and other facts, we concluded at the preliminary hearing, and we now affirm that holding, that the School Board intended to create Barrett as a segregated school and prevent Negro children from attending the predominantly Anglo schools east of Colorado Boulevard.

At trial (on the merits) defendants attempted to justify Barrett on the ground that until 1964 the Board maintained a racially neutral policy. Racial and ethnic data were not maintained by the District, and race was not considered as a factor in any decision. Defendants further stated that (1) the Barrett site had been owned by the District since 1949 and a school was needed in that general vicinity; (2) Colorado Boulevard was established as the eastern boundary of the Barrett attendance zone because it was a six lane highway and would have been a safety hazard were children required to cross it; and (3) Barrett was built relatively small because its main function was to relieve overcrowding in existing schools rather than to accommodate any significant projected increase in area population.

The above factors fail to provide a basis for inferring that a justifiably rational purpose existed for the action taken with respect to Barrett. *First*, the District owned other sites east of Colorado Boulevard.[2] Had a school been

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[1] When Barrett opened in 1960, its student body was 89.6 percent Negro.

[2] Dr. Oberholtzer testified that at the time Barrett was built, the School District also owned sites at 35th and Dahlia and 36th and Jasmine (Tr. pg. 2084).

built on one of these sites, it would have not only served the Barrett area, it would also have been integrated. *Second*, the fact that in 1960 many elementary school subdistricts included areas on both sides of busy thoroughfares indicates that safety was not a primary factor in setting school boundaries.[4] *Third*, because of Barrett's small size and the location of its subdistrict boundaries, Barrett relieved overcrowding only at the two predominantly Negro elementary schools west of Colorado Boulevard while affording no relief to the overcrowded Anglo Stedman elementary school eight blocks east of the Barrett site. *Finally*, at the time the decision to build Barrett at 29th and Jackson was made public, a large portion of the Negro community opposed the plan on the ground that Barrett would clearly be a segregated school. This opposition was made known to the Board, and, thus, the School Board cannot now claim that it was uninformed as to the racial consequences of its decisions. Indeed, at that time it was the view of the school administration that it was precluded from taking action which would have an integrating effect.

Between 1960 and 1965, several boundary changes were made in the Park Hill area and mobile units were employed

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[4] For example, in 1960, the attendance areas of the following elementary schools included areas on both sides of the indicated thoroughfares: Teller and Steck (Colorado Blvd.); Albion, Park Hill, Teller, Stevens, Wyman, Emerson, Evans, Greenlee, Cheltenham, and Colfax (Colfax Ave.); Crofton and Ebert (Broadway); Columbian, Cheltenham, Eagleton and Barnum (Federal Blvd.). Furthermore, it was the policy of the Board to place an elementary school at the center of its attendance area wherever possible. This policy was clearly ignored in the case of Barrett.

in some Park Hill schools to relieve overcrowding.[5] The effect of these various acts on the racial composition of Park Hill schools was identical. Each tended to isolate and concentrate Negro students in those schools which had become segregated in the wake of Negro population influx into Park Hill while maintaining for as long as possible the Anglo status of those Park Hill schools which still remained predominantly white. From this uniform pattern we concluded that the School Board knew the consequences and intended or at least approved of the resultant racial concentrations. We find nothing in the evidence presented at the trial which detracts from this conclusion.

As noted in our former opinion, in 1962 a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools (Voorhees Committee) was created. Following a thorough study, the Committee recommended that the School Board consider racial, ethnic and socio-economic factors in establishing boundaries and locating new schools, and that boundaries be set so as to establish heterogeneous school communities. Pursuant to this recommendation, the Board adopted Policy 5100, which called for changes or adaptations which would result in a more diverse or heterogeneous racial and ethnic school population.

A second study committee (Berge Committee) was established in 1966 to examine the policies of the Board with respect to the location of new schools in Northeast Denver and to suggest changes which would lead to integration of

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[5] The 1962 and 1964 boundary changes affected Stedman, Hallett, and Phillips schools. Mobile units were added to Stedman in 1964 and 1965 and to Hallett in 1965. For a more complete discussion as to the consequences of these boundary changes and mobile units see our opinions on plaintiffs' motion for preliminary injunction, reported at 303 F.Supp. 279 and 303 F.Supp. 289.

student population in Denver schools. This committee recommended that no new schools be built in Northeast Denver; that a cultural arts center be established which would be attended by students from various schools on a half-day basis once or twice a week; that educational centers be created; and that a superior school program be initiated for Smiley and Baker junior high schools.

After more than six years of studying and discussing these committee reports and recommendations, the Board in 1968 passed the "Noel Resolution" (Resolution 1490). The "Noel Resolution" noted that Policy 5100 recognized that continuation of neighborhood schools had resulted in the concentration of minority racial and ethnic groups in some schools within the District and that these schools provided an unequal educational opportunity. The Resolution directed the Superintendent of Schools to submit to the Board a comprehensive plan for the integration of the Denver Public Schools.

Pursuant to the "Noel Resolution's" directive, the Superintendent submitted a report entitled "Planning Quality Education—A Proposal for Integrating the Denver Public Schools." Between January and April 1969, the Board studied the Superintendent's report and passed three resolutions—1520, 1524 and 1531. These Resolutions were the product of intense study and discussion and were developed only after considering some fourteen alternative plans. Basically, their purpose was to eliminate segregation in the Negro schools in Park Hill while stabilizing the racial composition of schools in transition. Thus, these Resolutions constituted the first acts of departure from the Board's prior undeviating policy of refusing to take any positive

action which would bring about integration of the Park Hill schools.[6]

In May 1969, a School Board election was held. Much of the campaign revolved around Resolutions 1520, 1524 and 1531, especially those portions which called for mandatory bussing to relieve segregation. The two candidates who had pledged to rescind Resolutions 1520, 1524 and 1531 were elected. On June 9, 1969, the three Resolutions were rescinded and in their stead the Board passed Resolution 1533, which sought to achieve desegregation on a voluntary basis.[7] The rescissions were effectuated with little study and were justified only as a response to the community sentiment expressed in the School Board election.

We concluded at the hearing on preliminary injunction that the adoption of Resolutions 1520, 1524 and 1531 was a "bona fide attempt of the Board to recognize the constitutional rights of the persons affected by the prior segregation." 303 F.Supp. at 295. We further concluded, on the other hand, that the act of the Board repudiating these salutary policies was a legislative act and one of *de jure* segregation.

> The rescission of Resolutions 1520, 1524 and 1531 was a legislative act which had for its purpose restoration

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[6] To be sure, the Board had adopted statements of policy, such as Policy 5100, suggesting that it had abandoned its prior philosophy. However, Resolutions 1520, 1524 and 1531 marked the first time the Board had backed up earlier policy statements with affirmative action.

[7] Resolution 1533 provided for a voluntary exchange program at Hallett Elementary School on a reciprocal basis, i. e., a volunteering pupil from Hallett could transfer to another school *if* a pupil from that school would volunteer to attend Hallett. The Resolution also called for the transfer of 120 Stedman students, on a voluntary basis, to other elementary schools where space was available.

of the old status quo and was designed to perpetuate segregation in the affected area. This act in and of itself was an act of de jure segregation. It was unconstitutional and void. 303 F.Supp. at 295.

At trial defendants claimed that the three Resolutions had not been implemented at the time of the rescission, and thus in effect that no rights had ever vested under them. Yet the only apparent purpose of the rescission was to maintain a segregated condition at those schools which, but for the rescission, would have been afforded considerable relief. True, the resolutions had not been carried out, but extensive preparations were in progress. In any event, this cannot be made to turn on any property right analogy. Plaintiffs were deprived of a right to seek and possibly to attain equality.

Our preliminary injunction ordered full implementation of Resolutions 1520, 1524 and 1531, except to the extent that the Resolutions apply to East High School and Cole Junior High School. We now hold that the rescission as it applied to East and Cole was also unconstitutional. The School Board recognized that East High School contained growing numbers of minority pupils and that this rapid advance toward segregation threatened the high quality of education which had always been characteristic of East High School. It was, therefore, considered desirable to reduce the number of minority students at East and to stabilize the racial composition therein.[8] Although East may not now be a segregated school, it is unquestionably a

[8] Prior to the passage of Resolution 1520 the racial composition at East was approximately 54 percent Anglo, 40 percent Negro and 7 percent Hispano. The effect of the resolution would be to reduce minority enrollment at East to 32 percent.

school in transition. Left alone it will quickly become segregated. The School Board, with the passage of Resolution 1520, was administering preventive justice. It was making a reasonable and good faith effort to prevent East from becoming a segregated school.

Even though the racial composition at Cole Junior High School was not significantly changed by Resolution 1524, the Resolution did reduce the pupil membership at that school by 275 students. The purpose of this change was to decrease the pupil-teacher ratio at Cole and to make room for a number of special programs to be instituted there. This was also a good faith effort by the Board to improve the quality of education at the predominantly Negro Cole. The action of the Board in aborting and frustrating this effort cannot stand.

We conclude then that the effect of the rescission of Resolution 1520 at East High was to allow the trend toward segregation at East to continue unabated. The rescission of Resolution 1524 as applied to Cole Junior High was an action taken which had the effect of frustrating an effort at Cole which at least constituted a start toward ultimate improvement in the quality of the educational effort there. It perhaps looked to ultimate desegregation. We must hold then that this frustration of the Board plan which had for its purpose relief of the effects of segregation at Cole was unlawful. Resolutions 1520 and 1524, as they apply to East and Cole, should be implemented.

In reaching the above conclusion, we have very carefully considered both the majority and minority opinions in the now famous Supreme Court decision of Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), and have concluded that both opinions fully support the position which we have taken.

It will be recalled that *Mulkey*, like the case at bar, had to do with the repeal of legislative acts which recognized rights guaranteed by the equal protection clause of the Fourteenth Amendment. These were in the form of California statutes prohibiting the denial by individuals of the right to be free and equal regardless of race. The plaintiffs were tenants in apartment buildings, who were denied accommodations. By initiative a constitutional amendment, Proposition 14, was adopted. This seemingly innocuous provision guaranteed to everyone unlimited right to decline to sell or rent his property in his uncontrolled discretion. Thus, Proposition 14, or Article I, Section 26, effectively repealed the statute relied on by plaintiff.

The Supreme Court struck down the California amendment adopted by popular vote and did so despite its neutral visage. The Court held that it had the effect of involving the state in "private racial discriminations to an unconstitutional degree." The majority opinion of Mr. Justice White, in concluding that this was discriminatory state action, said:

> None of these cases squarely controls the case we now have before us. But they do illustrate the range of situations in which discriminatory state action has been identified. They do exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations. Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court be-

lieves that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned. 387 U.S. at 380-381, 87 S.Ct. at 1634.

Our case is like *Mulkey* in that it also involves repeal or rescission of a previous enactment which extended and upheld non-discriminatory rights. Our case is stronger than *Mulkey* in that there the statute was brought to bear on private transactions. Here, on the other hand, there can be no question about whether it is the state which is discriminating.

The sole basis for the dissenting opinion of Justice Harlan was that the constitutional provision was not state action; that it was merely a proclamation of state neutrality in transactions private in nature. The opinion of Mr. Justice Harlan states:

> In the case at hand California, acting through the initiative and referendum, has decided to remain 'neutral' in the realm of private discrimination affecting the sale or rental of private residential property; in such transactions private owners are now free to act in a discriminatory manner previously forbidden to them. In short, all that has happened is that California has effected a *pro tanto* repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance. The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California

Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done. The Fourteenth Amendment does not reach such state constitutional action any more than it does a simple legislative repeal of legislation forbidding private discrimination. 387 U.S. at 389, 87 S.Ct. at 1638.

It cannot be argued in the case at bar that the legislative action of the School Board was neutral. The Board specifically repudiated measures which had been adopted for the purpose of providing a measure of equal opportunity to plaintiffs and others. The School Board action was, to say the least, not neutral and the causal relation between the School Board action and the injuries is direct. We find and conclude then that *Mulkey* not only supports our position, it is a compelling authority in support of the conclusion which we have reached. It is so closely analogous that we would be remiss if we failed to follow it.

II.

The evidentiary as well as the legal approach to the remaining schools is quite different from that which has been outlined above. For one thing, the concentrations of minorities occurred at an earlier date and, in some instances, prior to the *Brown* decision by the Supreme Court. Community attitudes were different, including the attitudes of the School Board members. Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools.

Still another distinguishing point is that we do not here have legislative action similar to the rescission of Resolutions 1520, 1524 and 1531.

The first count of plaintiffs' second claim for relief alleges that *de jure* segregation exists at Manual High School; Cole Junior High School; Morey Junior High School; Boulevard Elementary School; Columbine Elementary School and Harrington Elementary School as a result of School Board action designed to isolate Negro and Hispano children in the above schools. Furthermore, plaintiffs claim that this intentional isolation of minority children aggravated or produced the segregated condition of the schools in question.

In support of their allegations, plaintiffs have offered boundary changes and other acts on the part of the School Board as constituting *de jure* segregation.

Before discussing the acts which are relied on, one other factor needs to be mentioned. In some of the schools there are concentrations of Hispanos as well as Negroes. Plaintiffs would place them all in one category and utilize the total number as establishing the segregated character of the school. This is often an oversimplification (certainly if relief is to be granted in a school, the Hispano should receive the same benefit as the Negro.) The plaintiffs have accomplished this by using the name "Anglo" to describe the white community. However, the Hispanos have a wholly different origin, and the problems applicable to them are often different.

One of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination. However, whether it is permissible to add the numbers of the two groups together and lump them into a single minority category for purposes of classification as a segregated school remains a problem and a question.

It would seem then that to the extent that Hispanos, as a group, are isolated in concentrated numbers, a school in

which this has occurred is to be regarded as a segregated school, either *de facto* or *de jure*.

We turn now to a consideration of the evidence offered by plaintiffs regarding boundary changes and elimination of optional areas, which evidence is presented in support of their argument that *de jure* segregation exists in the affected schools. Our comments and legal conclusions will follow.

1. *New Manual High School* (Location: 1700 East 28th Avenue. Present Racial Composition: 60.2 percent Negro, 27.5 percent Hispano, 8.2 percent Anglo)

Both the old and the new Manual were and are located in the older part of the city. This is an area which has long been occupied by the Negroes and is now partly occupied by the Hispanos as well. In the very earliest days of Denver it probably had no racial or ethnic character, and before the Negroes it was in all likelihood occupied by laboring people of various national origins.

The Negro movement has always been eastward because this has been the only open corridor, and this continues to be the case. Plaintiffs' big complaint is that the school was built in this old location and was thus earmarked for minority occupants. However, we have to be mindful of the evidence that it was opened in 1953 at a time prior to Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and we are told that this location had the consent of the people in the neighborhood. At that time there was much less concern about minority concentration. The community concern was with the nature and character of the new facility. In any event, the new Manual High School had the same attendance boundaries as the old. The eastern boundary of the mandatory Manual attendance zone was be-

tween Williams and High Streets, just one-half block east of the school site.[9]

In 1953, Manual was operating under its capacity, while East High School, to the southeast, was filled to capacity.[10] Although data is not available as to the 1953 Hispano enrollment at Manual, we know that in 1949-50 this figure was 23.5 percent. The Negro enrollment at Manual in 1953 was 35 percent. We can infer, therefore, that when new Manual opened in 1953, it was a minority school if Negroes and Hispanos are aggregated. Nearby East High School was predominantly Anglo, with a Negro enrollment of only two percent.

By 1956, Manual High School was 42 percent Negro. Whereas in 1953 the Williams-High boundary of the Manual attendance zone was approximately co-terminus with the easternmost point of Negro population movement, by 1956 the Negro population had expanded eastward to roughly York Street. In January 1956, the school administration recommended that the Manual boundary be moved east to York Street, thus including a portion of the former East-

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[9] The new Manual attendance area was irregularly shaped with its northern boundary at the city limits, its western boundary at the Platte River, and its southern boundary at 17th Avenue. Only the eastern boundary, between Williams and High Streets, is relevant for the purposes of this case.

[10] The capacity utilization of a school is a function of school size and number of students. Plaintiffs have computed school capacity by using the figure of 30 students per room multiplied by the number of rooms in the school. Defendants contend that this is unrealistic, because at lower achieving schools the student-teacher ratio has been reduced, so that, for example, 25 students per room may constitute capacity. Throughout this opinion, the lower achieving schools will be considered undercapacity only where the degree of undercapacity as represented by plaintiffs' data is so great that it cannot be explained purely in terms of a lower teacher-pupil ratio.

Manual optional zone.[11] This proposed boundary, therefore, coincided with the eastern movement of Negro population in that area.

The 1956 Manual boundary change was resisted by some members of the Negro community on the ground that it would serve to contain Negro students living between Williams and York at Manual by cutting off their prior option to attend East. This concern was communicated to the School Board at a series of public meetings. The school administration justified the change on the basis of the overcrowding at East and the underutilization at Manual. Manual had sufficient capacity to accommodate more students than those to be transferred under the proposed boundary change. It was, therefore, suggested that the Board move the Manual boundary east to Colorado Boulevard. This would have embraced a predominantly Anglo neighborhood. Such a move would not only have further alleviated overcrowding at East, but would also have had some integrating effect at Manual. How much we do not know. It would not have substantially changed its character, and the integrating effect would have been temporary, only because in a few years this neighborhood became Negro.

2. *Cole Junior High School* (Location: 3240 Humboldt Street. Present Racial Composition: 72.1 percent Negro; 25.0 percent Hispano; 1.4 percent Anglo)

In 1952, the eastern boundary of Cole Junior High was four blocks east of the school, between High and Race Streets.[12] At this time Cole was undercapacity while

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[11] East High School, at this time, had a Negro enrollment of one percent.

[12] Although there is no direct evidence of the racial composition of Cole in 1952, we may infer that it was a predominantly minority school at that time from the fact that in 1946-47 its racial composition was 43 percent Anglo; 21 percent Negro; 29 percent Hispano and 7 percent "Mongolian." By 1952 the Negro enrollment at Cole had increased to 30 percent.

Smiley Junior High, a predominantly Anglo school a short distance east of Cole, was overcapacity by approximately 300 students. Although the empty space at Cole would have been utilized to alleviate overcrowding at Smiley, this course of action was not taken.[13] Instead, the school administration determined to construct an addition at Smiley.

In 1956, a boundary change was proposed whereby the eastern boundary of Cole would be extended to York Street, thus transferring part of the Cole-Smiley optional zone to Cole.[14] This proposed change was criticized by members of the Negro community on the ground that its tendency was to preclude Negro students who were living between Race and York Streets from attending Smiley and would force them to attend Cole, which, by this time, was rapidly becoming a segregated school. Nevertheless, the Cole-Smiley boundary proposal was adopted. After the shift in the Cole boundary, Smiley remained overcapacity while Cole was substantially undercapacity.

In 1958, another addition was built at Smiley. As in 1952, this action was taken notwithstanding that empty spaces were available at Cole.

In March 1969, the School Board adopted Resolution 1524, which called for the reduction of student population at Cole. This action was designed to improve the educational opportunity offered to those students remaining at Cole,

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[13] This would presumably have entailed the transfer of Anglo students at Smiley to the predominantly minority Cole.

[14] This 1956 boundary change was allegedly made in response to the building of Hill Junior High School. However, the Hill attendance zone was carved out of the Smiley, Morey and Gove attendance zones and Cole did not play a significant part in the creation of the Hill area. It is also apparent that the Cole-Smiley boundary change of 1956 paralleled the Manual-East change of that same year, and the objections of many Negro leaders were the same with respect to both of these changes.

while making room for special education programs for low achieving students. Resolution 1524 was rescinded in June 1969.[15]

3. *Morey Junior High School* (Location: 840 East 14th Avenue. Present Racial Composition: 52.4 percent Negro; 26.8 percent Anglo; 18.6 percent Hispano)

The racial composition of Morey Junior High School in 1961 was between 65 and 80 percent Anglo. Morey was surrounded on four sides by optional zones. In 1962, the School Board adopted boundary changes which eliminated all but one of the Morey optional zones.[16] After this en-

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[15] We have determined in part I of this opinion that the rescission of Resolution 1524 was unconstitutional and that Resolution 1524 should be effectuated with respect to Cole. In this part of the opinion we are concerned only with whether further relief is warranted with reference to Cole.

[16] The 1962 changes involved transferring the Morey-Hill optional zone to Hill; the Morey-Byers optional zone to Byers; the Morey-Cole optional zone to Morey; and the Baker-Morey optional zone to Morey. The racial composition of each of these areas, as reflected by 1960 census tract data, is roughly as follows:

A. Morey-Hill optional zone—0 to 3 percent Negro, 0 to 3 percent Hispano

B. Morey-Byers optional zone—0 to 3 percent Negro, 0 to 3 percent Hispano

C. Morey-Cole optional zone—10 percent to over 50.1 percent Negro (with the larger portion over 50.1 percent Negro), 3.1 to 10 percent Hispano

D. Baker-Morey optional zone—0 to 3 percent Negro, 10.1 to 25 percent Hispano

Also, a portion of the Cole Junior High mandatory zone was transferred to Morey, the racial composition of this area being over 50.1 percent Negro and 3.1 to 10 percent Hispano.

A particularly strong protest with respect to the above boundary changes was voiced by parents of Anglo children living between 6th and 8th Avenues in a mandatory Morey attendance zone. They asserted that these changes would transform Morey into a minority school. In response to this protest the School Board also transferred this area between 6th and 8th Avenues to Byers, a predominantly Anglo junior high school.

actment became effective, the estimated Anglo enrollment at Morey declined to between 45 and 49 percent. Thus, the 1962 Morey boundary changes were largely responsible for the transformation of Morey from a predominantly Anglo school in 1961 to a predominantly minority school in 1962.

The defendants' testimony was to the effect that these changes were made in order to better utilize the capacities of Hill, Byers and Baker junior high schools. The testimony also showed that at that time Cole Junior High School, which was then predominantly Negro, was overcapacity and Morey was the most convenient school available for the purpose of accomplishing the objective. The effect, of course, was to relieve somewhat the concentration of Negroes at Cole, while substantially increasing the number of Negroes at Morey.

Undoubtedly, it is possible that the Board could have worked out a more equitable distribution, but it cannot be said that this was carried out with the design and for the purpose of causing Morey to become a minority school. The Board could not have escaped criticism for the plaintiffs if it had continued the concentration of Negroes at Cole rather than transferring them to Morey.

4. *Boulevard Elementary School* (Location: 2351 Federal Boulevard. Present Racial Composition: 68.1 percent Hispano, 29.9 percent Anglo)

In 1961, Boulevard Elementary School was undercapacity and its racial composition was 59 percent Anglo and 40 percent Hispano. Brown Elementary School, five blocks west of Boulevard, was operating at approximately full capacity and was 98 percent Anglo. Ashland Elementary School, northeast of Boulevard, was operating at its capacity and was 61 percent Anglo and 37 percent Hispano. The razing of a portion of Boulevard resulted in a de-

crease in that school's capacity, requiring the administration to adjust the Boulevard boundaries. The western portion of the Boulevard subdistrict was transferred to Brown and the southwest part of the Ashland attendance zone was assigned to Boulevard. As a result of these boundary alterations, the Hispano population of Boulevard was increased to 60 percent while reducing the Anglo enrollment to 39 percent, thus transforming Boulevard from a predominantly Anglo to a predominantly Hispano school. The school administration denied that this decision had any racial or ethnic character, maintaining that it was a matter of necessity because of the age and condition of the building destroyed.

5. *Columbine Elementary School* (Location: 2545 East 28th Avenue. Present Racial Composition: 97.2 percent Negro; 2.2 percent Hispano; .6 percent Anglo)

In 1951, Columbine Elementary School was overcapacity and its Negro enrollment was 24 percent. Harrington Elementary was slightly overcapacity and had no Negro students. Stedman Elementary School, which has been considered in part I of this opinion, at 29th and Dexter, was operating slightly under its capacity and also had no Negro students.

Three optional zones were established around Columbine in 1952—Columbine-Harrington; Columbine-Mitchell; and Columbine-Stedman. The asserted purpose of this action was to relieve overcrowding at Columbine. However, since both Harrington and Stedman were operating at approximately their capacity prior to the creation of the optional zones, the effect of the administration's action was to slightly decrease overcrowding at Columbine while creating an overcrowded situation at Harrington and Stedman. Furthermore, a study of the racial composition of

these schools one year after the creation of the optional zones indicated that the options were apparently employed by Anglo students as a means of escaping from Columbine to the almost totally Anglo Harrington and Stedman.[17]

Before considering the legal consequences of the above discussed actions of the School Board, there are some other facts which should be mentioned. Former Superintendent Oberholtzer testified at great length to the fact that the administration, including the Board, followed a policy of strict neutrality as far as segregation or integration was concerned. Indeed, Superintendent Oberholtzer stated that even after the decision in Brown v. Board of Education, *supra*, he was of the opinion that it was not permissible for him to classify Negroes as such, even for the purpose of bringing about integration. Thus, it was his belief that he was committed to maintaining the status quo in the schools. Other members of the Board also denied vigorously that they had ever been motivated by either an intention or desire to discriminate. Their testimony was that the boundary changes and their other actions were taken in order to utilize school capacities and carry out the neighborhood school concept.

In examining the boundary changes and removal of optional zones in connection with the several schools which are discussed above, we do not find any wilful or malicious actions on the part of the Board or the administration (in relationship to elementary schools). As to these schools, the result is about the same as it would have been had the

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[17] Between 1951 and 1952, the Negro enrollment at Columbine jumped from 24 percent to 31 percent, while there was no significant increase in Negro enrollment at either Harrington or Stedman. Between 1952 and 1955, the Negro enrollment at Columbine increased 38 percent.

administration pursued discriminatory policies, since the Negroes and, to an extent the Hispanos as well, always seem to end up in isolation. The substantial factor in this condition is twofold: First, a failure on the part of the Board or of the administration to take any action having an integrating effect, and secondly, deeply established housing patterns which have existed for a long period of time and which have been taken for granted.

It should also be kept in mind that prior to Brown v. Board of Education, *supra*, it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community. Time and again the Board members testified to the fact that in making decisions they held hearings and finally bowed to the community sentiment. Thus, they say they did not intend to segregate or refuse to integrate. They just found the consensus and followed it.

Under the present state of the law, particularly in the Tenth Circuit, a condition such as we have described above does not dictate the conclusion that this is *de jure* segregation which calls for an all-out effort to desegregate. It is more like *de facto* segregation, with respect to which the rule is that the court cannot order desegregation in order to provide a better balance.

It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding.

From the cases, we gleaned the following principles as essentials of *de jure* segregation:

(1) The State, or more specifically, the school administration, must have taken some action with a purpose to segregate;

(2) this action must have in fact created or aggravated segregation at the school or schools in question;

(3) a current condition of segregation must exist; and

(4) there must be a causal connection between the acts of the school administration complained of and the current condition of segregation.

The first of the above requirements actually consists of two elements—state action and a purpose to segregate. It seems unnecessary to elaborate on the element of state action at this time, since plaintiffs here emphasize only affirmative official acts.

The important distinguishing factor between *de facto* and *de jure* segregation is purpose to segregate. *See, e. g.*, Board of Education, etc. v. Dowell, 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931, 87 S.Ct. 2054, 18 L. Ed.2d 993 (1967); Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965). As the Court of Appeals for the Tenth Circuit stated in *Dowell, supra*:

> In Downs the trial court found the plan was not being used to deprive students of their Constitutional rights and here the trial court, in substance, found to the contrary. It is still the rule in this Circuit and elsewhere that neighborhood school attendance policies, when impartially maintained and administered, do not violate any fundamental Constitutional principle or deprive certain classes of individuals of their Constitutional rights. 375 F.2d at 166.

Segregative purpose may be overt, as in the dual system maintained in some states prior to Brown v. Board of Education, *supra*, or it may be covert, in which case purpose normally must be proved by circumstantial evidence. In order to satisfy this element of purpose, the intent to segregate need not be the sole motive for a school district's action; it need only be one of several factors which motivated the school administration. Thus, regardless of how this purpose is manifested, it is clear that:

> the constitutional rights of children not to be discriminated against in school admission on grounds of race or color * * * can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "geniously or ingenuously" Cooper v. Aaron, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5, 19 (1958).

The second requirement, assuming purposeful state action, is that the act or acts must have resulted in or substantially aggravated segregation. A threshold problem here is a definition of "segregation." This term connotes first and foremost a very heavy concentration of a minority group within the school in question. Once you have a predominantly minority school population, other factors come into consideration. For example, the racial and ethnic composition of faculty and staff, *e.g.*, Bradley v. School Board, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965); Hobson v. Hansen, 269 F.Supp. 401, 502 (D.D.C. 1967), aff'd. *sub nom.*, Smuck v. Hobson, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969); the equality of educational opportunity offered at the school; and the community and administration attitudes toward the school.

The third requirement, that a condition of segregation presently exists, recognizes the fact that the term "*de jure* segregation" speaks in present terms. In other words, if a past condition of segregation has been remedied, either through positive state action or through the natural course of events, there is, of course, no present injury justifying equitable relief.

The final and most important element in this case is that of a causal relationship between the discriminatory action complained of and the current condition of segregation in the school or schools involved. Thus, it would be inequitable to conclude *de jure* segregation exists where a *de jure* act had no more than a trifling effect on the end result which produced the condition.[18] In such a case no relief can be granted, for it is not the duty of a court of equity to punish a school board for all past sins, but rather to afford a remedy only where past sins have resulted in present injury.

This necessity of a causal connection between present injury and past discriminatory acts was recognized in Hobson v. Hansen, *supra*. Prior to 1954 the District of Columbia schools had been segregated by law. In 1954 a neighborhood policy was adopted in the District. At the time the *Hobson* case was instituted, substantial desegregation had not been achieved. Plaintiffs, therefore, contended

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[18] Although past discriminatory acts may not be a substantial factor contributing to present segregation, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation. Thus, in part I of this opinion, we discussed the building of Barrett, boundary changes and the use of mobile units as they relate to the purpose for the rescission of Resolutions 1520, 1524 and 1531.

that the effects of the dual system still remained and that they were entitled to relief. Judge Wright held that the dual system was insignificant as a cause of the present segregation:

> This suit was begun 12 years after the institution of the neighborhood school policy, * * *. Many concurrent causes have combined with the Board's 1954 decisions in the evolution of present reality. If the segregation in the District's schools is not currently objectionable under either an independent *de facto* or *de jure* rationale, it would be very difficult to strike it down merely because the neighborhood school policy failed to produce sufficient integration when it replaced an overt *de jure* system 13 years ago. 269 F.Supp. at 495.

So also in our case, the complained of acts are remote in time and do not loom large when assessing fault or cause. The impact of the housing patterns and neighborhood population movement stand out as the actual culprits.

Plaintiffs have argued that the construction of the new Manual in 1953 at the old site virtually insured its segregated character and that this act, as well as the Manual and Cole boundary changes, together with the Smiley additions at a time when Cole was undercapacity, are acts of *de jure* segregation. Quite apart from the cause element which will be discussed further below, it cannot be said that the acts were clearly racially motivated. One would have to labor hard in order to come up with this conclusion.

It can, however, be concluded that the segregation (or racial concentration) which presently exists at Manual and Cole, except insofar as Cole was affected by Resolution 1524 and its rescission as explained above in part I, is not *de jure*. How much of an impact the Board's decisions at

the time had on minority concentrations we do not know. We do know that much of the concentration occurred long after these decisions were made. For example, the Negro population at Cole and Manual increased over 20 percent between 1963 and 1968, and the only contribution which the Board could have made to that resulted from inaction. An essential requisite of a violation of the equal protection clause of the Constitution in the present context is positive legislative or administrative state action which discriminates on account of race, and which produces the condition complained of. The instant situation then cannot be placed at the administration doorstep; if cause or fault has to be ascertained it is that of the community as a whole in imposing, in various ways, housing restraints.

Similarly, it is doubtful whether the 1952 boundary change at Columbine can now be classified as a *de jure* act. To be sure, it increased the minority concentration at Columbine; yet there is a dearth of evidence that this was accompanied by a purpose to segregate rather than a purpose to eliminate double sessions, which was also a result of the change. In any event, as in the case of Manual and Cole, this act appears in restrospect to have had little to do with the present minority population at Columbine. Between 1953, the year following the Columbine boundary modification, and 1969, the percentage of Negro enrollment at the school more than doubled. Even the 1960 census tract data shows that almost the entire Columbine subdistrict was in an area with over 50.1 percent Negro population. It is not conceivable then that this 1952 boundary change, the immediate effects of which were relatively insignificant, could be a current cause of segregation at Columbine.

The Boulevard boundary change of 1962 was necessitated by the legitimate need to reduce pupil enrollment due to

the razing of a portion of the school. Furthermore, there is absolutely no evidence presented, other than the fact of the 1962 change, upon which to base a finding that the School District was motivated by an intent to segregate Hispano students at Boulevard Elementary School.

The removal of the Morey Junior High School optional zones in 1962 did have the effect of increasing the concentration of minority students at that school. It also had the salutary effect of relieving the concentration of Negro students at Cole, a result consistent with defendants' claim that it was carrying out a racially neutral policy. Both the desirable and undesirable consequences of the 1962 changes appear to have been by-products of a general redistribution. In view of that, it would strain both the facts and law to say that the administration acted with an unlawful purpose or design in this instance.

Moreover, whether Morey is presently a segregated school remains a question. To so categorize it requires the lumping together of all non-Anglo groups. The current racial composition at Morey is 52.4 percent Negro, 26.8 percent Anglo, 18.6 percent Hispano. Over 80 percent of the classroom teachers at Morey are Anglo. Morey is unquestionably racially imbalanced, is in transition and will offer a concentration problem unless the Board acts to stabilize it.

Plaintiffs' further claim is that the neighborhood school policy itself has been maintained by the School Board for the purpose and with the effect of segregating minority pupils to the degree that it is unconstitutional. They rely on the rulings of our Court of Appeals that the deliberate use of a neighborhood school system to perpetuate segregation is unlawful. Board of Education, etc. v. Dowell, 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931, 87

S.Ct. 2054, 18 L.Ed.2d 993 (1967); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965). What we have said above regarding boundary changes disposes of this contention. There is no comprehensive policy apparent other than the negative approach which has been described which could be considered in this context. The Board's eye-closing and head-burying is not the kind of conduct which the Circuit Court had in mind in *Dowell* and *Downs*.

Finally, the third count of plaintiffs' second claim for relief urges us to adopt a rule of law that a neighborhood school policy may in and of itself create and/or maintain unconstitutional segregation, even if the adoption of such a policy is motivated by legitimate factors. Plaintiffs' argument in essence is that the neighborhood school system is unconstitutional if it produces segregation in fact. We recognize that some courts have moved along this line.[19] However, the law in our Circuit, as enunciated in *Downs* and *Dowell, supra*, is that a neighborhood school policy, even if it produces concentration, is not *per se* unlawful if:

> it is carried out in good faith and is not used as a mask to further and perpetuate racial discrimination. Board of Education, etc. v. Dowell, 375 F.2d 158, 166 (10th Cir. 1967).

The United States Supreme Court has not yet ruled on this question, and we are here subject to the strong pronouncements of our Circuit Court. Under these decisions

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[19] Hobson v. Hansen, 269 F.Supp. 401 (D.D.C.1967), *sub nom.*, Smuck v. Hobson, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969); Barksdale v. Springfield School Committee, 237 F.Supp. 543 (D. Mass.1965), vacated, 348 F.2d 261 (1st Cir. 1965); Blocker v. Board of Education, 226 F.Supp. 208 (E.D.N.Y.1964); Branche v. Board of Education, 204 F.Supp. 150 (E.D.N.Y.1962).

plaintiffs are not entitled to relief merely upon proof that *de facto* segregation exists at certain schools within the School District.[20]

In summary then, we must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above mentioned boundary changes and elimination of optional zones. We hold that the evidence is insufficient to establish *de jure* segregation.

III.

The third count of plaintiffs' second claim for relief alleges that defendants are maintaining certain schools within the District which provide an unequal educational opportunity for the students attending them; that these are segregated schools;[21] and that, therefore, the students at these schools are being denied the equal protection of the law. The plaintiffs seek relief for a large number of schools at every level and in various conditions of racial concentration. These include Barret, Boulevard, Bryant-Webster, Columbine, Crofton, Ebert, Elmwood, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Hallett, Harrington, Mitchell, Smith, Stedman, Whittier, Wyatt and Wyman Elementary Schools; Baker, Cole, Morey and Smiley Junior High Schools; and East, Manual and West High Schools.[22]

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[20] There is no discernible difference in result between the *de facto* and *de jure* varieties. Both produce the same obnoxious results, but the Supreme Court has so far given its attention to the more serious problem of dual schools.

[21] Plaintiffs contend that where, as here, it is claimed that schools provide an unequal educational opportunity, it is irrelevant whether the schools in question are *de jure* or *de facto* segregated. This point is discussed later in this section.

[22] These schools were selected by plaintiffs through use of probability theory. Thus, they claim that if all children were picked at

In addition to the charge that all these schools are segregated,[23] plaintiffs maintain these are inferior schools and that racial concentration produces the inferiority. They use several indicia to establish the inferiority and inequality. All of these schools, they say, have (1) low average scholastic achievement; (2) less experienced teachers; (3) higher rates of teacher turnover; (4) higher dropout rates; and (5) older buildings and smaller sites.

Extensive and detailed evidence has been presented establishing the inferiority of plaintiffs' target schools. Some of these have high concentrations of either Negroes or Hispanos. Others are substantial, but at the same time relatively marginal in this regard.

It is clear that there is a relationship between racial concentration and inferiority in achievement and low standards and consequently low morale. However, our mission is to determine inequality based upon race or ethnic origin, we cannot undertake to cure all other ills which we might encounter here. The plaintiffs, of course, believe that all injustices ever encountered should be rooted out. Tentatively, at least, we have determined that for the present purpose a concentration of either Negro or Hispano

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random to attend each school in the District, the probability that the present racial composition would result at each of the above schools is phenomenally low. We do note that the schools selected through this procedure are generally those with the highest concentration of minority students in the District.

[23] Some of the above schools (Barrett, Smiley and East) have been considered, and full relief has been granted, in part I of this opinion. However, since these schools (with the exception of East) were clearly segregated before this suit was instituted, the statistical data on the educational opportunity provided by them prior to their desegregation has some relevance in creating an overall picture as to the effect of segregation on educational opportunity, and hence it is included in the findings of fact which follow.

students in the general area of 70 to 75 percent is a concentrated school likely to produce the kind of inferiority which we are here concerned with.

In the columnar list below, the elementary, junior and senior high schools with respect to which the plaintiffs have presented evidence are shown. It is to be noted that some of these schools are subject to the findings and conclusions contained in part I of this opinion, but they are nevertheless included here because of their racial concentrations, if not in every instance their educational inferiority.

ELEMENTARY SCHOOLS

School	Anglo (%)	Negro (%)	Hispano (%)
*Barrett	67.0	30.5	1.4
Boulevard	29.9	.5	68.1
Bryant-Webster	23.3	.5	75.5
Columbine	.6	97.2	2.2
Crofton	7.3	38.4	51.5
Ebert	10.6	34.6	52.4
Elmwood	7.9	00.0	91.6
Fairmont	19.8	00.0	79.9
Fairview	7.0	8.2	83.2
Garden Place	17.0	17.2	64.7
Gilpin	3.2	36.4	59.4
Greenlee	17.0	9.0	73.0
Hallett	38.2	58.4	2.6
Harrington	2.2	76.3	19.6
Mitchell	2.2	70.9	26.7
Smith	4.0	91.7	3.3
Stedman	4.1	92.7	2.7
Whittier	1.4	94.0	4.5
Wyatt	1.9	46.4	51.5
Wyman	27.5	38.0	29.7

JUNIOR HIGH SCHOOLS

School	Anglo (%)	Negro (%)	Hispano (%)
Baker	11.6	6.7	81.4
Cole	1.4	72.1	25.0
Morey	26.8	52.4	18.6
*Smiley	61.2	30.4	6.9

*Barrett and Smiley have been integrated by the preliminary injunction.

SENIOR HIGH SCHOOLS

School	Anglo (%)	Negro (%)	Hispano (%)
East	50.1	39.9	7.4
West	56.6	9.0	34.0
Manual	8.2	60.2	27.5

Based on the rule of thumb adopted above, we are here primarily concerned with the following schools: Bryant-Webster, Columbine, Elmwood, Fairmont, Fairview, Greenlee, Hallett, Harrington, Mitchell, Smith, Stedman and Whittier Elementary Schools; Baker and Cole Junior High Schools; and Manual High School.

A. *Achievement*

Plaintiffs' evidence establishes that the scholastic achievement in the above schools is significantly lower than in the other schools in the city. To evidence this, they point to the 1968 Stanford Achievement Test results, which results are designed to measure the achievement level of each pupil in specific scholastic areas, such as spelling, arithmetic, and science. Achievement data for elementary, junior and senior high schools appears in Appendix I.

At the elementary school level, these Stanford Tests results are reported in terms of grade level scores for the third and fifth grades in May 1968. Since May 1 marks the approximate date at which the eighth month of school begins, we are told that a third grade student should be achieving at a 3.8 level at this time, while a fifth grade student should be achieving at a 5.8 level.

We find that in May 1968, the children in the third grade at the segregated schools in question achieved at a grade level of approximately 2.96, and accordingly, were almost one full year below the level at which they should have been achieving. With respect to all 91 schools in the District in 1968, the average median grade level was 3.57, or approximately six months above the achievement level of the schools listed above.

Similarly, the average achievement among fifth grade students at the 12 segregated elementary schools was 4.30. All fifth graders in the District averaged 5.22, which is almost a full year ahead of the 12 segregated schools.

The data with respect to junior high schools, also shown in Appendix I, is based upon the May 1968 Stanford Achievement Tests, and is reported in terms of percentile scores (no grade placement scores were available for junior or senior high schools). A percentile score shows the percentage of pupils nationally whose scores are below the given percentile. For example, if a student's percentile score on a given test is 75, then 75 percent of the students in his grade nationally have scored lower on that test. Similarly, 25 percent of the students taking the test have scored higher.

The average percentile score for all ninth graders on all tests administered is 53.8. However, the two segregated junior high schools (Baker and Cole) achieved at an aver-

age percentile score of only 28.2. This is some 29 percentiles below the average percentile score among all ninth graders. It is interesting to note that the highest average percentile score of the two segregated junior high schools is lower than the lowest average percentile score at any of the other junior high schools in the city.

Senior high school data is based upon tests given in May 1968, to all eleventh grade students in the District, and, like the junior high school data, these scores are reported in terms of average median percentile.

The average median percentile score for all high schools at the eleventh grade level was 52. For Manual, the only minority concentrated high school, the average percentile score was 30. Thus, at the eleventh grade level Manual achievement was some 22 percentiles lower than the high school average for the city, and 70 percent of all students nationally performed better than the median at Manual.

B. *Teacher Experience*

Faculty experience is an important factor in determining the educational opportunity offered at a particular school, and plaintiffs have produced evidence which shows the percentage of faculty at a given school with (1) no years of prior Denver Public School experience; (2) probationary status (0-3 years of experience); and (3) 10 or more years experience. Teacher experience data for elementary, junior and senior high schools appears in Appendix II. At the elementary school level plaintiffs have compiled teacher experience data for their 20 target schools and 20 selected schools with high Anglo enrollment. We have here selected only those schools out of plaintiffs' list of target schools which we find to be segregated, and have compared teacher experience in them with teacher experience in plaintiffs' selected Anglo schools.

The evidence establishes that in the 12 segregated elementary schools in 1968, 23.9 percent of the teachers had no previous DPS experience, 48.6 percent were on probation and 17.4 percent had 10 or more years experience. In contrast, in the 20 selected Anglo schools, only 9.8 percent of the faculty had no previous experience, 25.6 percent were on probation and 47.1 percent—nearly half—had 10 or more years of experience. Of the 12 segregated elementary schools, only one—Bryant-Webster—had a higher percentage of teachers with 10 or more years experience than teachers with no experience or on probation, while sixteen of the 20 Anglo schools had more teachers with 10 or more years experience than non-experienced or probationary teachers.

As to junior high schools, plaintiffs have introduced teacher experience data on all junior high schools in existence in 1968 (see Appendix II). This evidence establishes that the segregated schools have more probationary and non-experienced teachers and fewer teachers with 10 or more years experience than the selected Anglo schools.

The data with respect to senior high schools is similar to that on junior high schools. As was the case with the junior high schools, there are more high school teachers with no or little experience and fewer with over 10 years at Manual than in other senior high schools.

C. *Teacher Turnover*

The effect of teacher turnover on the quality of educational opportunity is twofold. First, a high teacher turnover rate tends to have a disorganizing effect on the school in question. Furthermore, and more important, the teacher turnover rate in a particular school significantly affects the experience of the faculty at that school. In the present

case, plaintiffs have established that the present policy with respect to teacher transfers has the effect of creating a much higher turnover rate at predominantly minority schools than at predominantly Anglo schools. This in turn results in more faculty vacancies at these minority schools and the assignment to them of new teachers with little or no Denver Public School experience.

Denver Public Schools Policy 1617A deals with transfers for faculty. On or about April 20 of each year, the Assistant Superintendent for Personnel Services posts in each school a list of teaching vacancies to be filled the following school year. Those teachers who wish to transfer to schools with vacancies submit an application. Although the principal criterion for determining whether to grant an application for transfer is "whether the request will result in the best educational program for the School District," one of the major considerations for filling vacancies is seniority. Thus, teachers with the most seniority are normally given preference in making transfers. This transfer policy is embodied in an Agreement between School District Number One and the Denver Classroom Teachers Association.

This policy results in the more experienced teachers at minority schools transferring out of those schools when vacancies are opened at predominantly Anglo schools, with the resulting vacancies being filled by inexperienced teachers.

D. *Pupil Dropout Rates*

Plaintiffs' evidence as to dropout rates in junior and senior high schools[24] is set forth in terms of projected and

[24] Since, by law, it is mandatory that children attend school until the age of 16, there are no figures as to dropout rate with respect to elementary schools.

annual dropout rates. The annual dropout rate merely indicates the percentage of students who leave school during a given year. The projected dropout rate for a given year reflects the percentage of students beginning at a particular school who will drop out before graduation (see Appendix III).

The evidence tends to indicate that, generally, the dropout rate is higher at the two segregated junior high schools (Baker and Cole) and Manual Senior High School than at the other schools in the District.

E. *Building Facilities*

Plaintiffs have introduced evidence in an attempt to show a disparity in the age of school buildings and the size of school sites between predominantly minority and predominantly Anglo schools. We would agree that, in most general terms, this disparity exists. However, we do not think that the age of a building and site size are, in and of themselves, substantial factors affecting the educational opportunity offered at a given school. However, we do recognize that in schools which are segregated, have less experienced teachers and produce generally low achieving students, the fact that the physical plant is old may aggravate the aura of inferiority which surrounds the school.

The above material summarizes plaintiffs' evidence and our findings as to the objective indicia of inequality at the schools for which they seek relief. Although plaintiffs claim that factors such as inexperienced faculty tend to contribute to the inferior educational opportunity provided at these schools, their main argument is that the segregation which exists at many of these schools makes a major contribution to this inferiority.

Dr. Dodson, a professor of education at New York University, who has for the past 15 years studied the relationship between the scholastic performance of minority children and segregated schools, testified that a segregated school adversely affects a Negro child's ability to achieve. He indicated that studies show that by the time a school becomes segregated, it is looked upon by the whole community as being inferior.

At this point, the Negro community does not consider the segregated school as a legitimate institution for social and economic advancement. Since the students do not feel that the school is an effective aid in achieving their goal—acceptance and integration into the mainstream of American life—they are not motivated to learn. Furthermore, since the parents of these Negro students have similar feelings with respect to the segregated school, they do not attempt to motivate their children to learn. Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore, teachers expect low achievement from students at segregated schools, and thus do little to stimulate higher performance.

The defendants do not acknowledge that segregated schools per se produce lower achievement and an inferior educational opportunity. They point to other factors, such as home and community environment, socioeconomic status of the family, and the educational background of the parents as the major causes of inferior achievement. We do not disagree that these factors are relevant, but we cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity.

The first study of the equality of educational opportunity in the Denver Public Schools conducted by the Voorhees

Committee recognized this. In its 1964 report to the Board of Education this Committee stated that

> In a "neighborhood" school system one inevitable result of concentrations of races and ethnic groups because of housing patterns is concentrations of children in the schools into the same groups. There is abundant authority to the effect that "de facto" separation in schools may result in educational inequalities, and there is in Denver wide belief among the racial and ethnic minorities that the schools to which their children go are in some way unequal. In addition, however, there is the fact that there is not available to many children (perhaps a majority of the total school population, regardless of race or ethnic background) the democratic experience of education with members of other races and groups with which they will have to live and compete. The responsibility to eliminate or reduce this result where possible and to compensate for it where elimination is not possible by the removal of prejudice (whether based on color, ethnic or religious background, false values, or any other cause) must be the responsibility of the school to its pupils. Voorhees Committee Report, pp. 6-7.

The Committee also said:

> In 1954 the United States Supreme Court stated that segregated education is inherently unequal education. There was then and is now ample authority for such a statement. While the Court in that instance was concerned with segregation established by law, the Committee is persuaded that the same statement can correctly be made where de facto segregation of minor-

ity races occurs because of other factors, the most obvious of which is a pattern of housing restriction. The Committee feels that in adhering without obvious deviation to the principle of establishing school boundaries without regard to racial or ethnic background, the Board and the administration have concurred, perhaps inadvertently, in the perpetuation of existing de facto segregation and its resultant inequalities in the educational opportunities offered. Voorhees Committee Report, pg. A-5.

As a result of the Voorhees Report, the School Board, on May 6, 1964, adopted Policy 5100 providing that henceforth the school administration would maintain statistical data on the racial and ethnic composition of students in the Denver Public Schools. In adopting the philosophy of the Voorhees Report the Board said:

> The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentration and the establishment of heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity.

In 1966 the School Board again created a committee to investigate inequality of educational opportunity due to racial concentration in schools (the Berge Committee). The Committee's report is replete with references to the inferior education which results from segregation.

When we consider the evidence in this case in light of the statements in Brown v. Board of Education that segregated schools are inherently unequal, we must conclude that segregation, regardless of its cause, is a major factor in

producing inferior schools and unequal educational opportunity.

The equal protection clause of the Fourteenth Amendment prohibits any state from denying to any person the equal protection of the laws. Simply stated, a state may not treat persons differently without a legitimate reason for doing so. In the area of economic regulation the courts grant broad leeway to the states in creating classes of individuals and treating them differently. All that need be shown is a minimal justification in terms of a legitimate state interest for the inequality of treatment.

The courts, however, have jealously guarded the rights of disadvantaged groups such as the poor or minorities, and have held that where state action, even if non-discriminatory on its face, results in the unequal treatment of the poor or a minority group as a class, the action is unconstitutional unless the state provides a substantial justification in terms of legitimate state interest. See, *e. g.*, Griffin v. Illinois, 351 U.S. 12, 18 n. 11, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).[25] This general principle of consti-

[25] Under a claim for relief based upon separate-but-unequal school facilities, purpose or intent to discriminate is not a necessary factor. Where state action results in unequal treatment of the poor or minority groups, it is no defense that the state action was not taken with a purpose to injuriously affect only the poor or minorities as a class. *See* Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). *See also* Hobson v. Hansen, 269 F.Supp. 401, 497 (1967), which states:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

tutional law is fully applicable to school segregation cases. The present state of the law is that separate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to the inferior schools. As Judge Wright stated in Hobson v. Hansen, *supra*:

> Theoretically, therefore, purely irrational inequalities even between two schools in a culturally homogeneous, uniformly white suburb would raise a real constitutional question. But in cases not involving Negroes or the poor, courts will hesitate to enforce the separate-but-equal rule rigorously. * * * But the law is too deeply committed to the real, not merely theoretical (and present, not deferred) equality of the Negro's educational experience to compromise its diligence * * * when cases raise the rights of the Negro poor. 269 F.Supp. at 497.

As Judge Wright further pointed out in the *Hobson* case, *de facto* segregation today stands in the same position as did *de jure* segregation prior to Brown v. Board of Education. Under the old *Plessy* doctrine (Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896)) a school board was under no constitutional duty to abandon dual school systems created by law so long as all schools were equal in terms of the educational opportunity offered. Today, a school board is not constitutionally required to integrate schools which have become segregated because of the effect of racial housing patterns on the neighborhood

school system. However, if the school board chooses not to take positive steps to alleviate *de facto* segregation, it must at a minimum insure that its schools offer an equal educational opportunity.

The evidence in the case at bar establishes, and we do find and conclude, that an equal educational opportunity is not being provided at the subject segregated schools within the District.[26] (See page 78, *supra*, for a list of these schools.) The evidence establishes this beyond doubt. Many factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns.[27] It strikes one as incongruous that the community of Denver would tolerate schools which are inferior in quality.

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[26] This, of course, does not mean that we condemn in any way the leadership and educational efforts of the administration and faculty of these schools. Principals and teachers alike have put forth an outstanding effort to cope with the educational problems in their schools. However, until the underlying causes of these problems are removed, the work of these individuals can never be fully successful.

[27] We thus have a situation very similar to that found in Barksdale v. Springfield School Committee, 237 F.Supp. 543 (1965), vacated, 348 F.2d 261 (1st Cir. 1965). In that case Judge Sweeney found that *de facto* segregation was contributing to inequality of educational opportunity at the schools complained of. He then granted relief, not upon a theory that the School Board had an affirmative duty to remedy racial imbalance, but rather because the Constitution requires a School Board to provide equal educational opportunities for all children within the system.

IV.

Discussion of Remedies

A. *The Northeast Denver Schools*

Our preliminary injunction decree dealt largely with the Park Hill schools and, in effect, specifically enforced Resolutions 1520, 1524 and 1531, with the exception of that part of the resolution having to do with East Denver High School and that part having to do with Cole Junior High School.

In part I of this opinion we have determined that the plaintiffs are entitled to full relief in accordance with the Resolutions and are also entitled to have the East and Cole resolutions implemented in the final judgment. Inasmuch as we have concluded that the preliminary injunction should be made final, an appropriate form of judgment can be prepared to cover this. The preliminary order will remain in effect for the remainder of this year, and the present judgment will take effect in September 1970.

B. *A Program of Improvement*

Although we have concluded that there is not *de jure* segregation in the so-called core city schools,[91a] we have found and concluded that there is a denial of equal opportunity for education in these schools. We have found and concluded that the achievement level in these schools is markedly lower and dropout rates are high; and that there has been a concentration of minority and inexperienced teachers.

How to remedy this condition, that is how to extend to the plaintiffs equal educational opportunity, poses a seri-

[91a] That is, the segregated schools referred to in part III above.

ous and difficult problem, and we do not here present any cure-all. One obvious answer, of course, is that these schools must be renovated as educational institutions. The stress here is not on the inferiority of the buildings, and, indeed, they are oftentimes older and less attractive. Rather, the emphasis is on improving these as educational institutions. One obvious equalizing factor would be to have faculty members who are as competent as the faculty members at Anglo schools.

At the present time, teachers with seniority can select the superior schools and they do so. When these transfers occur a degrading effect on the school which they leave necessarily results. All concerned are reminded that theirs is a less desirable school. It may be that the administration will have to adopt a rule which prohibits these optional transfers by faculty members. These schools are entitled to at least their fair share of the most competent teachers. The administration may have to assign their very best teachers even if premium salaries have to be paid in order to accomplish this.

It is also clear from the evidence that the remedial or special education programs which have been carried on in these schools have not resulted in any significant improvement and so other methods are indicated. It does not fill the bill to merely apply for a federal grant and reduce the teacher-pupil ratio.

Above all, these schools need pride and spirit so that the participants, teachers and pupils, will feel that they are part of a meaningful effort. Certainly a first step in instilling this is to provide them with leadership—dedicated personnel plus the tools to carry out programs. Whether this objective is possible cannot be determined until a genuine good faith effort is forthcoming. In Superintendent

Gilberts and his staff the Board has access to experts who are capable of formulating such a program. Obviously this Court does not have this expertise, but it anticipates hearing from experts, including the Board staff.

C. *Compulsory Transportation*

The evidence in this case shows that neither the plaintiffs nor the defendants nor other interested parties are in favor of bussing as such. It is, however, conceded to be a necessity where integration is ordered, and it would appear to be the only way to implement the Resolutions (1520, 1524 and 1531) and to carry out Part I of this opinion.

In connection with equalizing the educational opportunity, it is not so clear that compulsory transportation is the answer. To be sure, if the children could go to school together on a natural basis, it would undoubtedly provide the most effective antidote for the inferiority. However, setting up an artificial and extensive system of bussing which compels cross-movement and which is not supported by either side has some tendency to undermine the program from the start.

There is a dearth of law in connection with the remedy applicable to equalizing the educational opportunity, and compulsory integration is not yet at least the prescribed remedy. However, it is conceivable that this could become the only effective remedy as a matter of law, and it conceivably could become recognized as a matter of constitutional law. Nevertheless, at this writing, the fashioning of a remedy is a process of weighing and balancing the equities.

From the intervenors and from other sources at the trial, the difficulties and vicissitudes of mandatory bussing have been presented. One persuasive point arises from the

proof of the plaintiffs. Their evidence establishing the inferiority of the subject schools is so convincing that it raises a serious equitable question about subjecting any pupils, minority or majority, to them. It would be imposing a *sanction* on pupils from good schools—a sanction for an offense which they did not commit.

D. *Voluntary Transfer Policy*

We have a single suggestion apart from improvement and that is a system of genuine voluntary transfer out of inferior schools to good schools. This would be a matter of right without the need for securing a reciprocal transfer from an Anglo school to a minority school. Persons desiring this immediate improvement of their educational opportunity could get it, and the District would, in accordance with its present policy based on distance, be required to furnish transportation. Moreover, the Board would be *required* to furnish space for these students. On the other hand, pupils attending the better schools would not be *compelled* to transfer to the core city schools.[21] They could do so if they wished.

Our suggestion recognizes that there are members of the minority groups who are not enthusiastic about compulsory bussing. These parents have the same apprehensions as the majority parents about sending their children into unknown conditions, and perhaps into hostile atmospheres. At the same time, in many instances, they have the same hopes and aspirations for their children as do members of the majority and are willing to make the sacrifice in order to improve the educational opportunity for them.

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[21] This would not, of course, apply to students subject to part I of this opinion and the integration Resolutions because actual inte-

Arguably, at least, this method satisfies the Constitution in that it recognizes the right of every student and makes that right available to him without forcing it on him. Comments of the litigants on this will be considered at a further hearing.

E. *Voluntary Open Enrollment*

As to the voluntary open enrollment policy of the School Board, certainly they should be free to pursue and develop this to the nth degree. Their position at the trial was that this would ultimately produce integration. One questions whether it would, but if it can be operated successfully, the Board should be encouraged to carry it out. It should be noted, however, that this is neither "voluntary" nor is it "open" because it requires that there be spaces available in the transferee school or that there be an exchange program. It seems clear to us that there would be few participants in an exchange program with the core city schools. It seems highly unlikely that students would elect to go to these schools from white neighborhoods and so it is questionable whether any integration would be achieved in a substantial way from this program. On the other hand, the method selected above has no such "catch" in it.

It is contemplated that any decree which is finally promulgated here will not be effective until next fall. On the other hand, the preliminary injunction heretofore entered would continue for the remainder of this school year until next September when the final judgment would be effective. This opinion does not purport to be a judgment for the purpose of appeal. Final judgment will be entered after a meeting with counsel which hopefully can be carried out within the next 30 days.

Appendix I: Achievement Data

Elementary Schools

Third Grade

School	*Average Median Achievement*
Barrett	2.81
Boulevard	2.80
Bryant-Webster	3.16
Columbine	2.93
Crofton	3.10
Ebert	2.71
Elmwood	3.42
Fairmont	2.85
Fairview	2.96
Garden Place	2.61
Gilpin	2.68
Greenlee	2.93
Hallett	3.06
Harrington	2.55
Mitchell	2.71
Smith	3.06
Stedman	3.13
Whittier	2.76
Wyatt	3.43
Wyman	3.05

Fifth Grade

School	*Average Median Achievement*
Barrett	4.73
Boulevard	4.33
Bryant-Webster	4.43
Columbine	4.27
Crofton	4.22
Ebert	4.17
Elmwood	4.62
Fairmont	4.10
Fairview	4.25
Garden Place	4.16
Gilpin	4.46
Greenlee	4.16
Hallett	4.24
Harrington	4.02
Mitchell	3.90
Smith	4.74
Stedman	4.64
Whittier	4.26
Wyatt	4.06
Wyman	4.47

Junior High Schools

School	*Average Median Percentile Score*
Baker	31.1
Byers	63.0
Cole	25.4
Gove	63.2
Grant	55.7
Hill	77.4
Horace Mann	32.3
John F. Kennedy	71.4
Kepner	49.0
Kunsmiller	62.2
Lake	48.7
Merrill	74.1
Morey	30.3
Rishel	57.2
Skinner	55.2
Smiley	42.9
Thomas Jefferson	75.6

Senior High Schools

School	*Average Median Percentile Score*
East	54
George Washington	76
John F. Kennedy	73
Abraham Lincoln	59
Manual	30
North	53
South	66
Thomas Jefferson	72
West	35

APPENDIX II: TEACHER EXPERIENCE

ELEMENTARY SCHOOLS

(Plaintiffs' 20 Selected Target Schools)

School	*None*	*Probation*	*10 or more years*
Barrett	21.1	31.6	21.1
Boulevard	16.7	50.0	27.8
Bryant-Webster	13.8	34.5	44.8
Columbine	27.3	50.0	11.4
Crofton	21.4	42.9	28.6
Ebert	21.1	42.1	26.3
Elmwood	39.1	39.1	17.4
Fairmont	25.0	78.6	10.7
Fairview	10.3	33.3	25.6
Garden Place	18.4	36.8	15.8
Gilpin	25.0	41.7	25.0
Greenlee	12.5	40.0	25.0
Hallett	25.0	46.4	28.6
Harrington	30.4	73.9	0.0
Mitchell	26.0	44.0	16.0
Smith	26.4	49.1	7.5
Stedman	23.7	39.5	13.2
Whittier	27.3	56.8	9.1
Wyatt	13.6	27.3	27.3
Wyman	22.2	50.0	16.7
Total Average	22.5	45.4	18.7

(Plaintiffs' 20 Selected Anglo Schools)

School	*None*	*Probation*	*10 or more years*
Ash Grove	17.9	35.7	21.4
Bradley	2.9	11.8	58.8
Bromwell	18.2	18.2	45.5
Carson	16.0	40.0	48.0
Cory	0.0	18.2	40.9
Doull	14.7	20.6	58.8
Ellis	9.1	18.2	42.4
Ellsworth	25.0	62.5	25.0
Fallis	7.7	15.4	46.2
Gust	21.9	40.6	31.3
Knight	4.3	30.4	56.5
McMeen	3.0	24.2	51.5
Montclair	0.0	11.1	48.1
Palmer	6.3	12.5	75.0
Pitts	11.8	29.4	58.8
Sabin	8.0	20.0	38.0
Slavens	13.0	30.4	52.2
Traylor	10.3	20.7	58.6
University Park	14.3	37.1	48.6
Washington Park	0.0	36.8	36.8
Total Average	9.8	25.6	47.1

APPENDIX II: TEACHER EXPERIENCE (continued)

ALL JUNIOR HIGH SCHOOLS

School	*None*	*Probation*	*10 or more years*
Baker	32.1	60.7	10.7
Byers	14.0	43.9	26.3
Cole	39.6	65.9	14.3
Gove	31.0	45.2	19.0
Grant	19.5	34.1	24.4
Hill	14.5	33.7	36.1
Kepner	14.5	50.7	17.4
Kunsmiller	6.0	32.5	32.5
Lake	10.6	40.9	31.8
Mann	20.3	55.9	16.9
Merrill	16.2	35.1	33.8
Morey	27.8	53.7	13.0
Rishel	16.7	36.7	21.7
Skinner	15.0	38.3	23.3
Smiley	35.7	63.3	7.1
Total Average	21.1	46.7	22.0

Target Schools

School	*None*	*Probation*	*10 or more years*
Baker	32.1	60.7	10.7
Cole	39.6	65.9	14.3
Morey	27.8	53.7	13.0
Smiley	35.7	63.3	7.1
Total Average	34.8	61.9	11.0

Anglo Schools

School	*None*	*Probation*	*10 or more years*
Hill	14.5	33.7	36.1
Merrill	16.2	35.1	33.8
Total Average	15.3	34.4	35.0

ALL SENIOR HIGH SCHOOLS

School	*None*	*Probation*	*10 or more years*
Lincoln	8.3	17.3	59.4
East	17.2	34.4	36.7
George Washington	8.9	17.0	54.1
Kennedy	6.6	15.4	48.5
Manual	17.1	37.8	32.4
North	8.2	29.1	41.8
South	8.2	16.4	55.7
Thomas Jefferson	6.8	22.2	50.6
West	14.5	30.0	40.0
Total Average	10.3	24.0	47.1

APPENDIX II: TEACHER EXPERIENCE (continued)

Target Schools

School	*None*	*Probation*	*10 or more years*
East	17.2	34.4	36.7
Manual	17.1	37.8	32.4
West	14.5	30.0	40.0
Total Average	16.3	34.1	36.4

Anglo Schools

School	*None*	*Probation*	*10 or more years*
George Washington	8.9	17.0	54.1
Kennedy	6.6	15.4	48.5
Thomas Jefferson	6.8	22.2	50.6
Total Average	7.4	18.5	51.0

APPENDIX III: PUPIL DROPOUT RATES

Junior High Schools	*Projected*	*Annual*
Baker	12.9	4.5
Byers	3.8	1.3
Cole	7.0	2.4
Gove	1.9	.6
Grant	3.0	1.0
Hill	.7	.3
Horace Mann	6.7	2.6
Kepner	3.7	1.5
Kunsmiller	1.7	.6
Lake	6.3	2.1
Merrill	.8	.3
Morey	15.7	5.1
Rishel	4.1	1.4
Skinner	2.1	.8
Smiley	6.1	2.1
John F. Kennedy	.3	.2
Thomas Jefferson	.6	.2
Senior High Schools	*Projected*	*Annual*
Abraham Lincoln	38.1	14.7
East	46.8	18.8
George Washington	10.8	3.6
Manual	57.0	24.4
North	51.8	21.9
South	39.6	15.3
West	46.9	19.5
John F. Kennedy	13.0	1.9
Thomas Jefferson	9.9	1.7

Opinion of District Court of May 21, 1970

UNITED STATES DISTRICT COURT

D. Colorado

Civ. A. No. C-1499

May 21, 1970

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor, *et al.*,

Plaintiffs,

v.

School District Number One, Denver, Colorado, the Board of Education, School District Number One, Denver, Colorado, William C. Berge, individually and as President, Board of Education, School District Number One, Denver, Colorado, Stephen J. Knight, Jr., individually and as Vice President, Board of Education, School District Number One, Denver, Colorado, James C. Perrill, Frank K. Southworth, John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, individually and as members, Board of Education, School District Number One, Denver, Colorado, Robert D. Gilberts, individually and as Superintendent of Schools, School District Number One, Denver, Colorado,

Defendants.

Decision Re Plan or Remedy

William E. Doyle, District Judge.

It is to be recalled that this suit, which has been previously before the Court, was instituted as a class action by

Negro and Hispano public school students and their parents. Plaintiffs complained that there was de jure segregation in many of the schools in School District Number One, Denver, Colorado, and that an unequal educational opportunity was being provided in the segregated schools within the District. On March 21, 1970, after approximately three weeks of trial, this Court handed down a memorandum opinion and order finding that certain schools, elementary, junior high and a high school within an area of Denver known as Park Hill, and also some 15 schools within the core city, were segregated. It was also concluded that our temporary injunction entered in August 1969, finding a condition of de jure segregation in certain schools resulting from the Denver Board of Education's action rescinding Resolutions 1520, 1524 and 1531, which had been designed to have an integrating effect on Park Hill schools, must be made permanent. We ordered full implementation of these Resolutions. D.C., 313 F. Supp. 61.

A further determination was that certain schools within the core city were segregated as the result of housing patterns and the neighborhood school system; that this constituted de facto segregation and was not unconstitutional per se. A corollary finding and conclusion was that the segregated core city schools in question were providing an unequal education opportunity to minority groups as evidenced by low achievement and morale. The causes of this inferiority were held to be the segregated condition, together with concentration of minority teachers, low teacher experience and high teacher turnover in each of the schools. We stated that:

> The present state of the law is that separate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that

these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to the inferior schools. 313 F.Supp. at 83.

We thus concluded that the School District had violated the equal protection clause of the Fourteenth Amendment by maintaining and operating schools which deprived the recipients of an equal educational opportunity. Both plaintiffs and defendants were asked to submit plans to remedy the inequality found to exist.

The cause is then presently before us for the purpose of fashioning a remedy which hopefully will establish equality of educational opportunity in the Court designated segregated schools.

Both plaintiffs and defendants have submitted lengthy plans for improving educational opportunity and many of the foremost authorities on this subject, both with respect to the Denver area and nationwide, have been called upon to testify.

I.

Description of Plans

Plaintiffs' proposed plan involves a three-step process for raising achievement and equalizing educational opportunity. The first step is desegregation, or the elimination of racial isolation of minority students through cross-transportation of pupils. Plaintiffs have concentrated on this phase of the program and the plans for desegregation are, for the most part, the product of computer analysis. The second phase involves integration, which the plaintiffs define

as the educational process of promoting mutual respect and understanding among students, teachers and the community. The final portion of the plaintiffs' plan suggests a system of compensatory education programs, carried out in an integrated environment, designed to equalize achievement.

At the outset we note that plaintiffs urge that the Court should reconsider certain schools which plaintiffs consider "target" schools, but which the Court found not to be *segregated* inferior schools. Plaintiffs call attention to the fact that two schools, namely Elyria and Smedley, are not only inferior in terms of achievement, but also meet the guideline set by the Court that the school contain at least 70 to 75 percent Negro *or* Hispano students. Furthermore, plaintiffs ask us to reconsider at least nine other schools which have a *combined* minority population of over 70 percent.[1] Failure to include Elyria and Smedley Schools was due to oversight. These must now be included in a plan for relief. We have concluded that none of the plans are wholly suitable and that a carefully tailored plan consisting of parts of the submitted ideas should be adopted. Nevertheless, a brief description of the plaintiffs' and defendants' proposals will furnish some understanding of the problem and of this order.

Plaintiffs propose *four* alternative plans for desegregation of elementary schools. The first of these desegregates the Court designated elementary schools by a system of cross-bussing. The total number of schools involved would be 29; the total number of students to be transported would be 8,380; the average miles traveled per student one-

[1] We concluded in our March 21 opinion that it was not appropriate to place Negroes and Hispanos in one category to arrive at a minority population of over 70 percent. 313 F.Supp. at 69.

way would be 6.4; the minimum Anglo enrollment at any school designated by the Court would total 54 percent.

The second proposed alternative plan calls for enrolling only pupils in grades 4-6 in the 12 Court designated elementary schools. Each of these schools would be paired with one or more Anglo schools which would be used only for grades K-3. This plan would involve 31 schools; 11,109 students would be transported; the average number of miles traveled per student one-way would be 6.3; minimum Anglo enrollment at the Court designated schools would be 51 percent.

Plan three is similar to plan one except that it would include all of plaintiffs' target elementary schools rather than just the Court designated elementary schools. It would, of course, require a much greater transportation effort involving as it does numerous schools which the Court has not included.

Plan four is similar to plan two, except that all of plaintiffs' target schools are provided with relief.

Alternative plans are submitted by plaintiffs for desegregating junior high schools. The *first* of these would desegregate Cole Junior High School by reassigning to Cole some 1,038 students already being bussed to Thomas Jefferson and John F. Kennedy. Also, students now being bussed to Cole would be bussed instead to Thomas Jefferson and John F. Kennedy. This plan would increase Anglo enrollment at Cole to 66 percent. The second alternative plan would desegregate not only Cole, but also Horace Mann, Lake, Morey and Baker Junior High Schools by a system of cross-bussing similar to that involved in the first alternative plan.

Plaintiffs also propose alternative programs for equalizing educational opportunity at Manual High School. *First*,

they recommend alteration of the school attendance boundaries of Manual, East and South, to create long narrow north-south corridors for each of the above schools. This would result in many Anglo students from south Denver attending Manual. As a *second* alternative, the plaintiffs suggest that Manual be made an open school which could be attended by any student in the District and which would specialize in vocational and pre-professional training. This plan is essentially the same as that proposed by the Board with respect to Manual.

Finally, plaintiffs have suggested several programs which would aid in creating cultural understanding and respect as well as programs for equalizing educational opportunity through compensatory education. These include faculty and staff inservice training and orientation, programs for community involvement, use of paraprofessionals, tutorial systems, individualized instruction, increased pre-school training and others which are very similar to the School Board's suggestions, except that under plaintiffs' plan, desegregation constitutes an essential first step.

The defendants' program for equalizing educational opportunity in the Court designated schools is basically one of compensatory education, with little emphasis on desegregation. Defendants offer some opportunity for mixing of the races, in that pupils at the fifteen Court designated schools could transfer to a school of their choice on a space guaranteed basis with transportation provided by the District, if the transfer will improve racial balance. This is similar to our suggestion in the March 21, 1970 opinion and it differs from the earlier School Board VOE program since the availability of space at a receiving school is not a precondition to transfer.

The remaining of defendants' offerings deal with various forms of compensatory education. Its first section outlines proposals for staffing. There would be encouragement and incentives to induce good teachers to work at the core city schools by extension of the school year and increased teacher compensation. An effort would be made to integrate teaching and administrative staffs. Teacher aides and paraprofessionals would be employed so that teacher time could be utilized more efficiently, there would be human relations training for all school district employees, and teachers would receive instruction in preparation for assignment to target schools.

Educational complexes, as described in the plan, are currently in preparation. A complex would include a basic neighborhood school with special programs at other schools in the cluster. Subjects, activities and services offered at the complex would be oriented to the requirements of the community in which the complex is located.

Defendants' plan also recognizes the importance of the early development of a child, and the need to reach minority children at an early stage. Programs such as Head Start now being used would continue. Those programs currently in use deal with children from three years old to the first grade in certain areas of the city, and a proposed National Follow Through program will work with children through the third grade.

Defendants' plan also describes special programs currently in progress or proposed for Cole Junior High School and Manual High School. The efforts at Cole include the use of laboratory approaches in all academic areas; use of inservice training; use of tutors and student aides; increased counseling efforts; a work-study program; and an extension center and a "crisis room" to be used with stu-

dents who do not adjust well to a regular classroom setting and are potential dropouts or subjects for suspension from school. The programs at Manual include extensive vocational skills and pre-professional courses and advanced placement opportunities.

At present, funds are available under Colorado Senate Bill 174 for children whose reading skills are two or more years below their grade level. Current S.B. 174 financed programs are in effect at Fairview Elementary School, and Baker and Cole Junior High Schools. State appropriations are expected to permit the continuation of these programs.

Finally, defendants list a number of innovative practices. These would emphasize the active, rather than passive elements of learning, recognizing that pupils will vary in their rate of learning based on their ability, background and other factors; efforts would be made to avoid practices which might degrade the child, such as underestimating his ability or denigrating his background or family (no matter how subtly or unconsciously done); and an effort would be made to supply an attractive climate for learning —attractive buildings and classrooms, good interpersonal relationships between parents, pupils and teachers, excursions into places of greater interest and so forth are all contemplated in this type of program.

II.

The Testimony

The crucial *factual* issue considered was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects or whether desegregation and integration are essential to im-

proving the schools in question and providing equality. The evidence of both parties has been directed to this question.

Plaintiffs' evidence focused directly on the proposition that desegregation is essential in improving the quality of educational opportunity in the Court designated schools and that compensatory programs of the type proposed by the defendants cannot work in a segregated setting.

Dr. James Coleman, professor of social relations at Johns Hopkins University and author of the Coleman Report on equality of educational opportunity, testified that isolation of children from low socioeconomic families creates an atmosphere which inevitably results in an inferior educational opportunity. Dr. Coleman stated that a child's ability to learn is significantly affected by the educational stimulation provided by his family. Since Negro and Hispano children from low socioeconomic families are typically not provided with this stimulation, a compensating stimulation must be provided by the peer group in the school. Where all children in the school come from families with similar low socioeconomic status, the negative effect produced by family background is reinforced rather than alleviated. Dr. Coleman testified that although a racially isolated school is not inferior *per se*, it will inevitably provide an unequal educational opportunity where the racial or ethnic isolation involves a homogeneous student body all from uneducated and deprived backgrounds.

Dr. Neil Sullivan, who is now Commissioner of the Massachusetts State Board of Education and who installed the Berkeley desegregation plan in Berkeley, California, testified that in his opinion it was racial segregation itself, rather than isolation of children from low socioeconomic families, which caused the inferiority of educational op-

portunity. Dr. Sullivan stated that Berkeley had attempted to improve racially segregated schools by massive programs of compensatory education including lowering the teacher-pupil ratio, improving equipment and materials, and instituting cultural enrichment programs. These programs had little effect on student achievement. It was Dr. Sullivan's expert opinion that any effort at compensatory education must be correlated with desegregation if it is to achieve positive results. He also stated that a program of desegregation similar to that used in Berkeley required two years of preparation and planning.

Dr. Sullivan's testimony was reinforced by the testimony of Dr. Robert O'Reilly. Dr. O'Reilly, the assistant director of research and evaluation for the New York State Department of Education, has made the most extensive study of compensatory education programs on a national scale currently available. He explained that most compensatory programs include such items as lowering teacher-pupil ratio, use of paraprofessionals, inservice teacher and staff training programs, individualized tutoring and cultural enrichment courses. He concluded from this study that compensatory education carried on in a segregated atmosphere had little or no effect on raising achievement. Dr. Sullivan conceded desegregation in and of itself is not a cure-all, but is an essential step in improving educational opportunity and that compensatory programs are important and probably useful, but only if conducted in a desegregated setting.

The main witness for the defendants was Dr. Robert Gilberts, Superintendent of Schools for School District Number One. Dr. Gilberts explained the defendants' proposed plan and offered a critique of the plaintiffs' suggested program. He stated that low achievement among children in

the Court designated schools was the result of a number of factors, including home situation, lack of discipline, absence of stimulation by parents, and verbal deficiencies resulting from the families' limited vocabulary. Although Dr. Gilberts was the developer of Resolutions 1520, 1524 and 1531, designed to desegregate schools in Park Hill, he indicated that this was merely a pilot project. He maintained that there is no affirmative evidence that desegregation would aid in providing an equal educational opportunity for minority children. Furthermore, Dr. Gilberts expressed doubt that desegregation could be successful without broad community support.[3]

The defendants' plan, as explained by Dr. Gilberts, is designed to reconstruct the educational climate by such programs as differential staffing, improved inservice training for teachers and staff, special innovative programs of vocational and preprofessional training at Manual High School and to some extent at Cole Junior High School, and increasing the number of experienced teachers at the Court designated schools. A program similar to the present Voluntary Open Enrollment would be instituted, but with a guaranteed open space provision so that any student in the district might transfer to another school with transportation provided by the District if the transfer would improve the racial balance of both receiving and sending schools. Within the next two years a portion of the "complex system" will be initiated in Denver. Dr. Gilberts admitted, however, that only the new VOE program was specifically designed to provide some measure of desegregation. For the most part the defendants' programs are to be carried out in a substantially segregated setting.

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[3] We agree that community support is essential, but this, of course, requires a community education program—indeed a campaign.

Defendants also called Messrs. Ward, Morrison and Rehmer, the Principals of Manual High School, Cole Junior High School and Bryant-Webster Elementary School, respectively.

Mr. Ward testified that he had initiated several innovative programs at Manual since becoming Principal. These included work-study vocational training in areas such as building trades, metal work, power and transportation and home economics. He also testified that pre-professional studies were instituted. These are designed to familiarize pupils with occupational fields such as law, medicine, education and engineering. Although there was no evidence that these innovative programs improved the academic achievement of Manual students, Mr. Ward stated that they had intensified interest among students in remaining in school.

Mr. Morrison has also begun certain innovative programs at Cole Junior High School. These include the use of laboratory approaches in all academic areas, tutors and student aides, work-study programs and the "crisis room" and extension center. He testified that these approaches have succeeded in restoring student and community confidence in the school. The result of these programs on academic achievement has not yet been determined. It does appear though that Cole Junior High is now being used as a specialty school.

Mr. Rehmer has instituted new programs at Bryant-Webster which are basically compensatory in nature, and have achieved some success in reviving student interest. This is a predominantly Spanish elementary school in which compensatory reading and some Spanish oriented programs have been stressed.

Finally, these Principals agreed that their programs could be carried out in an integrated setting and that

desegregation of their schools would substantially improve the educational opportunity for their students.

III.

Issues of Law

Before discussing our determinations of fact we must mention that there are present herein two novel questions of law.

The *first* of these is discussed in the memorandum opinion and order of March 21, 1970. This is the question whether a condition of de facto segregation is to be remedied in the same manner as a condition of de jure segregation. We found at the trial that the schools in question became segregated as a result of neighborhood housing patterns—at least that this was the substantial factor in producing the result. It was not caused by positive law or as a result of official action. In the present state of the law, particularly in this the Tenth Circuit, we were of the opinion that desegregation could not be decreed in these circumstances. Undoubtedly this question will receive attention in higher courts at the behest of one or both of the parties and we do not pursue it.

The *second* question is one of both law and fact, but is predominantly to be determined from the evidence. It is whether in a setting of grossly inferior minority schools, compensatory education—improvement of the minority schools, together with a free transfer policy such as that suggested in the March 21, 1970 opinion—constitutes a constitutionally acceptable remedy or whether in order to in truth improve the schools and to thus satisfy the requirements of the Constitution, it is necessary to prescribe and implement also a program of desegregation and inte-

gration. We have concluded after hearing the evidence that the only feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment. We have, however, delayed its being carried into effect for one year (for part of the program) and for two years (for the remainder). We have directed the adoption of an interim program such as that suggested in the March 21, 1970 opinion.

IV.

Findings and Guidelines

1. The overwhelming evidence in this case supports the finding and determination which we now make that improvement in the quality of education in the minority school can only be brought about by a program of desegregation and integration. This is the positive conclusion of Doctors Coleman, Sullivan and O'Reilly, all of whom are authorities in the field. Their opinions are supported by extensive, comprehensive, in depth studies and, in some instances, actual experience in the field.

2. The evidence clearly establishes that the segregated setting stifles and frustrates the learning process. One of the expert witnesses made the matter clear when he said that the isolation of any group develops a homogeneous mass which brings out the worst in the individual members and establishes a low standard of achievement. When, in addition, the group is from a socioeconomic group which is deficient, the bad results are intensified. Add to this the minority factor with the attendant lack of pride and

hope, and the task of raising achievement levels becomes insurmountable. The minority citizens are products, in many instances, of parents who received inferior educations and hence the home environment which is looked to for many fundamental sources of learning and knowledge yields virtually no educational value. Thus, the only hope for raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students.

3. To seek to carry out a compensatory education program within minority schools without simultaneously developing a program of desegregation and integration has been unsuccessful. Experience has shown that money spent in these programs has failed to produce results and has been, therefore, wasted. The ideal approach, and that which offers maximum promise of success, is a program of desegregation and integration coupled with compensatory education. Desegregation in and of itself cannot achieve the objective of improving the quality of the education in schools. It must be carried out in an atmosphere of comprehensive education and preparation of teachers, pupils, parents and the community. It also must be coupled with an intense and massive compensatory education program for the students if it is to be successful.

4. A system of free transfer to designated Anglo or white schools of minority groups furnishes a minimal, but at the same time an insufficient, fulfillment of the consti-

tutional rights of the persons involved. True, such a method furnishes some relief to the individuals who choose to exercise it, but here again it promises little unless it is accompanied by a careful, painstaking program of compensatory education because here, without the support, the individual is alone in an environment which is much more difficult and competitive than either the segregated or integrated one. It should be used then as an interim measure. It will serve to minimize the deprivation during the period of planning and preparation for a permanent system.

5. As a prelude to a program of integration, the Court designated minority schools must be drastically improved. The inequity implicit in sending majority students to a grossly inferior school was noted in our March 21, 1970 opinion. Substantial correction of these conditions is, therefore, a necessity.

V.

Provisions of the Plan

In our opinion of March 21, 1970, we recognized the underlying constitutional basis for this decision, which is that a state or its subdivision may not constitutionally maintain any program which treats members of minority groups unequally as compared with other groups. It makes no difference that the system may appear to be equal on its face, if its operation in fact results in unequal treatment. Further, when a court finds that such inequality of treatment exists, it is constitutionally bound to provide a remedy which will wipe out the inequality "root and branch."

Having found, in accordance with the overwhelming weight of the evidence, that the racial isolation of Negro and Hispano children which exists in the fifteen schools designated in this Court's opinion of March 21, 1970, to-

gether with Elyria and Smedley Elementary Schools, is the primary factor producing inequality of educational opportunity at those schools and that this inequality can be remedied only through a combined program of desegregation, together with a massive program of compensatory education, and having further concluded that neither the plans submitted by plaintiffs nor those of defendants are wholly satisfactory, we, therefore, now delineate the guidelines of the plan which, based on the evidence and the law, satisfies the Constitution and, at the same time, holds some promise of acceptance and success.

A. *Summary*

The plan calls for desegregation of the Court designated elementary schools (grades 1 through 6) including Smedley and Elyria Schools. Part of this is to be accomplished on or before September 1, 1971, and the remainder is to be carried out not later than September 1, 1972. The detailed plan, including the exchanges which will be necessary, is not adopted now because it is believed that further study must be made. Baker Junior High School is also to be desegregated. A substantial part of the desegregation program must be completed on or before September 1, 1971, and complete desegregation and integration is to be accomplished on or before September 1, 1972.

Cole Junior High is also to be desegregated and integrated on or before the same dates applicable to Baker. This can be accomplished by making Cole a specialty school if the Board of Education determines that this is more feasible.

Manual High School is to become a specialized City high school which will offer pre-professional and particular college preparation courses. It will also offer, in accordance

with the Board's plan, a variety of work-study programs designed to develop talent in arts and trades.

The compensatory education program and the free transfer programs of the Board are also part of the plan.

B. *Elementary Schools*

At least 50 percent of the Court designated elementary schools, grades 1 through 6, including Elyria and Smedley Elementary Schools, must be desegregated by fall of 1971.

Complete desegregation of all Court designated elementary schools, grades 1 through 6 must be accomplished by the beginning of school in the fall of 1972. We consider complete desegregation fulfilling the constitutional requirement to be accomplished when each of the above schools has an Anglo composition in excess of 50 percent. Although it is probably not constitutionally required, the desirability of having the minority student population in each of these schools apportioned equally between Negro and Hispano children is apparent.

Because the plaintiffs and the School District have the expertise necessary for devising a system of school redistricting and transportation to achieve the result set forth above, we leave these details to them. But we stress that the details of the scheme must be carefully examined and checked, having in mind that the program is a human one. While the computers can be useful in such an effort, their results must be checked with care to prevent unnecessary burden to the persons involved. The final details will be subject to review by the Court. We have, of course, been reluctant to decree mandatory transportation, and it should be avoided to the extent possible.

C. *Junior High Schools*

Substantial progress must be made in desegregating Baker Junior High School by fall of 1971. Complete desegregation of Baker Junior High School along the lines set forth above for elementary schools must be effectuated by the beginning of the school year in the fall of 1972.

Cole Junior High School. The Board is directed to adopt one of two alternative plans. First, the Board of Education may desegregate Cole. If this alternative is adopted, substantial progress must be made in desegregating Cole by fall of 1971, with complete desegregation of Cole Junior High by the beginning of the school year in the fall of 1972. The second alternative is to establish Cole by fall of 1971 as an open school for special education and other special programs now in effect or which the School Board may wish to put into effect in the future. Under this second alternative, those students who would have attended Cole in the 1971-72 school year, but who do not wish to participate in the special programs offered at Cole, may transfer with a guarantee of space to another junior high school. It should be open to students from other parts of the City in furtherance of the special programs. A basic assumption is that the desegregation and integration policies here enunciated will be accomplished regardless of which scheme is adopted for Cole.

D. *Manual High School*

We approve and order implementation of the plans set forth by the defendants and plaintiffs for establishing Manual as an open school for the continuation and *expansion* of the vocational and pre-professional training programs which have been instituted by the Principal, the faculty and staff.

If this program develops and transforms Manual to an outstanding institution capable of attracting and accommodating students from the entire City, an integration program would be superfluous.

E. *Preparation*

Between now and the beginning of school in fall 1971, and continuing through fall of 1972, an intensive program of education must be carried out within the community and the school system in preparation for desegregation and integration. This should include at least a program for orienting teachers in the field of minority cultures and problems and how to effectively deal with minority children in an integrated environment. A similar program should be undertaken for staff and administrators. It will also be necessary to educate the community as to the educational benefits and values, not only for the children but also for the community, to be derived from desegregation and integration.

F. *Free Transfer*

Between now and the fall of 1971, *as an interim measure only*, we approve the Board of Education's program for VOE with a guaranteed space provision, and it shall be so implemented with respect to all Court designated schools including Elyria and Smedley Elementary Schools.

G. *Compensatory Education*

We approve of the Board's plans for compensatory education programs for minority children. At a minimum these programs should include:

1. Integration of teachers and administrative staff;

2. Encouragement and incentive to place skilled and experienced teachers and administrators in the core city schools;

3. Use of teacher aides and paraprofessionals;

4. Human relations training for all School District employees;

5. Inservice training on both district-wide and individual school bases;

6. Extended school years;

7. Programs under Senate Bill 174;

8. Early childhood programs such as Head Start and Follow Through;

9. Classes in Negro and Hispano culture and history; and

10. Spanish language training.

All of the above programs, including several others, are now included in the defendants' plan. These programs for compensatory education are to be initiated for the 1970-71 school year. Those programs which are already in effect should be continued in the 1970-71 school year, with any modifications which the Board of Education deems necessary in order to carry out this order.

VI.

Concluding Remarks

We are mindful that the task of the School District is a difficult and complex one. Constitutional standards must, of course, be met at the earliest feasible time, but a program which is too hastily conceived and developed could fail to

achieve its goals. In view of the essential preparation and planning which must go into a program of this magnitude, it is felt that a two year period within which to accomplish desegregation and integration is reasonable, particularly in light of the fact that the plan calls for substantial progress to be made during the year 1971-72.

We have noted the desirability (even though it is not constitutionally mandated) of having both Negroes and Hispanos in the desegregated schools on as close to an equal basis as possible. If integration and desegregation are to have the maximum salutary effect, it would seem to follow that school children be exposed to all racial and ethnic groups which make up the larger community in which they live. True integration is not likely to occur in Denver if Negroes and Hispanos are separated in the public educational system, no matter how innocently the separation has come about.

It is also to be noted that only grades 1 through 6 of the elementary schools are covered in the Court's plan. Kindergarten students are excluded. In the present de facto segregation circumstances in which the effort is improvement, we assume that we have some discretion. Although it may have some value to desegregate children at that early age, it must be kept in mind that their school day is shorter than that of the older children. Mandatory transportation, which may well be necessary to effectuate much of the Court's plan, seems impractical. It seems preferable to wait until that child is on a schedule more closely aligned with that of the other students at his school. Furthermore, because of the tender years of the kindergartners, it appears somewhat dubious whether the value to be gained is sufficient to justify placing these infants in this extraordinary setting.

Finally, we cannot predict with any degree of certainty how successful the free transfer or open enrollment program will be. However, the evidence at the hearing was not encouraging. On the other hand, it may surprise us. Indeed, there is no assurance that the program here prescribed will fully succeed. Its success will depend in large part on the effort which is expended and on the spirit in which the endeavor is carried out.

All adjudications in the case have now been completed and a final judgment can be entered. The remaining detail is a matter requiring the closest scrutiny and study which will require many months. There being no further substantive matter to decide, there is no just cause for delay and the entire matter can now be appealed.

Opinion of Court of Appeals of June 11, 1971

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAY, 1971, TERM

No. 336-70

WILFRED KEYES, *et al.*,

Plaintiffs-Appellees,

v.

SCHOOL DISTRICT No. 1, Denver, Colorado, *et al.*,

Defendants-Appellants.

No. 337-70—(Cross-appeal)

WILFRED KEYES, *et al.*,

Plaintiffs-Appellants,

v.

SCHOOL DISTRICT No. 1, Denver, Colorado, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(District Court No. C-1499)

Gordon G. Greiner, Denver, Colorado (Conrad K. Harper, New York, New York, on the brief), for Keyes, et al.

William K. Ris, Denver, Colorado (Benjamin L. Craig and Michael H. Jackson, Denver, Colorado, on the brief), for School District No. 1, et al.

Before PICKETT, HILL and SETH, United States Circuit Judges.

HILL, Circuit Judge.

This is a suit in which the parents of children attending Denver Public Schools sued individually, on behalf of their minor children, and on behalf of classes of persons similarly situated, to remedy the alleged segregated condition of certain Denver schools and the effects of that condition. The School District, the present Board of Education and its Superintendent were all named as defendants. The action was brought under 42 U.S.C. §§ 1983, 1985, 28 U.S.C. § 1343(3), (4), and the Fourteenth Amendment of the United States Constitution seeking to enjoin defendants from maintaining, requiring, continuing, encouraging and facilitating separation of children and faculty on the basis of race, and further from unequally allocating resources, services, facilities and plant on the basis of race. Declaratory relief was also sought under 28 U.S.C. § 2201. On appeal, defendants appear as appellants and cross-appellees, and plaintiffs appear as appellees and cross-appellants.

The reported background is extensive. In July, 1969, appellees' motion for preliminary injunction was granted in an opinion found at 303 F.Supp. 279. The motion sought to enjoin the rescission of Resolutions 1520, 1524 and 1531. The preliminary injunction was appealed and was remanded by this court for further findings and consideration of additional questions. Thereafter, the preliminary injunction was supplemented and modified at 303 F.Supp.

289. The decision on the merits is recorded at 313 F.Supp. 61, and the remedies are set forth in an opinion at 313 F.Supp. 90.

The complaint set out two separate causes of action. The first cause contained six counts, all of which pertained to rescission of School Board Resolutions 1520, 1524 and 1531. Therein the plaintiffs alleged that these Resolutions were an attempt by the School Board to desegregate and integrate the public schools of Northeast Denver, and that the rescission of these resolutions was unconstitutional because the purpose and effect was to perpetuate racial segregation in the affected schools. In connection with this cause of action, plaintiffs urge that the rescission of the Board Resolutions constituted affirmative state action resulting in de jure segregation in the schools affected thereby. The second cause of action contained three counts that are pertinent here. The first count, in effect, alleged that through affirmative acts the defendants and their predecessors deliberately and purposely created and maintained racial and ethnic segregation in the so-called "core" area schools within the district. The second count, in effect, alleged that the defendants had purposely maintained inferior schools by their method of allocation to these schools, and such practice has caused those schools to be substantially inferior to other schools within the district with predominantly Anglo students. The effect of such practice, plaintiffs urged, denied the minority students an equal educational opportunity in violation of the equal protection clause of the Fourteenth Amendment. The third count was an attack upon the school district's neighborhood school policy. They urge such policy to be unconstitutional because it results in segregated education.

In substance, the trial court found and concluded as to the first claim that the named schools in Northeast Denver were segregated by affirmative state action. In its findings, the trial court noted specific instances of boundary gerrymandering, construction of a new school and classrooms, minority-to-majority transfers, and excessive use of mobile classroom units in this section of the district, all of which amount to unconstitutional state segregation. In addition, it was held that the adoption of Resolutions 1520, 1524 and 1531 was a bona fide attempt by the Board to recognize the constitutional rights of the students affected by prior segregation, and that the act of repudiating these Resolutions was unconstitutional state action resulting in de jure segregation. As to the second claim, on the first count, the court found that the acts complained of in the core area were not racially inspired, and accordingly the allegations of de jure segregation were not accepted. On the second count, the court found that although the core area schools were not segregated by state action, fifteen designated schools should be granted relief because it was demonstrated that they were offering their pupils an unequal educational opportunity in violation of the Fourteenth Amendment equal protection clause. Upon findings that the Denver neighborhood school policy had been constitutionally maintained under the standards set forth in Board of Education of Oklahoma City v. Dowell, 375 F.2d 158 (10th Cir. 1967), and Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), relief on the third count was denied.

On appeal in No. 336-70, appellants attack the findings and conclusions as to the first claim and the second count of the second claim. In the cross-appeal, No. 337-70, the Keyes class urge error in the findings and conclusions regarding the first and third counts of the second claim.

Appellants' initial argument in No. 336-70 makes a two-fold attack on the findings and conclusions regarding the existence of de jure segregation in the schools located in Denver's Northeast sector. First, it is contended that under a proper application of the law, the evidence will not support a finding of de jure segregation. Second, appellants argue that the act of rescinding Resolutions 1520, 1524 and 1531 was not an act of de jure segregation.

A complete understanding and resolution of the issues presented by appellants requires a survey of the events which preceded the Board's action in rescinding the three Resolutions. In the Denver Public School System, there are 92 elementary schools, 16 junior high schools, and 9 senior high schools.[1] There has never been a law in Colorado requiring separate educational facilities for different races. The policy to which the School Board has consistently adhered is the neighborhood school plan. The goal is a centrally located school which children living within the boundary lines must attend. Although the Board has no written policy governing the setting of attendance boundaries, several factors have apparently been employed. Among these are current school population in an attendance area, estimated growth of pupil population, the size of the school, distance to be traveled, and the existence of natural

[1] The overall racial and ethnic composition of Denver Public Schools as of 1968-69 was as follows:

Educational Level	Total Students	% Anglo	% Negro	% Hispano
Elementary	54,576	61.7	15.2	22.0
Junior High	18,576	64.0	15.5	17.0
Senior High	23,425	76.1	10.4	9.0
Totals	96,577	70.7	12.7	15.8

boundaries.[3] The Board also attempts to draw junior high school and senior high school boundary lines so that all students transferring from a given school will continue their education together.

On several occasions during the 1960's, the Board formed committees to study the equality of educational opportunities being provided within the system. In 1962, the Voorhees Committee was assigned the onerous task. That group recognized that in a school district where there are concentrations of minority racial and ethnic groups, the result of a neighborhood school system may be unequal educational opportunities. Therefore, they recommended that the School board consider racial, ethnic and socio-economic factors in establishing boundaries and locating new schools in order to create heterogeneous school communities. The recommendations were apparently ignored.

Thereafter, in May, 1964, the Board passed Policy 5100 which also recognized that the neighborhood school plan resulted in the concentration of some minority racial and ethnic groups in certain schools. Rather than abandon the neighborhood school concept, however, the Board decided to incorporate "changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees." But nothing of substance was accomplished.

In 1966, the Berge Committee was formed to examine Board policies with regard to the location of schools in Northeast Denver and to suggest changes which would lead to integration of Denver students. This committee

[3] Report and Recommendations to the Board of Education School District Number One Denver, Colorado, by a Special Study on Equality of Educational Opportunity in the Denver Public Schools (March 1, 1964), pp. A-1 to A-6.

recommended that no new schools be built in Northeast Denver; that a cultural arts center be established for student use; that educational centers be created; and that superior educational programs be initiated for Smiley and Baker Junior High Schools. Again, the recommendations were not effected.

In 1968, the Board passed the Noel resolution which again formally recognized the problem of concentrated racial and ethnic minority school populations in Northeast Denver and the possibility of resulting unequal educational opportunities. The resolution directed the Superintendent of Schools to submit to the Board a comprehensive plan for integrating the Denver Schools. A plan was submitted, and after a four-month study, Resolutions 1520, 1524 and 1531 were passed. In essence, each of these resolutions sought to spread the Negro populations of these schools to numerous schools by boundary changes, thereby achieving what has been described as racial balance in all of them so that their predominantly Negro populations would become roughly 20% and white students from other areas would produce an Anglo population in each school of about 80%. Resolution 1520 made changes in attendance areas of secondary schools; Resolution 1524 dealt with both secondary schools and junior high schools; and Resolution 1531 changed attendance areas of the elementary schools.

However, before full implementation of the Resolutions could be accomplished, a Board election was held. Two candidates who promised to rescind the Resolutions were elected, and thereafter the Board did rescind Resolutions 1520, 1524 and 1531. In their place, Resolution 1533 was passed which basically provided for a voluntary exchange program between the Northeast elementary schools and other elementary schools of the district. Shortly thereafter, this suit was initiated.

The schools of concern to this argument are located in Northeast Denver in what is generally referred to as the Park Hill area. The schools are: East High School, Smiley and Cole Junior High Schools, Barrett, Stedman, Hallett, Park Hill and Philips Elementary Schools. Prior to 1950, the Negro population was centered in the Five Points area, near the northwest corner of City Park. Since 1940, the Negro population has steadily increased from 8,000 to 15,000 in 1950, to 30,000 in 1960, and to approximately 45,000 by 1966. The residential movement reflecting this growth has been eastward, down a "corridor" which has fairly well defined north-south boundaries. In the early 1950's, York Street (some 16 blocks west of Colorado Boulevard) was the east boundary of the residential expansion. Ten years later, the movement had reached and crossed Colorado Boulevard to a limited degree, and now the corridor of Negro residences extends from the Five Points area to the eastern city limits. The schools of concern are in and adjacent to this narrow strip of Negro residences.

Barrett Elementary is located one block west of Colorado Boulevard in the heart of the Negro community. When it opened in 1960, the attendance lines were drawn to coincide almost precisely with the then eastern boundary of the Negro residential movement—Colorado Boulevard. When the school was being planned in 1958 and the sites for construction were being considered, the area west of Colorado Boulevard was already predominantly Negro; by 1960, when the school opened, the racial composition of the neighborhood which it was to serve was reflected in the 89.6% Negro student enrollment. In 1970, the racial and ethnic composition of the school was approximately 93% Negro, 7% Hispano.

In addition, Barrett was built to accommodate only 450 students, a factor which manifestly precluded its use to

substantially relieve the overcrowded conditions at adjacent schools. In 1960, Stedman (then predominantly Anglo), which was eight blocks due east of Barrett, was well over its intended capacity. Rather than constructing a larger physical plant at Barrett to accommodate part of Stedman's overflow, Barrett's size was restricted to serve only those pupils west of Colorado Boulevard.

The trial court held that "the positive acts of the Board in establishing Barrett and defining its boundaries were the proximate cause of the segregated condition which has existed in that school since its creation, which condition exists at present. . . . The action of the Board . . . was taken with knowledge of the consequences, and these consequences were not merely possible, they were substantially certain. And under such conditions we find that the Board acted purposefully to create and maintain segregation at Barrett." 303 F. Supp. at 290-91.

In 1960, Stedman was 96% Anglo, 4% Negro and was 20% above capacity. By 1962, it was 35 to 50% Anglo and 50 to 65% Negro. In 1963, it was 87.4% Negro and 18.6% Anglo, and still overcrowded. By 1968, this school was 94.6% Negro and 3.9% Anglo. Stedman is eight blocks due east of Barrett, and in 1960 the residential trend all but insured that in a few years it would be predominantly Negro. In 1962, three boundary changes were proposed to the Board which would have transferred students from Stedman to Smith, Hallett and Park Hill, each of which was predominantly Anglo. These three proposals were refused by the Board. In 1964, the Board made two boundary changes which affected Stedman: (1) a predominantly Anglo section of Stedman's school zone was detached to Hallett, and (2) the Park Hill—Stedman optional zone (96% Anglo) was transferred to Park Hill.

To facilitate an expanding population at Stedman, which was overwhelmingly Negro, mobile units were erected.

The trial court held: "The actions of the Board with respect to boundary changes, installation of mobile units and repeal of Resolution 1531 shows a continuous affirmative policy designed to isolate Negro children at Stedman and to thereby preserve the 'white' character of other Park Hill schools." 303 F. Supp. at 292.

In 1960, Park Hill and Philips Elementary Schools were predominantly Anglo. In 1968, Park Hill was 71% Anglo, 23.2% Negro and 3.8% Hispano; Philips was 55.3% Anglo, 36.6% Negro and 5.2% Hispano. Notwithstanding the Negro movement into this area, these two schools have continued a majority of Anglos in the student body.

The court stated: "In light of the natural and probable segregative consequences of removing the stabilizing effect of Resolution 1531 on Park Hill and Philips and re-establishing the original district boundaries, the Board must be regarded as having acted with a purpose of approving those consequences." 303 F. Supp. at 292-93.

In 1960, Hallett Elementary was 99% Anglo; in 1968 it was 90% Negro, 10% Anglo. The school is about 12 blocks due east of Stedman. When the Stedman boundary changes were considered in 1962, Hallett was under capacity and was 80 to 95% Anglo. The results of the boundary changes, had they occurred, would have brought Hallett up to capacity and would have had an integrative effect on the latter school. The 1964 Stedman boundary change that sent the predominantly Anglo section of Stedman to Hallett resulted in a 80% Anglo section of Hallett's attendance area being transferred to Philips. The effect of the Hallett to Philips transfer was a reduction in Anglo pupils at Hallett from 68.5 to 41.5%. By 1965, when four mobile

units were built and additional classrooms constructed, Hallett was 75% Negro.

The court said: "The effect of the mobile units and additional classrooms was to solidify segregation at Hallett, increasing its capacity to absorb the additional influx of Negro population into the area." 303 F. Supp. at 293.

The feeder schools for Smiley Junior High School are Hallett, Park Hill, Smith, Philips, Stedman, Ashley and Harrington. By the established residential trend, Smiley will soon be all Negro. In 1968 there were 23.6% Anglo, 71.6% Negro and 3.7% Hispano, and there were 23 minority teachers. Only one other school in the entire Denver system, Cole Junior High, had more than six minority teachers. The court held: "The effect of this repeal [of Resolutions 1520 and 1524] was to re-establish Smiley as a segregated school by affirmative Board action. At the time of the repeal, it was certain that such action would perpetuate the racial composition of Smiley at over 75% minority and that future Negro population movement would ultimately increase this percentage. . . . We, therefore, find that the action of the Board in rescinding Resolutions 1520 and 1524 was wilful as to its effect on Smiley." 303 F. Supp. at 294.

In 1969, East High School was 54% Anglo, 40% Negro and 7% Hispano. The court held that neither before nor after the passage of Resolution 1520 could East be considered segregated. But "[r]escission of these resolutions might, through the feeder system, result in a segregated situation at East in the future." 303 F. Supp. at 294. In the opinion at 313 F. Supp. 61, 68, the trial court extended its findings of de jure segregation to East High and Cole Junior High: "The effect of the rescission of Resolution 1520 at East High was to allow the trend toward segre-

gation . . . to continue unabated. The rescission of Resolution 1524 as applied to Cole Junior High was an action taken which had the effect of frustrating an effort at Cole which at least constituted a start toward ultimate improvement in the quality of the educational opportunity there. . . . We must hold then that this frustraion of the Board plan which had for its purpose relief of the effects of segregation at Cole were unlawful."

Thus the issue is whether, under applicable constitutional principles, the Board has acted with regard to the Park Hill area schools in a manner which violates appellees' Fourteenth Amendment rights. This controversy was tried to the district court without a jury. On the basis of the testimony and exhibits produced at that trial, the court made findings of fact and conclusions of law. To the extent that appellants' or cross-appellants' arguments rest upon a relitigation or reassessment of factual matters, Rule 52 F.R.Civ.P. 28 U.S.C. requires us to defer to the findings of the trial court unless we are satisfied that they are clearly erroneous. Mitchell v. Texas Gulf Sulphur, —— F2d —— (10th Cir. 1971); Fireman's Fund Insurance Company v. S.E.K. Construction Company, Inc., —— F.2d —— (10th Cir. 1970).

We begin with the fundamental principle that state imposed racial segregation in public schools is inherently unequal and violative of the equal protection clause. Swann v. Charlotte-Mecklenburg Board of Education, —— U.S. —— (1971); Brown v. Board of Education, 347 U.S. 483 (1954); Downs v. Board of Education of Kansas City, 336 F.2d 988 (1964). This Fourteenth Amendment prohibition against racial discrimination in public schools is not limited to the action of state legislatures, but applies with equal force to any agency of the state taking such

action. Cooper v. Aaron, 358 U.S. 1 (1958). And we can perceive no rational explanation why state imposed segregation of the sort condemned in Brown should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers. Taylor v. Board of Education of City School District of New Rochelle, 294 F.2d 36 (2nd Cir. 1961).

Appellants maintain that although a racial imbalance does exist in the Park Hill area schools, it is justifiable under their neighborhood school policy which has been and is now operated with total neutrality regarding race. It is true that the rule of the Circuit is that neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance. United States v. Board of Education of Tulsa County, 429 F.2d 1253 (10th Cir. 1970); Board of Education of Oklahoma City v. Dowell, 375 F.2d 158 (10th Cir. 1967); Downs v. Board of Education of Kansas City, supra. However, when a board of education embarks on a course of conduct which is motivated by purposeful desire to perpetuate and maintain a racially segregated school, the constitutional rights of those students confined within that segregated establishment have been violated.

The evidence supports the trial court's findings regarding Barrett Elementary School. When construction of new schools in predominantly Negro neighborhoods is based on rational, neutral criteria, segregative intent will not be inferred. Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966); Sealy v. Department of Public Instruction of Pennsylvania, 252 F.2d 898 (3rd Cir. 1958); Craggett v. Board of Education of Cleveland, 234 F.Supp.

381 (N.D. Ohio 1964); Henry v. Godsell, 165 F.Supp. 87 (E.D.Mich. 1958). Conversely, if the criteria asserted as justification for the construction and designation of attendance lines are a sham or subterfuge to foster segregation, odious intent may be inferred. Here there is sufficient evidence to support segregative intent.

The school was admittedly built in an area of increasing school population with the stated purpose of relieving overcrowded conditions at nearby schools. But the size of the school belies its intended purpose. Although Negro students transferred from nearby schools, with a large segment of Negro children formerly bussed to Park Hill being transferred to Barrett, none of the Anglos from overcrowded Stedman, eight blocks away, were transferred to Barrett. And in point of fact, the small physical plant at Barrett did little to relieve the overcrowded conditions in nearby elementary schools since even after 1960 every adjacent elementary school continued to operate over its intended capacity.[3] The only school which now approached its actual intended capacity was Park Hill, which was predominantly Anglo. This is an unjustifiable non sequitur. The site upon which the building was constructed could have handled a significantly larger facility which would have had long range effects on the overcrowded conditions of the area. Instead, for obscure reasons, the building was

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[3]

School	Capacity '59	Capacity '60	Enrollment '59	Enrollment '60	% of Capacity '59	% of Capacity '60
Columbine	780	780	901	884	116	113
Harrington	450	450	690	546	153	121
Park Hill	660	630	859	650	130	103
Stedman	630	630	687	698	109	111
Barrett	—	450	—	507	—	113

designed to hold only 450 pupils when the adjacent elementary schools in 1959 already had an excess pupil population of 617.

Although the use of Colorado Boulevard under other circumstances could prove to be a valid exercise of Board discretion, it cannot be justified under the facts here. The Board admits that other elementary school attendance areas are intersected by major traffic thoroughfares, and that in at least one instance an elevated crossing was built to facilitate pupil safety. Thus it was not an immutable boundary which absolutely precluded the extension of attendance lines. On the whole, when viewing the reason asserted by the Board for the construction of Barrett, in light of the actual results obtained, we cannot find clear error in the district court's finding that the size of the school and the location of its attendance boundaries reflected a purposeful intent to build and maintain a Negro school.

We are likewise compelled to support the findings of the trial court regarding the manipulation of boundaries and the use of mobile classroom units within the Park Hill area. These acts, found the trial court, "tend to isolate and concentrate Negro students in those schools which become segregated in the wake of Negro population influx into Park Hill while maintaining for as long as possible the Anglo status of those Park Hill schools which still remained predominantly white." 313 F.Supp at 65.

The Board's refusal to alter the Stedman attendance area in 1962 was not an affirmative act which equates with de jure segregation. The evidence reflects that the proposals would have assigned Stedman students to Smith, Hallett and Park Hill Elementary Schools. Although the racial composition of each of these schools was predominantly Anglo in 1962, Park Hill was well over capacity,

Hallett was slightly over capacity, and Smith was just under capacity. But more important, the residential areas which were to be part of the transfer contained less than 5% Negroes. Thus by making those alterations in attendance zones, Stedman would have lost Anglo pupils to the other schools. There can be no racial overtones attributed to the Board's refusal in 1962 to make the requested Stedman transfers.

However, we have found no evidence, nor have appellants referred us to data, which rebuts or justifies the 1962 Hallett to Philips transfer. Both schools were predominantly Anglo at the time, but Hallett was in a transition stage going from 85 to 95% Anglo in 1962 to 41.5% Anglo in 1964, and to 90% Negro in 1969. The students which were sent to Philips were in the former Hallett-Philips optional zone and were virtually 100% Anglo. The trial court held that the only thing accomplished by the rezoning was the moving of Anglo students from a school district which would gradually become predominantly Negro to one which has remained predominantly Anglo. The evidence does not contradict that analysis.

The other boundary alteration that gave rise to the trial court's finding of gerrymandering of attendance zones in the Park Hill area occurred in 1964. In 1963, Hallett was 68.5% Anglo, Philips was approximately 98% Anglo; Stedman was about 19% Anglo, and Park Hill was over 95% Anglo. The first change transferred a predominantly Anglo portion out of Stedman to Hallett. Second, the Park Hill-Stedman optional zone, which was virtually all Anglo, was transferred to Park Hill. Third, a predominantly Anglo section of the Hallett district was transferred to Philips. A predominantly Anglo section of Stedman's district was sent further east to Hallett. In 1964, Hallett was reduced

to 41.5% Anglo, Philips was roughly 82% Anglo; Stedman was about 15% Anglo, Park Hill was about 90% Anglo.

Although there is a sharp conflict between the parties as to whose testimony and what data should be credited, there is evidence in the record to support the trial court's determination that these were segregative acts taken with knowledge of the effect they would have. The trend is clear that as the Negro population expanded into new neighborhoods, the predominantly Anglo clusters were transferred, by the Board, to one of the remaining predominantly Anglo schools. Smiley Junior High was deemed to be a segregated school because of the racial composition of its students and its faculty. In addition, it appears that Anglo students were permitted to transfer to predominantly Anglo schools even though they lived in the Smiley attendance area. The findings of the trial court, plus the additional effects of allowing Anglos to transfer out of Smiley, are supported by evidence of record and must be sustained.

At this point we pause to acknowledge that the problems facing the school board of any metropolitan city are varied and difficult. The complexities of managing a large school district such as Denver's in a manner which provides equal educational treatment for all students are manifestly made more difficult when, through circumstances often beyond their control, a single racial group settles in a particular neighborhood. Even so, the perplexities of the task cannot be used to justify abdication of constitutional responsibilities.

When a community experiences a steady and ascertainable expansion of Negro population resulting in a new and larger "Negro community", the school board must exercise extreme caution and diligence to prevent racial isolation in those schools. When new buildings are built, new class-

rooms added, attendance areas drawn, and teachers assigned, the board must guard against any acts which reflect anything less than absolutely neutral criteria for making the decisions. The facts as outlined above simply do not mirror the kind of impartiality imposed upon a board which adheres to a neighborhood school plan. *Cf.* Downs v. Board of Education of Kansas City, supra. In sum, there is ample evidence in the record to sustain the trial court's findings that race was made the basis for school districting with the purpose and effect of producing substantially segregated schools in the Park Hill area. This conduct clearly violates the Fourteenth Amendment and the rules we have heretofore laid down in the Downs and Dowell cases. *See* Taylor v. Board of Education of City School District of New Rochelle, 191 F. Supp. 181 (S.D.N.Y. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961); *aff'd* 294 F.2d 36 (2nd Cir. 1961).

The second portion of appellants' first argument urges that the trial court erred in concluding that the act of rescinding Resolutions 1520, 1524 and 1531 was an act of de jure segregation in and of itself. It is their position that this was a valid exercise of the Board's legislative powers; that there was no segregative effect; and that there were no underlying segregative motivations.

Since we have sustained the findings regarding state imposed segregation in the Park Hill area schools, it is unnecessary to further decide whether the rescission of Resolutions 1520, 1524 and 1531 was also an act of de jure segregation. It is sufficient to say that the Board's adoption of those resolutions was responsive to its constitutional duty to desegregate the named schools and the trial court was within its powers in designating those Resolutions as the best solution to a difficult situation. Although the alternative plan proposed in Resolution 1533 is not totally devoid

of merit, a realistic appraisal of voluntary transfer plans has shown that they simply do not fulfill the constitutional mandate of dismantling segregated schools. In fact, the voluntary transfer plans previously employed in Denver have had a minimal effect on the segregated status of the Park Hill area schools. In sum, we conclude that the trial court properly refused to accept Resolution 1533 as a workable solution. Once state imposed segregation is found, trial courts are to employ their broad equitable powers to insure full and immediate desegregation. *See* Brown v. Board of Education, 349 U.S. 294 (1955). The implementation of Resolutions 1520, 1524 and 1531 comports with that duty and holds great promise in achieving that goal. (See Appendix I)

Appellants' second argument relates to the older core area of the city which is populated predominantly by Negroes and Hispanos. Appellees alleged in the trial court that the schools in this area were also segregated by unlawful state action. The trial court refused this plea, and it is the subject of the cross-appeal to be discussed below. However, in addition, appellees urged that a number of these same schools were offering their students an unequal educational opportunity, thus denying them their Fourteenth Amendment right to equal protection. The contention is premised on the assertion that when compared to the other schools in the district, the core area schools were offering inferior education.

The trial court preliminarily resolved that of the 27 schools allegedly offering a sub-standard education, only those with 70 to 75% concentration of either Negro or Hispano students would likely produce cognizable in-

feriority. 313 F. Supp. at 77. The schools so designated were:

School	*Anglo (%)*	*Negro (%)*	*Hispano (%)*
Bryant-Webster*	23.3	.5	75.5
Columbine*	.6	97.2	2.2
Elmwood*	7.9	0.0	91.6
Fairmont*	19.8	0.0	79.9
Fairview*	7.0	8.2	83.2
Greenlee*	17.0	9.0	73.0
Hallett*	38.2	58.4	2.6
Harrington*	2.2	76.3	19.6
Mitchell*	2.2	70.9	26.7
Smith*	4.0	91.7	3.3
Stedman*	4.1	92.7	2.7
Whittier*	1.4	94.0	4.5
Baker**	11.6	6.7	81.4
Cole**	1.4	72.1	25.0
Manual***	8.2	60.2	27.5

*Elementary **Jr. High ***Sr. High

Ultimately the trial court did conclude that these designated schools were providing an education inferior to that being offered in the other Denver schools. 313 F.Supp. at 97-99. The relief decreed varied as to each level, but generally provided that the twelve designated elementary schools, including Elyria and Smedley, are to be integrated with an Anglo composition in excess of 50%. One-half of these schools were to be desegregated and integrated by the fall of 1971, and the remainder must be desegregated and integrated by fall of 1972. Baker Junior High is to be similarly desegregated and integrated by fall of 1971. As to Cole Junior High, it could either be desegregated and integrated as are the elementary schools by fall of

1972, or it could be made the center for essential district-wide programs. Manual High is to be operated as a district-wide school for the continuation and expansion of its vocational and pre-professional programs.

Specifically, the court found (1) that on the basis of 1968 Stanford Achievement Test results, the scholastic achievement in each of the designated schools was significantly lower than in the other schools in the district; (2) that during 1968 in the designated schools there were more teachers without prior experience, more teachers on probation (zero to three years of experience), and fewer teachers with ten or more years teaching experience than in the selected Anglo schools; (3) that because of Board policy which allows intrasystem teacher transfers on the basis of seniority, the more experienced teachers transferred out of predominantly minority schools at the earliest opportunity; (4) that there are more pupil drop-outs in the junior high and senior high schools in the designated schools; and (5) that the size and age of the school building do not of themselves affect the educational opportunity at a given school, but smaller and older buildings may aggravate an aura of inferiority.

The second portion of the finding that the designated schools offer an unequal educational opportunity is premised on the conclusion that "segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity." 313 F.Supp. at 82.

Preliminarily it is necessary to determine whether a school which is found to be constitutionally maintained as a neighborhood school might violate the Fourteenth Amendment by otherwise providing an unequal educational opportunity. The district court concluded that whereas the Constitution allows separate facilities for races when

their existence is not state imposed, the Fourteenth Amendment will not tolerate inequality within those schools. Although the concept is developed through a series of analogized equal protection cases, *e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963), it would appear that this is but a restatement of what Brown v. Board of Education, 347 U.S. 483, 493 (1954) said years ago: "Such an opportunity [of education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

For the moment we perceive no valid reason why the constitutional rights of school children would not be violated by an education which is sub-standard when compared to other schools within that same district, provided the state has acted to cause the harm without substantial justification in terms of legitimate state interest. If we allow the consignment of minority races to separate schools, the minimum the Constitution will tolerate is that from their objectively measurable aspects, these schools must be conducted on a basis of real equality, at least until any inequalities are adequately justified. Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969).

The trial court's opinion, 313 F.Supp. at 81, 82, 83, leaves little doubt that the finding of unequal educational opportunity in the designated schools pivots on the conclusion that segregated schools, whatever the cause, per se produce lower achievement and an inferior educational opportunity. The quality of teachers in any school is manifestly one of the factors which affects the quality of schooling being offered. And the evidence of the case supports the finding that the teacher experience in the designated core area schools is less than that which exists in other Denver

schools. However, we cannot conclude from that one factor—as indeed neither could the trial court—that inferior schooling is being offered. Pupil dropout rates and low scholastic achievement are indicative of a flaw in the system, but as indicated by appellees' experts, even a completely integrated setting does not resolve these problems if the schooling is not directed to the specialized needs of children coming from low socio-economic and minority racial and ethnic backgrounds. Thus it is not the proffered objective indicia of inferiority which causes the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs.

As stated in the first instance then, the trial court's findings stand or fall on the power of federal courts to resolve educational difficulties arising from circumstances outside the ambit of state action. It was recognized that the law in this Circuit is that a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided the plan is not used as a veil to further perpetuate racial discrimination. 313 F.Supp. at 71. In the course of explicating this rule and holding that the core area school policy was constitutionally maintained, the trial court rejected the notion that a neighborhood school system is unconstitutional if it produces segregation in fact. However, then, in the final analysis, the finding that an unequal educational opportunity exists in the designated core schools must rest squarely on the premise that Denver's neighborhood school policy is violative of the Fourteenth Amendment because it permits segregation in fact. This undermines our holdings in the Tulsa, Downs and Dowell cases and cannot be accepted under the existing law of this Circuit.

We cannot dispute the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation in fact may create an inferior educational atmosphere. Appellees observe that several of the federal district courts across the land have indicated that because of the resulting deficiencies, the federal courts should play a role in correcting the system. Davis v. School District of the City of Pontiac, 309 F.Supp. 734 (E.D.Mich. 1970); United States v. School District 151 of Cook County, Illinois, 286 F.Supp. 786 (N.D.Ill. 1968); Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967); Blocker v. Board of Education of Manhassett, New York, 226 F.Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Education of the Town of Hempstead, 204 F.Supp. 150 (E.D.N.Y. 1962); and Jackson v. Pasadena City School District, 382 P.2d 878 (S.C.Cal. 1963). However, the impact of such statements is diminished by indications in the Hobson, Blocker, Branche, Cook County, Pontiac, and Jackson cases that the racial imbalance resulted from racially motivated conduct.

Our reluctance to embark on such a course stems not from a desire to ignore a very serious educational and social ill, but from the firm conviction that we are without power to do so. Downs v. Board of Education, 336 F.2d at 998. Before the power of the federal courts may be invoked in this kind of case, a constitutional deprivation must be shown. Brown v. Board of Education, 347 U.S. 483, 493-95 (1954) held that when a state segregates children in public schools solely on the basis of race, the Fourteenth Amendment rights of the segregated children are violated. We never construed Brown to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue. Deal v. Cincinnati

Board of Education, 369 F.2d 55 (6th Cir. 1966); 419 F.2d 1387 (1969); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963). Unable to locate a firm foundation upon which to build a constitutional deprivation, we are compelled to abstain from enforcing the trial judge's plan to desegregate and integrate the court designated core area schools.

Although the Board is no longer required by court order to correct the situation in the core area schools, we are reassured by the Board's passage of Resolution 1562 that the efforts made thus far will be only the beginning of a new effort to relieve the problems of those schools. In Resolution 1562, the Board has resolved that regardless of the final outcome of this litigation, it intends to improve the quality of education offered in the system. And it specifically directs the Superintendent and his staff to devise a comprehensive plan "directed toward raising the educational achievement levels at the schools specified by the District Court in its opinion." The salutary potential of such a program cannot be minimized, and the Board is to be commended for its initiative. Because of the significance of the Resolution, it is set out in full in Appendix II.

Appellants have also urged that mandatory bussing of students from the core area schools is neither compelled by the Constitution nor allowed by the Civil Rights Act, 42 U.S.C. § 2000c-6(a)(2). Although the disposition of the issue regarding the status of segregation in the core area schools obviates the necessity of deciding that issue, it is perfectly clear to us that where state imposed segregation exists, as it does in the Park Hill area, bussing is one of the tools at the trial court's disposal to alleviate the condition. It cannot be gainsaid that bussing is not the panacea

of segregation. But, after considering all the alternatives, if the trial court determines that the benefits outweigh the detriments, it is within its power to require bussing. Swann v. Charlotte-Mecklenburg Board of Education —— U.S. —— (1971).

The cross-appeal is first directed at the core schools which the district court refused to label as segregated by state action. At the outset, cross-appellants argue that they were required to labor under an erroneous burden of proof, and that the degree of justification for permitting racially imbalanced schools to exist was too low. The law of this Circuit guides us to approve the trial court's manner of handling the contested issues.

With the knowledge that we have said that neighborhood schools may be tolerated under the Constitution, it would be incongruous to require the Denver School Board to prove the non-existence of a secret, illicit, segregatory intent. It was indicated in the Tulsa case that neighborhood school plans are constitutionally suspect when attendance zones are superficially imposed upon racially defined neighborhoods, and when school construction preserves rather than eliminates the racial homogeny of given schools. United States v. Board of Education of Tulsa County, 429 F.2d at 1258-59. But that case dealt with a school system which had previously operated under a state law requiring segregation of races in public education. As in all disestablishment cases where a former dual system attempts to dismantle its segregated schools, the burden was on the Tulsa School Board to show that they had undertaken to accomplish a unitary public school system. Such an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent. Cross-appellants' reliance on United States v. School District 151 of Cook County, Illinois, 286 F. Supp. 786 (N.D.

Ill. 1968), aff'd 404 F.2d 1125 (7th Cir. 1968), is misplaced for the same reasons set out above. In that case, the court was likewise dealing with a school district which was segregated by unlawful state action.

Where, as here, the system is not a dual one, and where no type of state imposed segregation has previously been established, the burden is on plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action. Once a prima facie case is made, the defendants have the burden of going forward with the evidence. Hobson v. Hansen, 269 F. Supp. at 429. They may attack the allegations of segregatory intent, causation and/or defend on the grounds of justification in terms of legitimate state interests. But the initial burden of proving unconstitutional segregation remains on plaintiffs. Once plaintiffs prove state imposed segregation, justification for such discrimination must be in terms of positive social interests which are protected or advanced. The trial court held that cross-appellants failed in their burden of proving (1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools.

The evidence in this case is voluminous, and we have attempted to carefully scrutinize it. Thorough review reflects that cross-appellants have introduced some evidence which tends to support their assertions. However, there is also evidence of record which supports the findings of the trial court, so under Rule 52 F.R.Civ.P. 28 U.S.C., we must affirm. It must be remembered that we do not review this record de novo but can reverse fact findings only upon *clear* error. That kind of mistake is not extant here. The background of the allegedly unlawful acts and the

trial court's analysis of the Board's discriminatory intent and/or causation, with which we agree in each instance, follows.

The New Manual High School was constructed in 1953, just two blocks from old Manual High School. Through the years, from 1927 to 1950, Manual High had enrolled lessening numbers of Anglo students until in 1953, the school was less than 40% Anglo, about 35% Negro, and about 25% Hispano. The attendance zone for New Manual was the same as it had been for Manual, opening at about 66⅔% capacity. Cross-appellants contend that the construction of New Manual at its present location insured its segregated character, and that this act was equivalent to state imposed segregation. The trial court refused this argument on two grounds: First, that the decision to build New Manual on its present site was not racially motivated, and, second, that state action was not the cause of the current racial imbalance. 313 F. Supp. at 75.

In 1956 the Board adopted boundary changes which directly affected Manual High School (42% Negro) and Cole Junior High School (40% Negro). A portion of the Manual—East High optional attendance area was converted to a mandatory Manual attendance zone, and a portion of the Cole—Smiley Junior High optional attendance area was made a mandatory Cole attendance zone. The new mandatory zones were coterminus with the approximate eastern boundary of the Negro residential movement. Again the trial court held that cross-appellants had failed to establish that the boundary changes were racialy motivated or that those alterations caused the current racial imbalance. 313 F. Supp. 75.

In 1962 the Board adopted boundary changes which eliminated the optional attendance zones on three sides of Morey Junior High School. The changes involved trans-

ferring the Morey-Hill optional zone to Hill Junior High; the Morey-Byers optional zone to Byers Junior High; the Morey-Cole optional zone to Morey Junior High; and the Baker-Morey optional zone to Morey. Morey is located on the south side of the Cole attendance area and declined from 71% Anglo in 1961 to 45% Anglo in 1962. The trial court found, however, that despite the apparent segregatory effect at Morey, the concentration of Negroes at Cole was relieved, and the facilities at Hill, Byers and Baker Junior High Schools were better utilized. Thus, although on the surface the alterations appear to be racially inspired, there is evidence to sustain the trial court's finding that the changes were not carried out with the design and for the purpose of causing Morey to become a minority school. 313 F. Supp. at 72.

Cross-appellants have also alluded to other factors which they urge are probative of segregatory intent, i.e., faculty and staff assignments, obfuscation of minority achievement data, and double standards in dealing with overcrowding. Although minority teachers were usually located in the core area or Park Hill area schools, the Board's reason for doing so was not reflective of segregative desires. It operated on the prevailing educational theory of the day, the Negro pupils related more thoroughly with Negro teachers. The rationale was that the image of a successful, well educated Negro at the head of the class provided the best kind of motivation for Negro children and that in turn the Negro teacher had a greater understanding for the Negro pupil's educational and social problems. Although the validity of that theory is under severe attack today, we do not agree that the results of its past application infer segregatory intent. In response to new educational theories, the Denver public school system has today assigned Negro teachers to schools throughout the system

and has reduced the percentages of Negro teachers in the predominantly minority schools.

We are unable to see how the evidence regarding the obfuscation of minority achievement data relates to the Board's alleged segregative intent. And although cross-appellants urge that a double standard was used to deal with overcrowded conditions, the trial court's reluctance to premise segregatory intent on that basis is supported by the record. The evidence reflects that the bussing of Anglo students was caused by the city's annexation of residential areas that did not have school buildings. Hence the school children in these annexed areas were transported to the nearest school where space was available. The premise of alleging a double standard in the treatment of races is resultingly non-existent.

The remainder of the issues designated in the cross-appeal have either been disposed of or made irrelevant by preceding parts of this opinion.

The Final Judgment and Decree of the trial court is affirmed in all respects except that part pertaining to the core area or court designated schools, and particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of the unequal educational opportunity afforded, this issue having been presented by the Second Count of the Second Cause of Action contained in the complaint. In that respect only, the judgment is reversed. The case is accordingly remanded for the implementation of the plan in accordance with this opinion. The trial court is directed to retain jurisdiction of the case for the purpose of supervising the implementation of the plan, with full power to change, alter or amend the plan in the interest of justice and to carry out the objective of the litigation as reflected by this opinion.

APPENDIX I

RACIAL AND ETHNIC COMPOSITION OF SUBJECT SCHOOLS WITH RESPECT TO USE OF RESOLUTIONS 1520, 1524 AND 1531

If Resolution 1520 is used:[1]

Senior High School	*Total* No.	*Anglo* No.	%	*Negro* No.	%	*Hispano* No.	%
East	2,600	1,776	68	649	25	175	7
George Washington	2,896	2,528	87	333	11	35	1
South	2,739	2,258	82	147	5	334	12
Totals	8,235	6,562	80	1,129	14	544	7

If Resolution 1520 is not used:[2]

Senior High School	*Total* No.	*Anglo* No.	%	*Negro* No.	%	*Hispano* No.	%
East	2,623	1,409	54	1,039	40	175	7
George Washington	2,942	2,823	96	84	3	35	1
South	2,670	2,330	87	6	0	334	13
Totals	8,235	6,562	80	1,129	14	544	7

[1] Source: Compiled from *The Review*, Official Publication, Denver Public Schools, Vol. XLX (sic), May, 1969, supplemented by information supplied by school officials, *The Review*, Vol. XLIX, April, 1969. [Plaintiffs' Exhibit 7C]

[2] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Secondary Schools*—September 23, 1968, Denver Public Schools, Division of Personnel Services. [Plaintiffs' Exhibit 7D]

If Resolutions 1520 and 1524 are used:[3]

Junior High School	*Total*	*Anglo*		*Negro*		*Hispano*	
	No.	*No.*	*%*	*No.*	*%*	*No.*	*%*
Byers	1,241	1,053	85	110	9	78	6
Cole	944	9	1	661	70	274	29
Grant	885	696	79	107	12	82	9
Hill	1,303	1,035	79	226	17	42	3
Kepner	1,483	1,016	69	70	5	397	27
Kunsmiller	1,949	1,544	79	245	13	160	8
Merrill	1,578	1,350	86	205	13	23	1
Rishel	1,286	939	73	39	3	308	24
Smiley	1,333	960	72	306	23	67	5
Thomas Jefferson	1,637	1,584	97	45	3	8	0
Totals	13,639	10,186	75	2,014	15	1,439	11

If Resolutions 1520 and 1524 are not used:[4]

Junior High School	*Total*	*Anglo*		*Negro*		*Hispano*	
	No.	*No.*	*%*	*No.*	*%*	*No.*	*%*
Byers	1,138	1,053	93	7	1	78	7
Cole	1,219	46	4	884	73	289	24
Grant	815	696	85	37	5	82	10
Hill	1,753	1,685	96	26	1	42	2
Kepner	1,437	1,016	71	24	2	397	28
Kunsmiller	1,709	1,544	90	5	0	160	9
Merrill	1,578	1,550	98	5	0	23	1
Rishel	1,250	939	75	3	0	308	25
Smiley	1,553	367	24	1,112	72	74	5
Thomas Jefferson	1,597	1,584	99	5	0	8	1
Totals	14,049	10,480	75	2,108	15	1,461	10

[3] Source: Compiled from *The Review*, Official Publication, Denver Public Schools, Vol. XLX (sic), May, 1969, supplemented by information supplied by school officials, *The Review*, Vol. XLIX, April, 1969. [Plaintiffs' Exhibit 8C]

[4] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Secondary Schools*—September 23, 1968, Denver Public Schools, Division of Personnel Services. [Plaintiffs' Exhibit 8D]

Opinion of Court of Appeals of June 11, 1971

If Resolution 1531 is used:[5]

Elementary School	*Total*	*Anglo*		*Negro*		*Hispano*	
	No.	*No.*	*%*	*No.*	*%*	*No.*	*%*
Asbury	570	480	84	61	11	29	5
Ashley	368	444	81	60	11	44	8
Barrett	368	269	73	88	24	11	3
Carson	720	562	78	144	20	14	2
Denison	580	482	83	31	5	67	12
Force	922	744	81	86	9	92	10
Montclair & Annex	753	602	80	120	16	30	4
Moore	622	460	74	90	14	72	12
Palmer	482	390	81	72	15	19	4
Park Hill	863	682	79	112	13	69	8
Philips	584	409	70	128	22	47	8
Schenck	765	638	83	31	4	96	13
Steck	431	353	82	73	17	4	1
Stedman	566	27	5	514	91	25	4
Steele	569	424	75	103	18	42	7
Whiteman	550	429	78	99	18	22	4
Totals	9,893	7,395	75	1,812	18	683	7

[5] Source: Compiled from *The Review*, Official Publication, Denver Public Schools, Vol. XLX (sic), May, 1969, supplemented by information supplied by school officials. [Plaintiffs' Exhibit 9D]

If Resolution 1531 is not used:[4]

Elementary School	*Total* No.	*Anglo* No.	%	*Negro* No.	%	*Hispano* No.	%
Asbury	540	480	90	31	6	29	5
Ashley	550	472	86	35	6	43	8
Barrett	423	1	0	410	97	12	3
Carson	629	568	90	42	7	19	3
Denison	550	482	88	1	0	67	12
Force	862	744	86	26	3	92	11
Montclair	634	588	93	16	2	30	5
Montclair Annex	161	158	98	3	2	0	0
Moore	580	460	79	48	8	72	12
Palmer	482	442	92	24	5	16	3
Park Hill	968	684	71	228	23	56	6
Philips	555	307	55	208	37	45	8
Schenck	735	638	87	1	0	96	13
Steck	410	353	86	44	10	13	3
Stedman	686	27	4	634	92	25	4
Steele	499	424	85	33	7	42	8
Whiteman	610	537	88	49	8	24	4
Totals	9,869	7,365	75	1,823	18	681	7

[4] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Elementary Schools*—September 23, 1968, Denver Public Schools, Division of Personnel Services. [Plaintiffs' Exhibit 9E]

APPENDIX II

WHEREAS, this Board of Education, in common with other boards of education in urban areas in this country, has before it the extremely difficult task of providing relevant and effective education to children of infinitely varied backgrounds and abilities; and

WHEREAS, this Board of Education is concerned about all the children of Denver and is constantly searching for ways and means to improve the quality of education offered to them; and

WHEREAS, this Board of Education has, as an interim measure, adopted various plans and approaches toward the improvement of the quality of education offered to the children of Denver, including voluntary open enrollment with transportation provided; and

WHEREAS, the intervention of a lawsuit in the United States District Court has prevented this interim measure from achieving its full potential; and

WHEREAS, that Court in its Memorandum Opinion dated March 21, 1970, has found that certain schools of this School District show average pupil achievement below the city-wide average achievement of pupils; and

WHEREAS, this Board is, and has been, aware of these differences in average pupil achievement among the various schools and has been attempting to set educational policy which will permit the professional staff of this School District to devise and employ new methods of education designed to improve achievement in all schools including those with low achievement averages, by such means as early childhood education, intensified reading programs, cultural

arts centers, outdoor education centers, school clusters or complexes, in-service education, modification and expansion of curricular offerings, and other promising ideas; and

WHEREAS, the United States District Court now has invited this Board to devise and present to it a plan designed to improve the achievement of pupils in certain of its schools;

NOW, THEREFORE, IT IS RESOLVED by this Board of Education that, regardless of the final outcome of the litigation, this Board reaffirms its intent to continue improvement in the quality of education offered to all of the children of Denver, and it hereby directs the Superintendent and his staff to devise a plan directed toward raising the educational achievement levels at the schools specified by the District Court in its opinion. This plan shall be a pilot program which shall include consideration of the following:

1. Differentiated staffing;
2. Increasing the level of faculty experience and decreasing faculty turnover;
3. Increased and improved inservice training for staff;
4. Voluntary open enrollment as opposed to mandatory transfers for pupils;
5. The school complex concept which will focus on decentralized decision-making, community and parent involvement, new educational programs and agency cooperation;
6. Early childhood education;
7. Special programs now being implemented at Cole Junior High School and Manual High School;

8. Special programs available under the Educational Achievement Act of Colorado (Senate Bill 174);

9. Other promising educational innovations.

The plan shall be feasible and within the financial ability of the District, and include a timetable for implementation.

Such a plan shall be submitted to the Board on or before May 6, 1970.

Judgment of Court of Appeals

May Term—June 11, 1971

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

No. 336-70

Wilfred Keyes, *et al.*,

Plaintiffs-Appellees,

v.

School District No. 1, Denver, Colorado, *et al.*,

Defendants-Appellants.

No. 337-70

(Cross-appeal)

Wilfred Keyes, *et al.*,

Plaintiffs-Appellants,

v.

School District No. 1, Denver, Colorado, *et al.*,

Defendants-Appellees.

These causes came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and were argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed in all respects except that part

pertaining to the core area or court designated schools, and particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of the unequal educational opportunity afforded, this issue having been presented by the Second Count of the Second Cause of Action contained in the complaint. In that respect only, the judgment is reversed. The case is accordingly remanded for the implementation of the plan in accordance with this opinion. The trial court is directed to retain jurisdiction of the case for the purpose of supervising the implementation of the plan, with full power to change, alter or amend the plan in the interest of justice and to carry out the objective of the litigation as reflected by the opinion of this Court.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By /s/ MARYLEE DOWNING
Deputy Clerk

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-507

WILFRED KEYES, et al.,

Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are as set forth in the Appendices to the petition herein and in respondents' conditional cross petition No. 71-572.

QUESTION PRESENTED

The question stated by petitioners is not stated in terms of the findings of fact in this case. In addition, petitioners have improperly combined the issues of their two separate causes of action into one question in an attempt to

create an issue of unconstitutional deprivation as to the whole, whereas none exists as to that part of the judgment petitioners seek to have this Court review.

STATEMENT OF THE CASE

Petitioners' statement of this case distorts the actual facts as found by the district court after preliminary hearing and a lengthy trial. Petitioners make certain selective references to evidence offered by them, as the basis for their legal arguments and theories even though the district court resolved conflicts as to such evidence in favor of the respondents. Hence respondents are obliged to restate the case in terms of the findings of fact made by the trial court as gleaned from its several opinions. References are to the opinions below printed in the appendix to petitioners' petition.

INTRODUCTION

The complaint contained two separate causes of action. The first cause of action alleged *de jure* racial segregation in certain of the schools in northeast Denver and sought desegregation thereof. The district court found *de jure* racial segregation existed as to three elementary schools and one junior high school and granted the relief sought. The Court of Appeals affirmed.

The second cause of action alleged *de jure* racial segregation and a denial of equal educational opportunity in other schools in Denver and sought desegregation of all of Denver's schools. The district court found no *de jure* racial segregation but did find a denial of equal educational opportunity in 17 schools which were *de facto* segregated. The Court of Appeals affirmed the finding of no *de jure* racial segregation and concluded that there was no unconstitutional deprivation of equal educational opportunity.

The foregoing findings must be considered in light of the number of schools in the Denver system comprised of 92 elementary, 17 junior high and 9 high schools totaling 118 schools.

School District No. 1 was created by Article XX of the Constitution of Colorado in 1902. It has never maintained separate educational facilities for different races. Pupils in the Denver School System are assigned to schools on the basis of their residence. School attendance areas are established for each school based upon the so-called neighborhood school policy.

> "It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." (67a)

FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT

(a) *Demographic Characteristics of Denver's Negro Population*

Prior to 1950, the Negro population in Denver was concentrated in an area located in the north central part of Denver (4a, 47a). (See generally map, appendix). No records of the racial composition of the schools serving this area were kept. The schools located in this area were largely, but not entirely, Negro. The Negro population was relatively small and the concentration in that area had developed over a long period of time. There is no finding that any acts of the school district caused or contributed to this situation as it existed in 1950 (4a).

Beginning in 1950 the Negro population experienced a substantial growth and moved eastward very rapidly so that by 1960 the Negro population was sizable and had expanded across Colorado Boulevard into the western portion of a residential area known as Park Hill. In the 1960's the Negro migration continued rapidly eastward across the northern portion of Park Hill, changing the population of that area to substantially Negro (4a, 47a).

(b) *Construction of New Schools*

Of all the new schools built by the Denver school district since the end of World War II (Denver spent over 100 million dollars in school construction during that time), the petitioners complain of only two. The first, Barrett Elementary School, completed in 1960, was treated in their first cause of action. The district court found that it was created as a segregated school and this was affirmed by the Court of Appeals (49a). It has been desegregated.

The other school, the replacement of Manual High School in 1953, before *Brown I.*,[1] was treated in the second cause of action. The new school was built on the old building's grounds, and served exactly the same attendance area (59a). The district court affirmatively found that no racial motivation or segregative effect was present in the replacement of this school (61a, 71a). This was affirmed on appeal (149a).

(c) *Changes in School Attendance Areas*

As to the first cause of action, the district court found that four minor boundary changes (one in 1962 and three in 1964) at two Park Hill elementary schools (Stedman and Hallett) and the use of mobile units at one of them, constituted *de jure* segregation (50a). This was affirmed by the

[1] *Brown v. Board of Education*, 347 U.S. 483 (1954)

Court of Appeals (136a) and the district court has ordered desegregation. No similar findings were made as to any of the other 116 schools in the system.

In their second cause of action, petitioners claimed that boundary changes with respect to two other elementary schools (Columbine in 1952 and Boulevard in 1962) and three secondary schools (Manual High and Cole Junior High in 1956 and Morey Junior High in 1962) also contributed to Negro concentrations in those schools. But the district court found that there was no racial motivation in the changes (71a, 72a and 73a), that no racial segregation resulted (72a, 73a), and was unable to find, in the case of Morey Junior High, that the school was ever segregated (73a). The district court summarized by concluding ". . . [w]e must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above-mentioned boundary changes and elimination of optional zones. We hold that the evidence is insufficient to establish *de jure* segregation." (75a)

The findings of the district court negate the statements in petitioners' statement of the case and in their statement of the question presented that the school district created and aggravated racial segregation throughout the entire school system.

(d) *Other Claims of Segregation*

There were no findings by the district court that either the "optional zones" or "limited open enrollment" had the effect of minority-to-majority transfers or any other segregative effect. It should be noted that limited open enrollment was superseded in 1968 by "Voluntary Open Enrollment" which authorized transfers with transportation furnished by the district if the transfer had an integrative effect in both sending and receiving schools. (109a, 118a)

(e) *Findings Regarding Educational Opportunity*

As to some 17 schools located mainly in the central area of Denver and having the largest concentrations of Negro (9 schools) or Spanish surnamed (8 schools) pupils (77a, 78a), the district court found that an "equal educational opportunity" was not being provided, based on the conclusion that racial or ethnic "isolation or segregation *per se*" (84a), "regardless of cause" (86a), was a substantial factor which produced low median pupil achievement scores. However, the district court also found that other relevant factors constituting major causes of inferior achievement were "home and community environment, socioeconomic status of the family, and educational background of the parents" (84a).

ARGUMENT

I. THERE IS NO CONFLICT IN THE DECISIONS.

This case does not involve a racially segregated school system created or aggravated by the defendants. The district court found it was not. Petitioners' statements to the contrary are not correct as has been demonstrated in the statement of the case.

Racial imbalance in the Denver school system simply was not caused or brought about by any actions of the school district, except, under the findings of the district court, as to 3 of 92 elementary schools and, derivatively, one of 17 junior high schools, all of which were located in northeast Denver and were involved in the first cause of action. The district court has decreed desegregation of each of such schools and petitioners do not claim error with respect thereto (99a-121a, A3-A8 in Appendix to conditional cross petition). Petitioners themselves elected to treat the schools of northeast Denver separately in the first cause of action of the complaint and they achieved the remedy sought thereunder.

No cases have been cited holding that facts such as those found by the district court in this case constitutionally require desegregation of the *entire* district. Therefore, there can be no conflict in lower court decisions.

As to the second cause of action dealing with schools in the core area of the city, the district court expressly found that "there is no comprehensive policy" of segregating pupils by race on the part of the Denver school district (74a).

Petitioners incorrectly suggest that this case bears some resemblance to the Pontiac case (*Davis vs. School District of City of Pontiac*, 309 F.Supp. 734), where system-wide racial balancing was ordered. But in the Pontiac case the district court, after acknowledging *"that a Board of Education has no affirmative duty to eliminate segregation where it has done nothing to create it,"* (emphasis supplied) went on affirmatively to find, as a fact, that the board of education intentionally acted to create and perpetuate segregation throughout the school system and was, therefore, guilty of *de jure* segregation as to the *entire* system (309 F.Supp. 741,2). That court then concluded that the school officials had an obligation to overcome the effects of such *de jure* segregation, and ordered the desegregation of the *entire* school system. The Court of Appeals (6th Cir.) reviewed the findings of fact and concluded that "the findings of purposeful segregation by the school district" were supported by substantial evidence and affirmed (443 F.2d 573). The Pontiac case thus rested on the same principles applied in this case, although the Pontiac case differs profoundly in the facts as found by the respective district courts to the extent of the *de jure* segregation found to exist. Indeed, as to the violation and remedy, the Denver case more closely resembles another case cited by petitioners,[2] where one school within the school district was found to have been segregated

[2] *Taylor v. Board of Education of New Rochelle*, 294 F.2d 36 (2d cir), cert. den., 368 U.S. 940 (1961)

by school authorities and where the remedy was to desegregate that school.

Nor do the district court's findings as to assignment of Negro teachers help petitioners. The only specific findings of disproportionate assignment of Negro teachers were with respect to two of the four schools found to be *de jure* segregated, namely, Barrett with 52.6% Negro (21a) and Smiley with 23 Negro teachers out of 98 (Def. Exh. S, 31a). This does not constitute segregation of faculty and staff in the Denver system.

To accept petitioners' contentions, this Court would have to extend the district court's findings of *de jure* segregation far beyond the four schools found to be so affected. Thus, petitioners attack the district court's findings that there was no *de jure* segregative action by the school district with respect to five other schools in the north central part of the city (71a-72a), findings which were sustained by the Court of Appeals (148a-149a). Petitioners do not assert that such findings of the district court were clearly erroneous, or that the Court of Appeals erred in sustaining them. Nevertheless, petitioners complain that the district court "excused segregatory acts" on the grounds of remoteness, intervening causes, and lack of intent (Petition pp. 18,19). The district court did not "excuse" any acts of the district, but found no acts constituting *de jure* segregation as to such schools (67a). Such racial imbalance as existed was found by the district court to have resulted from housing patterns (71a). There was no finding that such housing patterns resulted from any public or private discrimination.

Petitioners have not demonstrated a conflict in the decisions of the lower courts on facts such as found by the district court and affirmed by the Court of Appeals. Futher, the decision of the Court of Appeals is consistent with the

recent pronouncements of this Court.[3] Therefore, petitioners have failed to present a ground for review by this Court on the basis of conflict.

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT FEDERAL COURTS HAVE NO POWER TO REMEDY A SITUATION NOT CAUSED BY STATE ACTION.

In their reason numbered II, petitioners contend that the Court of Appeals erred in reversing the trial court's ruling that the Constitution is violated by a combination of comparatively low median achievement test scores and racial imbalance in 17 of Denver's 118 schools even though it had expressly found that such conditions were not caused by state action.

Alleged error is not a sufficient basis to grant certiorari under Rule 19.1(b) of the rules of this Court and the petition should be denied for this reason alone.

In any event, the decision of the Court of Appeals on this question is correct and in accord with the decisions of this Court.

It is clear that the district court relied on so-called *de facto* segregation as the major factor contributing to "unequal educational opportunity".[4]

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[3]"Absent a constitutional violation there would be no basis for judicially ordering assignment of pupils on a racial basis." *Swann vs. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 27

[4]Throughout the trial of this case and its appeals, petitioners and the district court have used the terms "segregation" and "equal educational opportunity" generally and without defining them. Segregation implies deliberate state action setting persons apart from each other on the basis of race unless modified by the term *"de facto"* which indicates the absence of state action. The term "equal educational opportunity" was employed by this Court in *Brown* and in the context of that case, this Court said at 347 U.S. 483, 492:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity

The district court rejected plaintiffs' contention that the neighborhood school system is unconstitutional if it results in segregation in fact (74a). Yet it concluded that segregation, regardless of its cause, is a major factor in producing unequal educational opportunity and hence is unconstitutional (86a-87a).

This circular reasoning was met squarely by the Court of Appeals:

> "Preliminarily it is necessary to determine whether a school which is found to be constitutionally maintained as a neighborhood school might violate the Fourteenth Amendment by otherwise providing an unequal educational opportunity. The district court concluded that whereas the Constitution allows separate facilities for races when their existence is not state imposed, the Fourteenth Amendment will not tolerate inequality within those schools. Although the concept is developed through a series of analogized equal protection cases, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963), it would appear that this is but a restatement of what Brown v. Board of Education, 347 U.S. 483, 493 (1954) said years ago: 'Such an opportunity [of education], where the state has undertaken to provide it, is a right which

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of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Thus it appears clear that the term "equal educational opportunity" as used in *Brown* means that no child should be denied access to the public schools solely on the basis of his race. In other words the opportunity to get an education must be made available by states to all equally without regard to race. Respondents are not aware of any decision of this Court extending the meaning of that term. Yet petitioners employ the term as though it means equal educational result.

must be made available to all on equal terms.'" (142a)

* * *

"The trial court's opinion, 313 F.Supp. at 81, 82, 83, leaves little doubt that the finding of unequal educational opportunity in the designated schools pivots on the conclusion that segregated schools, whatever the cause, per se produce lower achievement and an inferior educational opportunity." (143a)

The Court of Appeals quite correctly observed that federal courts have no power to resolve educational difficulties arising from circumstances outside the ambit of state action and held that:

"Before the power of the federal courts may be invoked, in this kind of case, a constitutional deprivation must be shown. Brown v. Board of Education, 347 U.S. 483, 493-95 (1954) held that when a state segregates children in public schools solely on the basis of race, the Fourteenth Amendment rights of segregated children are violated. We never construed Brown to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue. Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966); 419 F.2d 1387 (1969); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963)." (145a-146a)

The Sixth Circuit had occasion recently to consider whether the law has been changed by the decisions of this Court[5] since Brown:

[5] *Deal v. Cincinnati Board of Education*, 419 F.2d 1387, (6th Cir. 1969), cert. den. ____ U.S. ____ (1971)

"Appellants petitioned the Supreme Court for certiorari in the first appeal and it was denied. Certiorari was also denied in *Downs* and *Bell, supra*. The denial of certiorari in the present case ought to constitute our opinion in the first appeal as the law of the case, but appellants contend that the law has been changed by the recent decisions of the Supreme Court in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Bd. of Educ. of Gould School District*, 391 U.S. 443 (1968); *Monroe* v. *Bd. of Comm'rs. of the City of Jackson*, 391 U.S. 450 (1968).

"In our opinion, these three decisions did not change any law applicable to our case and appellants' reliance on them is misplaced. The gist of the holdings in these cases was that in desegregating a dual school system, a plan utilizing 'freedom of choice' or a variant 'free transfer' is not an end in itself and would be discarded where it did not bring about the desired result.

"On the other hand, our case involves the operation of a long-established unitary non-racial school system—just schools where Negro as well as white children may attend in the district of their residence. There is not an *iota* of evidence in this record where any of the plaintiffs or any of the class which they represent was denied admission to a school in the district of his residence."

This is precisely the finding of fact by the district court in the case at bar:

"It is to be emphasized here that the Board has not refused to admit any student at any time be-

cause of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." (67a)

This Court has recently considered its *Brown* decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971):

> "We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*).
>
> "This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown v. Board of Education* was all about." 402 U.S. 1, 5-6.

In defining the scope of the remedial power of federal courts in such cases, this Court stated in *Swann* that:

> ". . . [J]udicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." 402 U.S. 1 at 16.

As an example, this Court stated that school authorities might well decide that there should be racial balance in every school in a district as a matter of educational policy and pointed out that, absent a constitutional violation, such

would not be within the authority of a federal court. 402 U.S. 1 at 16.

This review of the basic principles of separation of constitutional powers is appropriate here as the district judge in his zeal to do something about educational problems that have plagued educators for many years has exceeded his authority by acting in an area where no constitutional violation exists. The Court of Appeals recognized this excess of jurisdiction and corrected it (146a).

The holding of the Court of Appeals in this case that the neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided that the plan is not used as a veil to perpetuate racial discrimination, is given support by other language in *Swann*: "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." 402 U.S. 1 at p. 28. Denver has never maintained a dual school system. Denver's neighborhood school policy was in effect long before there was any racial imbalance in its schools, (59a), and thus was never utilized as a tool to perpetuate racial segregation. In sum, Denver's neighborhood school policy was and is racially neutral (66a) and racially neutral policies of local governments do not violate the Constitution* even if they result, as in this case, in some racial imbalance.

III. THIS CASE HAS NO SIGNIFICANT NATIONAL IMPLICATIONS.

Petitioners conclude their reasons for granting certiorari by stating that on either of the grounds discussed by them, the decision of the Court of Appeals is wrong and that the case should be reviewed because of its national implications without stating what these implications might be. Certainly,

*This Court recently applied this same rule in a case involving alleged discrimination in low-rent public housing. *James v. Valtierra, et al.*, ____ U.S. ____ (1971).

the national implications of federal judicial entry into the field of determining educational policy would be significant, but as this case now stands, the Court of Appeals has corrected this excess of jurisdiction leaving the problem of operating public schools throughout the nation where the Constitution intended—in the legislative and executive branches of government and not in the judicial branch. No significant national implications resulted when this Court declined to review other similar holdings.[7]

These cases have no significant national implications largely because they turn on their own facts which are vastly different in different areas of the country and vary from district to district. No useful purpose would be served by this Court's reiterating the elementary rule of constitutional law that absent a violation of the Constitution, federal courts are powerless to deal with educational problems.

---

[7]*Taylor v. Board of Education of City School District of New Rochelle*, 294 F.2d 36 (2nd Cir. 1961), *cert. den.* 368 U.S. 940 (1961); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. den.* 389 U.S. 847 (1967); *Deal v. Cincinnati Board of Education*, 419 F.2d 1387 (6th Cir. 1969), *cert. den.* ____ U.S. ____, 29 L.Ed. 2d 128 (1971); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *cert. den.* 377 U.S. 924 (1964); *Downs v. Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. den.* 380 U.S. 914 (1965); and *United States v. School District No. 151, Cook County, Illinois*, 404 F.2d 1125 (7th Cir. 1968), *cert. den.* ____ U.S. ____, 29 L.Ed. 2d 111 (1971).

CONCLUSION

For the foregoing reasons, respondents respectfully pray that the petition be denied.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-507

Supreme Court, U. S.
FILED
MAY 1 1972
MICHAEL RODAK, JR., CLERK

WILFRED KEYES, *et al.*,

Petitioners,

—v.—

SCHOOL DISTRICT No. 1, Denver, Colorado, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

—v.—

SCHOOL DISTRICT NO. 1, Denver, Colorado, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The principal opinions of the courts below are as follows:

1. Opinion of District Court granting preliminary injunction, July 31, 1969, reported at 303 F. Supp. 279 (App. to Pet. for Cert. 1a-19a).

2. Opinion of District Court making supplemental findings and conclusions, August 14, 1969, reported at 303 F. Supp. 289 (App. to Pet. for Cert. 20a-43a).

3. Opinions of District Court on merits, March 21, 1970, reported at 313 F. Supp. 61 (App. to Pet. for Cert. 44a-98a).

4. Opinion of District Court on remedy, May 21, 1970, reported at 313 F. Supp. 90 (App. to Pet. for Cert. 99a-121a), and final decree June 11, 1970, unreported (A. 1970a).

5. Opinion of Court of Appeals, June 11, 1971, reported at 445 F.2d 990 (App. to Pet. for Cert. 122a-158a).

Other opinions filed in this case are as follows:

6. Opinion of Court of Appeals vacating preliminary injunction, August 5, 1969, unreported (A. 455a).

7. Opinion of Court of Appeals staying preliminary injunction, August 27, 1969, unreported (A. 459a).

8. Opinion of Mr. Justice Brennan as Acting Circuit Justice reinstating preliminary injunction, August 29, 1969, reported at 396 U.S. 1215 (A. 464a).

9. Opinion of Court of Appeals on motion to amend stay, September 15, 1969, unreported (A. 467a).

10. Opinion of District Court denying Motions to Dismiss, October 17, 1969, unreported (A. 475a).

11. Opinion of Court of Appeals granting stay, March 26, 1971, unreported (A. 1981a).

12. Per curiam Order of Supreme Court of the United States vacating stay, April 26, 1971, reported at 402 U.S. 182 (A. 1984a).

13. Opinion by Court of Appeals on Motion for Clarification, August 30, 1971, unreported (A. 1987a).

Jurisdiction

The judgment of the Court of Appeals was entered June 11, 1971 (App. to Pet. for Cert. 159a-160a). On September 8, 1971, Mr. Justice Marshall granted an extension of time for filing the petition for certiorari to and including October 9, 1971. The Petition for Writ of Certiorari was filed October 8, 1971, and granted January 17, 1972 (A. 1988a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provision Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

Whether petitioners are entitled to obtain system-wide relief to desegregate the Denver public schools because:

1. The district court's findings that "during the ten year period preceding . . . [1969] . . . the Denver School Board has carried out a segregation policy" (303 F. Supp. at 287), establish that the deprivation of constitutional rights of black pupils in Denver is so substantial and systemic as to require the use of remedial doctrines applied to dual systems created by segregation statutes.

2. The district court erred in ruling segregation to be "innocent" and lawful in certain schools serving Denver's older black neighborhood—including particularly Manual Training High School—because the court applied incorrect legal standards and perspectives in making its decision on intent to segregate and the causes of segregation.

3. The court below erred in holding that the sole criterion of constitutionally actionable racial segregation was segregationist intent judged by the narrow test whether decisions of the school board resulting in racial separation could conjecturally be explained by any conceivable non-racial explanation.

4. The Denver public schools have denied equal protection of the laws to students assigned to a number of predominantly Black and Hispano schools where there is manifestly an inequality in educational opportunity, both from the standpoint of the input resources placed in the schools by the school board and the educational achievement of the pupils.

Statement

I. *Introduction.*

This suit was commenced June 19, 1969, by petitioners, the parents of eleven children attending the Denver public schools, who seek injunctive and declaratory relief to remedy racial segregation of children and faculty and racial discrimination in the district's provision of public education. A. 3a. The complaint alleged that the district's practices violated the Equal Protection Clause of the Four-

teenth Amendment to the Constitution of the United States, and invoked the civil rights jurisdiction of the United States District Court for the District of Colorado. 28 U.S.C. §1343, 42 U.S.C. §1983. A. 4a. Plaintiffs asked for "a comprehensive plan for the school district as a whole" to remove segregation and afford equal opportunity. A. 32a.

After extensive litigation, the district court concluded that the school district had indeed violated petitioners' constitutional rights by various racially discriminatory practices, including deliberate segregation of black from white pupils in certain schools, and operation of a number of schools attended by Negro or Hispano[1] pupils where there was a serious and systematic denial of a chance for an equal education to pupils of these minority groups.

The district court first entered a preliminary injunction requiring the board to implement three resolutions it passed and rescinded prior to the lawsuit which were intended to begin desegregation of certain black schools in northeast Denver and to stabilize others in danger of be-

---

[1] We adopt the term "Hispano" as it is customary in the school district and used throughout the record. A Colorado Department of Education publication explains the usage in this manner:

> "And as for a name for the people of this Latin heritage to go by, it has not yet been agreed upon. The term 'Hispano' is popular in their intellectual circles today. The late Jack Guinn, a staff writer for the *Denver Post*, quoted Dr. Daniel T. Valdes, historian and professor of sociology in Denver's Metropolitan State College, on the subject:
>
> > 'Hispano is a cultural term accurately applied to people of and from Spain, Mexico and Cuba, and any other country with a Spanish heritage. It avoids the confusion of hyphenated words, such as Spanish-American and Mexican-American, which are sometimes resented.'"
>
> COLORADO DEPARTMENT OF EDUCATION, HUMAN RELATIONS IN COLORADO, A HISTORICAL RECORD, 203 (1968).

Similarly, Caucasians or whites are often referred to in the record as "Anglos."

coming segregated. The preliminary injunction took effect in September 1969, after the order was twice vacated by the Tenth Circuit and ultimately reinstated by Mr. Justice Brennan as Acting Circuit Justice. *Keyes* v. *School District No. One*, 396 U.S. 1215 (1969).

In May 1970, the district court entered a final decree requiring a variety of remedies to redress the constitutional violations. The opinion on the merits reaffirmed the earlier findings of certain deliberate segregation practices and policies, but held that plaintiffs had failed to prove segregationist purpose and effect with respect to other schools not dealt with in the preliminary injunction hearing. The court also found that defendant board had failed to provide equal educational opportunity to students at a number of predominantly Negro and Hispano schools and that this denied equal protection. The trial court formulated a varied remedial plan, including (a) making permanent the temporary injunction, (b) desegregating 17 minority schools by such techniques as redistricting, transportation, specialty schools, and free transfer programs, and (c) ordering various "compensatory education" programs to improve the quality of education offered to minority students.

On appeal by the school board the Tenth Circuit affirmed in part and reversed in part. It affirmed the relief originally granted in the temporary injunction, and some additional measures relating to the northeast part of the City, upholding the trial court's findings that the school board engaged in an unconstitutional policy of deliberate racial segregation with respect to certain schools. However, the appeals court reversed the finding that there was a denial of equal protection by unequal treatment of minorities in predominantly Negro and Hispano schools, and set aside the relief requiring desegregation and educational

improvement programs for minority students not covered by the board's three 1969 desegregation resolutions enforced by the preliminary injunction. The court of appeals also rejected plaintiffs' appeal seeking the desegregation of nine other minority schools not covered by the district court's order.

II. *The Denver School District.*

During the 1968-69 school term, School District No. 1, which serves Denver, operated 119 schools with 96,580[3] pupils.[2] The principal minority groups are Negroes (14%) and Hispanos (20%); a more detailed breakdown of the attendance pattern appears below.[4] The system employed

---

[1] There were 92 elementary schools, 15 junior high schools, 2 junior-senior high schools, and 7 senior high schools for a total of 116 regular schools. In addition, the board operated an Opportunity School, a Metropolitan Youth Education Center, and an Aircraft Training Facility. See DX-HK, p. 26, A. 2158a.

[2] References herein to those portions of the transcript of the various proceedings below, which are not reproduced in the Appendix will be made as follows:

—the hearing on the preliminary injunction, held July 16, 18, 21 and 22, 1969, will be cited as "P.H. Tr.";

—the hearing on the merits, held during February, 1970, will be cited as "Tr.";

—the hearing on relief held in May, 1970, will be cited as "R.H. Tr."

Exhibits introduced by petitioners, plaintiffs below, will be cited as "PX"; defendants' exhibits will be cited as "DX."

[4] Source: PX 242, 243, 273, 274, 302, 303; A. 2050a; A. 2053a; A. 2072a; A. 2074a; A. 2078a; A. 2080a.

	Anglo		*Negro*		*Hispano*		
Pupils	*No.*	%	*No.*	%	*No.*	%	*Total*
Elementary	33,719	61.8	8,297	15.2	12,570	23.0	54,586
Jr. High	14,848	68.7	2,893	13.4	3,858	17.9	21,599
Sr. High	14,852	72.8	2,442	12.0	3,101	15.2	20,395
Total	63,419	65.7	13,632	14.1	19,529	20.2	96,580

4,443 classroom teachers, including 7% Negroes and 1.9% Hispanos.[5] The city covers 98.4 square miles, including substantial areas annexed in the last thirty years.[6] The school budget for 1968-69 was more than $91.5 million dollars.[7] The district is governed by an elected board of seven members.

III. *The Pattern of Racial Segregation.*

A. Pupils.

At the outset of this case Denver schools were characterized by an intense pattern of isolation of black pupils from white pupils and an intense concentration of black teachers in schools with black pupils. Nearly three-fifths of the Negro pupils attend schools which are less than 10% Anglo, and nearly 4/5ths were in schools less than 30% Anglo:[8]

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[5] Source: PX 244, 245, 275, 276, 304, 305; A. 2055a; A. 2057a; A. 2075a; A. 2076a; A. 2081a; A. 2082a.

	Anglo		*Negro*		*Hispano*		*Other*		
Teachers	*No.*	*%*	*No.*	*%*	*No.*	*%*	*No.*	*%*	*Total*
Elementary	2,012	88.8	193	8.5	39	1.7	21	.9	2,265
Jr. High	881	88.5	87	8.7	22	2.2	6	.6	996
Sr. High	1,103	93.3	44	3.7	21	1.8	14	1.2	1,182
Total	3,996	89.9	324	7.3	82	1.9	41	.9	4,443

[6] The district grew from 58.8 sq. miles in 1940 to 98.4 sq. miles in 1969. DX HK, pp. 20-21; A. 2158a.

[7] DX HK, p. 19, A. 2158a.

[8] The district judge adopted a rule of thumb that schools with more than 70% of a single minority group were "segregated." 313 F. Supp. at 77; 313 F. Supp. at 92.

NUMBER AND PERCENTAGE OF PUPILS
1968-1969

ALL SCHOOLS

Percentage of Anglo Students	*No. of Schools*	*Anglo*		*Negro*		*Hispano*	
		No.	*%*	*No.*	*%*	*No.*	*%*
90–100%	31	28,096	44.3	379	2.8	845	9.3
80–89%	20	13,863	21.9	316	2.3	1,959	10.0
70–79%	15	7,609	12.0	595	4.4	1,921	9.8
60–69%	9	4,788	7.5	46	.3	2,413	12.4
50–59%	7	4,354	6.9	1,389	10.2	2,332	11.9
40–49%	4	1,163	1.8	140	1.0	1,340	6.9
30–39%	7	1,412	2.2	90	.7	2,232	11.4
20–29%	5	990	1.6	1,684	12.4	1,320	6.8
10–19%	8	870	1.4	1,346	9.9	3,372	17.3
1–9%	8	252	.4	4,785	35.1	1,441	7.4
less than 1%	4	22	0	2,862	21.0	354	1.8
Total	118	63,419	100	13,632	100	19,529	100

Source: PX 242, 243, 273, 274, 302, 303; A. 2050a; A. 2053a; A. 2053a; A. 2072a; A. 2074a; A. 2078a; A. 2080a.

The pattern of pupil segregation existed at all levels. At the elementary level where 92 schools serve comparatively smaller neighborhoods than at the secondary level, the pattern was particularly intense. Two-thirds of the black elementary pupils attended ten schools,[9] all of which had less than 10 percent Anglo pupils; indeed, one-third were in schools with less than 1% Anglo populations. More than four-fifths of the black elementary children at-

[9] The ten schools with less than 10% Anglo students in 1968-69 were: (less than 1%)—Barrett, Columbine, Mitchell and Whittier (less than 10%)—Crofton, Gilpin, Harrington, Smith, Stedman and Wyatt. Crofton, Gilpin and Wyatt had Hispano majorities and substantial numbers of black pupils.

tended schools less than 20 percent Anglo. The table in note 9 shows the breakdown.[10]

Black junior high pupils were concentrated at Cole, Morey and Smiley. More than four-fifths of the black junior high pupils (2423 out of 2893 or 83.7%) attended these three schools with 4 percent of the Anglo population.

The remaining 470 black students were scattered among 14 other junior high schools with 95.6% of the Anglos.

At the high school level blacks were concentrated in Manual Training High School and East High School which served 91% of all black high school pupils and 10% of Anglo pupils. Out of a total of 2,442 black high school pupils there were 1,200 (49.1%) at Manual, the only predominantly minority high school. Manual had 78 Anglo and 300 Hispano pupils. Another 1,039 black pupils attended East High School (53.7% Anglo). The remaining 203 black pupils were scattered in 7 predominantly Anglo high schools with 13,365 Anglos.

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[10] NUMBER AND PERCENTAGE OF PUPILS
1968-69

ELEMENTARY SCHOOLS

Percentage of Anglo Students	*No. of Schools*	*Anglo*		*Negro*		*Hispano*	
		No.	*%*	*No.*	*%*	*No.*	*%*
90–100%	22	18,614	40.4	242	2.9	401	3.2
80–89%	17	8,426	25.0	267	3.2	1,109	8.8
70–79%	11	4,164	12.3	404	4.9	894	7.1
60–69%	8	2,986	8.9	41	.5	1,490	11.9
50–59%	4	1,129	3.3	212	2.6	687	5.5
40–49%	3	711	2.1	76	.9	766	6.1
30–39%	7	1,412	4.2	90	1.1	2,232	17.8
20–29%	3	393	1.2	145	1.7	1,072	8.5
10–19%	7	734	2.2	1,257	15.2	2,718	21.6
1–9%	6	128	.4	2,701	32.6	852	6.8
less than 1%	4	22	.1	2,862	34.5	354	2.8
Total	92	33,719	100	8,297	100	12,570	100

Source: PX 242, 243; A. 2050a; A. 2053a.

B. Teachers.

Negro classroom teachers have been assigned in those schools where black pupils are concentrated. The District Court found that this concentration results from a deliberate school district policy of assigning black teachers to teach black children. 303 F. Supp at 284-285. In 1964, the Voorhees Committee, appointed by the Board to study the school system, reported this policy and urged its abandonment:

> While precise statistics are not available, the Committee believes that almost all of Denver Negro teachers were initially assigned to schools having a high proportion of Negro students. A few have been transferred to other schools. There is now at least one Negro teacher in each senior high school except for Manual which has eleven. Nine out of thirteen junior high schools have one or more Negro teachers, and Cole has thirty-three. One or two Negro teachers have been placed in each of seven elementary schools other than those which contain large numbers of Negro children.
>
> Spanish surname teachers are fewer in number than Negro teachers and the housing pattern of people of Spanish-American background is more dispersed. However, it does appear that relatively few Spanish surnamed teachers have been assigned to areas where there are few or no residents with Spanish-American background.
>
> As a result of its interviews the Committee is convinced that race has been relevant in the assignment of teachers. It appears that the administration has been extremely reluctant to place Negro and Spanish-American teachers in predominantly white schools because of concern with a possible lack of acceptance on

the part of a white neighborhood and a realistic assessment of the possible lack of support by some principals and faculties.

* * *

Recommendations as to Teacher Assignment and Transfer

1. The Board of Education should establish and enforce a policy that qualified teachers of minority background will be assigned throughout the system. A. 2015a-2016a.

Former Superintendent Oberholtzer confirmed that the racial policy was deliberate and he defended it on the ground that Negro teachers should be assigned to schools with concentrations of Negro pupils for whom they would have "immediate empathy" and for whom they would be "role-models". A. 1352a. In 1964 there were about 15 schools with Negro teachers, all located in the central part of the City. A. 1165a. By 1969-70, Negro teachers had been assigned to many more schools, but a disproportionate concentration remained in the schools with most of the black pupils.

In 1969-70 at the elementary level, with 193 Negro elementary teachers, 91 were concentrated in 9 schools, each of which had less than 10% Anglo pupils,[11] and 121 (62%) were in schools with less than 20% Anglo pupils.[12] At the junior high level, 60 of 87 black teachers, or 68%, were

[11] Thus, 91 or 47% of the black elementary teachers are assigned to Barrett, Columbine, Mitchell, Whittier, Gilpin, Harrington, Smith, Stedman and Wyatt. The only school with less than 10% Anglo pupils which has no Negro teacher is Crofton, a predominantly Hispano school. See PX 244, 245, 275, 276, 304, 305; A. 2055a; A. 2057a; A. 2075a; A. 2076a; A. 2081a; A. 2082a.

[12] *Ibid.* See Ebert, Elmwood, Fairmount, Fairview, Garden Place, Greenlee and Hallett schools (each with 10-19% Anglo pupils) with a total of 30 black teachers.

assigned to the three schools—Cole, Morey and Smiley—serving four-fifths of the black junior high pupils. Among senior high school pupils 25 of the 44 black teachers are assigned to Manual Training High School, the only predominantly minority high school in the district. Adding the six black teachers at East High School to those at Manual, we find 31 of the 44 black teachers (70%) at the two high schools attended by nine-tenths of the black high school students. The district judge concluded that the "tendency to concentrate minority teachers in minority schools has helped to seal off these schools as permanent segregated schools." 303 F. Supp. at 284-285.

IV. *Pupil Assignment Policies and Practices.*

The largest portion of the record relates to the pupil assignment practices of the Denver school authorities. The courts below made detailed findings on this subject. We undertake to summarize the major findings and evidence.

A. General policies and practices.

The district court found that the Denver school system had carried out a segregation policy for a ten year period prior to the filing of this lawsuit. Judge Doyle wrote:

> We have seen that during the ten year period preceding the passage of Resolutions 1520, 1524 and 1531, the Denver School Board has carried out a segregation policy. To maintain, encourage and continue segregation in the public schools in the face of the clear mandates of Brown v. Board of Education cannot be considered innocent. 303 F. Supp. 279.

Judge Doyle found that the "climactic and culminative act of the Board was the June 9 rescission of Resolutions 1520, 1524 and 1531" and "there can be no gainsaying the

purpose and effect of the action as one designed to segregate." 303 F. Supp. at 285.

The ten year period of undeviating and uniform conduct to concentrate the growing Negro population in separate schools in northeast Denver and to keep other schools white is detailed in the opinions below. See 303 F. Supp. at 284-286, 290-295; 313 F. Supp. at 64-69; 445 F.2d at 996-1002. Judge Doyle sums it up:

> Between 1960 and 1969 the Board's policies with respect to these Northeast Denver schools show an undeviating purpose to isolate Negro students first in Barrett, and later in Stedman and Hallett while preserving the Anglo character of schools such as Philips and Park Hill. The ultimate effect of the Board's actions and policies in the face of a steady influx of Negro families into the area was to create and maintain segregated situations at Barrett, Stedman, and Hallett which ultimately led to a substantially segregated situation at Smiley. 303 F. Supp. at 294-295.

During part of the period the board was carrying out its "undeviating purpose" to segregate Negro pupils, it claimed to operate under a color-blind neighborhood assignment policy. Indeed, the former Superintendent, Dr. Oberholtzer, thought that Colorado's constitutional prohibition against racial classifications of school children actually prevented him from adopting any policy designed to further integration or relieve the concentration of Negroes in certain schools. A. 1370a-1371a. At the same time that the school system was deliberately establishing segregated schools, the "view of the school administration [was] that it was precluded from taking action which would have an integrating effect". 313 F. Supp. 65.

Community protests in 1962 by black and civil rights groups over a plan to build an all-black junior high school

in northeast Denver on the same site with Barrett led the board to form the Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools (sometimes called the Voorhees Committee) which issued a report in 1964. PX 20; excerpts at A. 1997a-2020a. The 1964 report criticized the board's school boundary policies as perpetuating racial isolation, as well as the policy of concentrating minority faculties in minority schools. The committee concluded that segregated schools resulted in inequality in educational opportunity and recommended a policy of considering racial and ethnic factors in setting boundaries to minimize segregation and establish heterogeneous schools. The school board adopted such a position —Policy 5100 (PX 1; A. 1989a)—and then did nothing to implement the policy. 303 F. Supp. at 283. "Nothing of substance was accomplished". 445 F.2d at 996. The 1966 Berge Committee (PX 21) appointed by the board also suggested changes to lead to integration, but "Again, the recommendations were not effected". 445 F.2d at 996.

In May 1968 the board by a 5-2 vote adopted the Noel Resolution (Res. 1490, PX 2, A. 1991a), proposed by Mrs. Rachel Noel, its only black member, directing the superintendent to prepare a "comprehensive plan for the integration of the Denver Public Schools," for adoption no later than December 31, 1968. Superintendent Gilberts presented a plan in October 1968. DX-D; excerpts at A. 2128a. Eventually Dr. Gilberts proposed and the board adopted three resolutions relating to school segregation: Res. 1520 (Jan. 30, 1969), PX 3, A. 42a; Res. 1524 (Mar. 20, 1969), PX 4, A. 49a; and Res. 1531 (Apr. 24, 1969), PX 5, A. 60a. The three resolutions constituted a modest and tentative step to deal with segregation. Resolution 1531 was aimed at 2 black schools in northeast Denver (Barrett and Stedman) and two nearby Anglo schools (Park Hill and Philips). It desegregated Barrett by changing boundaries and transporting students to and from white schools. It left

Stedman with the same predominantly black percentage but reassigned about 120 blacks to white schools permitting the removal of 4 mobile classrooms from Stedman. The resolution also made boundary changes and used transportation to stabilize Philips and Park Hill as Anglo majority schools. The resolution also sought to integrate Hallett by promoting voluntary exchanges with white schools, a program started by a group of white parents in January 1969.

Resolutions 1520 and 1524 proposed to desegregate Smiley Junior High by boundary changes, and sought to prevent East High School from becoming segregated by other boundary changes. Finally, Resolution 1524 reassigned some 200 pupils from the majority black Cole Junior High to other schools, reducing the number attending this school, which would nevertheless remain only 1% Anglo. Despite the modest objectives of this pilot desegregation program, Judge Doyle found that the passage of these resolutions "constituted the first acts of departure from the Board's prior undeviating policy of refusing to take any positive action which would bring about integration of the Park Hill schools". 313 F. Supp. at 66.

However, on June 9, 1969, the board, its membership changed by an election in which integration was the principal campaign issue (A. 1087a), rescinded the three resolutions. The rescission by a 4-3 vote, over the opposition of the superintendent (A. 241a) occurred as soon as the new board members took office. Judge Doyle, after analyzing the effect of rescission on each of the affected schools, concluded that the only purpose of rescission was the perpetuation of segregation:

> This action was taken with little study and was not justified in terms of educational opportunity, educational quality or other legitimate factors. The only stated purpose for the rescission was that of keeping faith with the will of the majority of the electorate.

> The effect of the rescission was to restore and perpetuate the status quo as it existed in northeast Denver prior to the passage of Resolutions 1520, 1524 and 1531. This status quo was one of segregation at Barrett, Hallett, Stedman and Smiley. 303 F. Supp. at 295.

Although the main focus of the resolutions was aimed at only eight minority schools (Barrett, Stedman, Hallett, Park Hill, Philips, Smiley, Cole and East) they nevertheless involved 37.6% of all black students in the school system. Smiley and Cole enrolled 68.9% of black junior high students. East had 42% of black high school pupils. A chart showing the effect of the implementation of rescission of the resolutions on the attendance pattern of these schools, plus the 23 other schools involved in receiving transferred students under the three resolutions, is attached to the Tenth Circuit's opinion. See 445 F.2d at 1008. We point out in footnote 13 below the relation of the schools found to be deliberately segregated to the system as a whole.[13]

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[13] The board was found guilty of intentional segregationist acts of one kind or another with respect to the schools listed below. (As to Cole and East the conclusion rests on the rescission of Resolutions 1520 and 1524).

PUPILS—1968-1969

	Anglo	*Negro*	*Hispano*	*Total*
Barrett	1	410	12	423
Stedman	27	634	25	686
Hallett	76	634	41	751
Park Hill	684	223	56	963
Philips	307	203	45	555
Smiley Jr. High	360	1112	74	1546
Cole Jr. High	46	884	289	1219
East High	1409	1039	175	2623
Subtotal elementary	1095	2104	179	3378
Subtotal Jr. High	406	1996	363	2765
Subtotal Sr. High	1409	1039	175	2623
Total	2910	5139	717	8766

(continued)

B. The Manner in Which School Authorities' Decisions Have Determined the Racial Composition of Schools.

The record indicates the variety of decisions by which school authorities control the racial composition of schools in Denver. This control over racial composition has been purposefully exercised, according to the findings below, even during periods when the board asserted it was color-blind in such matters. The control appears in routine decision-making at the administration level, and in major and minor decisions by the elected school board.

It should be noted that there has been substantial continuity in administrative control of the Denver system for many years. Dr. Oberholtzer served as Superintendent from 1947-1967. A. 1300. The present Superintendent Howard Johnson (1970 to date) served as Deputy Supt. during Oberholtzer's tenure and remained in that position during Supt. Gilberts' tenure (1967-1970). Mr. Johnson was responsible for teacher placement and attendance boundaries during the years involved in the lawsuit. A. 256a-257a.

The findings below relate to decisions about such things as (1) the location of new schools and additions to schools, (2) the size of schools, (3) the utilization of schools, (4) the drawing of school attendance boundaries, (5) the use of optional zones, (6) the use of transfer plans, (7) the

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The total black school enrollment in 1968 was:

Elementary	8297
Jr. High	2893
Sr. High	2442

Thus the above-mentioned schools included:

Elementary	— 25.36% of all black elem. pupils
Jr. High	— 68.99% of all black Jr. High pupils
Sr. High	— 42.55% of all black Sr. High pupils
Total	— 37.69% of all black pupils

Source: PX 242, 243, 273, 274, 302, 303; A. 2050a; A. 2053a; A. 2072a; A. 2074a; A. 2078a; A. 2080a.

use of mobile classrooms, (8) the maintenance of transportation programs, (9) the composition of school faculties, (10) the differing educational programs offered at schools.

The record in this case shows that where race was an issue each type of decision was invariably made in Denver so that the *result* was racial segregation. For a decade before the suit was filed the court found they were made for the *purpose* of segregating. Yet the courts below found the system guilty of unlawful segregation practices only in those cases where the asserted justification for action was shown to be "a sham or subterfuge to foster segregation." 445 F.2d at 1000. Wherever the board could show *any* "rational neutral criteria segregative intent will not be inferred." *Id.* Indeed, the district court refused to find unlawful segregation in cases where it thought "the result is about the same as it would have been had the administration pursued discriminatory policies, since the Negroes, and to an extent the Hispanos as well, always seem to end up in isolation." 313 F. Supp. at 73. But, even with this strict burden of proof, which petitioners protest as too onerous, the Denver system was found to have engaged in a decade-long segregation policy affecting a substantial portion of the black community.

1. *Assigning Faculty by Race.*

As described at pp. 11-13 above, the school district admitted to a long time practice of assigning minority teachers to schools with minority children. The District Judge found that this practice "helped to seal off these schools as permanent segregated schools." 303 F. Supp. at 284-85. He also found that the reason for the practice was racial prejudice or more precisely that the reluctance to place minority teachers in white schools was because of

"concern over a possible lack of acceptance by the white community and because of a fear of lack of support by some faculties and principals." 303 F. Supp. 284.

The findings of unlawful segregation at Barrett (52.6% Negro teachers) and Smiley Jr. High (23% Negro teachers) were expressly related to the faculty assignments by race. 303 F. Supp. at 290, 294. Schools where black teachers were concentrated in heavily disproportionate numbers were invariably schools where black pupils were concentrated. See PX 318, A. 2083a; PX 258, A. 2059a; and DX-DG, A. 2146a, showing percentage of Negro teachers 1964-1968 in elementary schools with faculties 20% or more Negro. The percentage of black teachers at Barrett, Hallett, Smiley and Cole was actually greater in 1967 and 1968 than it was five years earlier when the board announced a policy of assigning minority teachers outside minority schools. A. 337a-38a.

The policy of assigning minority teachers to minority schools was in effect when Dr. Oberholtzer became superintendent in 1947 and continued in following years.[14] During the period when the board said it thought itself legally bound to be "color blind" in pupil assignments it nevertheless continued assigning black teachers to schools with black pupils. The board's policy was that a teacher's residence should have nothing to do with the teacher's school assignment, nor was it a reason for granting teacher transfers. A. 285a.

Negro principals were also assigned only to minority schools. The Voorhees Committee reported in 1964:

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[14] The first Negro teacher in Denver was hired at Whittier Elementary school in 1934. From 1934 to 1944 there were never more than five Negro teachers in the system and all were assigned to Whittier. By 1954 there were 43 Negro teachers in the system all assigned to minority schools. See PX 410, A. 2106a.

"At present, Denver's two Negro principals two Spanish-American assistant principals, one Negro assistant principal and one Negro teacher-assistant are assigned to schools in minority neighborhoods. (Two Negro coordinators and one Japanese-American assistant principal are not so assigned.) The Committee sees no acceptable reason why administrators with minority background should continue to be assigned to schools where minority students predominate." PX 20, pp. D-17-18.

2. *Size and Location of School Buildings; Additions to Buildings; Capacity Utilization; Mobile Classrooms.*

The racial composition of schools in the system was determined by interrelated decisions about such matters as the location of new schools, the construction of added space at existing schools by new permanent or mobile classrooms, and decisions to overcrowd[15] or under-utilize existing school capacities. For example, the district court found that Barrett elementary school was built in a particular location "with conscious knowledge that it would be a segregated school." 303 F. Supp. at 285. Barrett was built as a small school on a large site with its size designed to fit the number of black pupils in the area without providing any room for pupils from an overcrowded white school a few blocks away:

"At the time Barrett was built Stedman School, in a predominantly white area, and located a few blocks east of Barrett, was operating at approximately 20 percent over capacity. Yet Barrett was built as a

[15] Sometimes the decision would be made to use double sessions in a school to keep the children in their neighborhood. A. 1180a. Sometimes the school day was "extended" to increase capacity. A. 375a.

relatively small school and was not utilized to relieve the conditions at Stedman." 303 F. Supp. at 285.

Manual Training High School was built in 1953 as the smallest high school in the city (it still is) to accommodate the predominantly Black and Hispano population in the central city area. A. 1404a. It was admittedly designed to serve the minority community as Dr. Oberholtzer, then Superintendent, testified:

Q. Now, first of all, with respect to the building of new Manual, it's true, is it not, Doctor, that Manual High School today is the smallest high school in the district? A. It is the smallest senior high school, yes.

Q. And it was at the time it was built, also, was it not? A. I believe it was, yes.

Q. Why was Manual built so small, Doctor? A. Are you talking about new Manual or old?

Q. New Manual. A. The new Manual was built in the same general location as the old Manual and substantially the same attendance area. That was the reason.

Q. It was built to serve a particular community? A. The community in that area, yes.

Q. What was the composition of that community, Doctor? A. Negro and Anglo, largely; some Hispano.

Q. Well, you recall, do you not, Doctor, that as early as, I believe it's 1950-1951, that Manual was already a predominantly minority school, do you not, about 40 percent black, 35 percent Hispano, 25 percent Anglo? A. Somewhere in that neighborhood.

Q. And I assume that that neighborhood that new Manual was to serve wasn't getting any whiter between, say, 1951 and '53 when new Manual was opened? A. No.

Q. It was becoming blacker, was it not? A. There was some tendency, yes, to that.

Q. Well, it's true, isn't it, that when the new Manual opened, Doctor, it only had 77 Anglos in it?

Mr. Brega: Your Honor, I object to this line of testimony. In 1953—that was prior to Brown and at that time the law in the country was separate but equal. That was all right. If that were the case in Denver, that would not have been unconstitutional at that time. I think it's moot and not relevant to the the issues.

The Court: Well, I think that we have been permitting inquiry into the history of this for various purposes. So we will not draw the line at this point.

The Witness: Would you repeat the question, please?

Mr. Greiner: Would the reporter read it, please?

(Question read by the reporter.)

A. I do not recall that figure.

(A. 1404a-1405a.)

In 1949, 76% of Denver's Negro high school students (278 of 363) attended old Manual High School; by 1956, 84% of them (541 of 641) attended new Manual. A. 499a-500a; PX 401. A school board publication makes it clear that new Manual was designed to be a predominantly minority school to replace the old school of the same name PX 356, A. 2086a, "The New Manual":

"Some Basic Problems to Be Faced
In Planning a New Manual

There was little doubt when it became known that Manual would be on the "must" list of the new buildings that Manual could not be just a high school cut

from a general pattern. Manual is different. The college preparatory function of a high school is not the first consideration in Manual although it has not been neglected for those boys and girls who do go to college. For roughly three-fourths of the student body college is virtually an impossibility.

The usual problems faced by youth are sharpened for the many Manual boys and girls who are members of minority groups. Since 1926 the Anglo population at Manual has dropped from over eighty per cent to about forty-one per cent; the Negro population has gone from ten to twenty-seven per cent; the Spanish-American figure has risen from less than one per cent to twenty-three and one-half per cent; and the Oriental has gone from seven-tenths of one per cent to eight per cent. These boys and girls have needs which the school must meet in order to prepare them for effective participation in the community. The chart following shows the changing racial distribution in Manual."

The district court's decision about plaintiffs' complaint that Manual was "earmarked for minority occupants" was that "we have to be mindful of the evidence that it was opened in 1953 at a time prior to Brown v. Board of Education . . . , and we are told that this location had the consent of the people in the neighborhood." 313 F. Supp. at 69-70. The court said: "At that time there was much less concern about minority concentration." 313 F. Supp. at 70.

Control of racial composition by decisions as to capacity utilization is also illustrated by Manual which was operated under capacity from the time of its opening in 1953, although nearby East High School with only 2% Negro enrollment was "filled to capacity." 313 F. Supp. at 70.

School capacities were controlled by adding mobile classrooms to expand some crowded buildings. This became a

general practice in northeast Denver where there was a large migration of blacks in the 1960's and 28 mobile classrooms were erected to accommodate the black pupils.[16] Mobile classrooms were used almost exclusively at black schools in the northeast Denver area. A. 106a. Capacities at Stedman and Smith were systematically controlled by the periodic addition of mobile units to contain the blacks in the area.

Mobile units and new classrooms were added to Hallett beginning in 1965 to "solidify segregation."[17] Mobile units were added to Smith with similar results.[18]

3. *Transportation Policies.*

Denver has used its transportation system as an alternate means of dealing with the lack or shortage of facilities in particular neighborhoods, and this has necessarily had an impact on the racial composition of schools. The established policy was to make free transportation available to elementary pupils who lived more than a mile from their assigned schools. A. 1188a. In 1968 the school system sup-

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[16] "The building of 28 mobile units in the Park Hill area in 1964 (at the time there were only 29 such units in all of Denver) resulted in a further concentration of Negro enrollment in Park Hill schools. The retention of these units on a more or less permanent basis tended to continue this concentration and segregation." 303 F. Supp. at 285. See PX 101; PX 73, 74.

[17] "In 1965 four mobile units were constructed at Hallett. Shortly thereafter, the Board also approved the construction of additional classrooms. At this time Hallett was approximately 75 percent Negro. The effect of the mobile units and additional classrooms was to solidify segregation at Hallett increasing its capacity to absorb the additional influx of Negro population into the area." 303 F. Supp. 293.

[18] When the school became overcrowded Smith parents were offered a choice between adding mobile units at Smith or being bussed possibly back to black core city schools. A. 691a-694a, 696a-697a.

plied transportation to 1184 Negro and Hispano children (6% of minority elementary children) and 4,369 Anglo children (about 13% of Anglo elementary children). A. 775a. In 1969-70 the Superintendent said about 12,000 pupils were bussed and that the board's "pay-as-you-go" policy for financing new construction necessitated much of the busing in newly annexed areas. A. 1755a.

Basically in southeast and southwest Denver, Anglo pupils in newly annexed areas of the city were bussed to the nearest Anglo school which had available capacity.[19] A. 1183a-1184a. Before the lawsuit, no Anglo students were bussed to any predominantly minority schools. A. 1203a. The school administration policy was not to bus pupils into schools classified as the poverty area, target area or culturally deprived area under federal programs. A. 1205a-1206a.

Plaintiffs' Exhibits 390-A and 390-B are large maps (described in testimony at A. 767a-775a) which show that the school system bussed numbers of Anglo students past under-utilized minority schools.

Anglo pupils were bussed as far as ten miles before the lawsuit, some of the longest distances being from Southwest Denver to Asbury, University Park, Steele and Cory. A. 375a. Exhibit 390 shows that in many cases students who were being transported were not being taken to the nearest school which had capacity to absorb them. One of the more striking examples of this was the transportation in 1967 and 1968 of junior high school children from the Montbello area to Lake Junior High School. These children who live in the northeasternmost corner of the city were being transported past Cole Junior High School,

[19] The District did not employ mobile units to increase the capacity of schools which were even closer to the annexed areas. PX 101.

which was under-utilized, to the western edge of the city. PX 426. The Montbello children were predominantly Anglo, and Cole's membership was predominantly Negro. In this case a neighborhood or distance principle was not enforced.

Judge Doyle noted that the three 1969 resolutions contemplated the use of transportation facilities to promote desegregation. In ordering that the three resolutions be implemented he noted that "the board has had for many years and now has a policy of transporting students who live a certain distance from their schools," and thus transportation was "probably necessary in order to carry out this decree, but nothing in this order shall be construed to require the Board to use such transportation if it can be dispensed with." 303 F. Supp. at 296.

The court's final decree requiring integration of various schools contemplated that detailed plans about such matters as transportation requirements would be submitted to the court at a later date. In fact, the board did submit various transportation plans in considerable detail at a hearing which occurred in May 1971 while the case was pending on appeal.[20]

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[20] The transcript of this hearing commencing May 14, 1971 was not before the court of appeals because it took place while the appeal was under advisement. However the transcript has been lodged with the Clerk of this Court so that the Court may have access to all available materials about the case which may be relevant. Judge Doyle concluded that the board's Plan C as modified by the suggestions of plaintiffs' counsel should be adopted. May 1971 Tr. p. 445. The original Plan C would have required transportation for an estimated 3,919 pupils to desegregate the seven minority elementary schools in the first year of the plan. The estimated cost was $828.80 per day or about 21 cents per child per day. (See Report, Alternative Plans for Implementation of United States District Court Orders Stated in the Final Decree of June 8, 1970, Denver Public Schools, March 17, 1971, p. 51.)

4. *Establishing and Changing School Attendance Areas.*

The general practice in Denver was to hold public hearings and have formal board action only on secondary attendance boundaries and to permit the administrative staff to fix elementary school attendance areas or sub-districts without public hearings or detailed board attention. A. 117a; A. 901a. An important but unexplained exception to this general practice was the fact that various elementary boundaries in northeast Denver involved in the court's finding of deliberate segregation during the 1960's were set by the school board. A. 173a; 303 F. Supp. at 291. One consequence of the staff making elementary school zone changes is that many such changes did not appear in minutes of the school board, and for the years prior to 1960 only a few maps were still available at the time of the trial. A. 842a. Thus the parties engaged in attempting to reconstruct boundary maps for years prior to about 1960, except for the 1956-57 boundary changes. A. 842a-857a; 481a-484a.

The district court's findings of deliberate fixing of boundary lines for the purpose of segregating Negroes from whites related to (1) the original boundaries set when Barrett was opened in 1959 (303 F. Supp. at 290; PX 40, 41; A. 2021a; A. 2022a); (2) 1962 and 1964 boundary decisions affecting Stedman (303 F. Supp. at 291; PX 50, 53, 70, 71; A. 2024a; A. 2026a; A. 2028a; A. 2030a); (3) various actions during the 1960's maintaining Park Hill and Philips as Anglo schools (303 F. Supp. at 292); (4) 1962 boundary

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By the 1970-71 school year the system was transporting 12,500 pupils daily on 134 school buses, including busing of handicapped pupils, pupils in newly annexed areas, pupils more than one mile from elementary schools or more than two miles from junior high schools, pupils in crowded areas, pupils under the court orders of 1969 and 1970 and pupils on instructional excursions (*Id.* at 6-7).

decisions relating to Hallett-Philips and 1964 decisions relating to Stedman-Hallett and Hallett-Philips (303 F. Supp. 293); (5) rescission of the 1969 proposed boundary changes for Smiley and East (303 F. Supp. 294).

Plaintiffs offered evidence trying to prove discrimination in the fixing of various other boundaries which is summarized in the district court opinion at the pages indicated hereinafter: (1) original boundaries between New Manual and East High schools 1953, and changes in 1956 (313 F. Supp. at 69-70, 75); (2) Cole and Smiley Jr. High schools boundary change in 1956 (similar to Manual-East change at same time; 313 F. Supp. 70-71, 75); (3) Cole, Morey and Byers junior high school changes in 1962 (313 F. Supp. 71-72, 76); (4) Boulevard school boundary change 1961 (313 F. Supp. at 72, 76) and Columbine zone changes 1962 (313 F. Supp. at 72-73, 75-76). We summarize the evidence as to Manual, Cole and Columbine.

Manual. The eastern boundary of Manual in 1953 was set one-half block from the building. PX 203; Map of Manual Boundaries 1955; A. 2044a. It coincided with the easternmost Negro residence. As the Negroes moved eastward, the Manual boundaries were changed with them to embrace the Negroes as part of the mandatory Manual area where theretofore the area had been in an optional Manual-East zone. PX 204, Map of 1956 Manual Boundaries, A. 2046a. There was widespread concern in the Negro community about the segregationist effects of the proposed 1956 Manual changes, and Mr. Lorenzo Traylor, a black official of the Urban League, organized meetings with schools officials and community groups to protest the changes but had no success. His testimony about the Manual changes and the Cole boundary changes in 1956 shows very plainly that the boundary changes followed the black population migration eastward, that the school of-

ficials were made aware of this and that they declined to adopt alternative proposals that would have worked to integrate Manual and Cole. A. 580a-599a. In summary:

1. When the new Manual was built, its eastern boundary was only one-half block from the school, approximating the location of the Negro population.

2. The eastern boundary of Manual was moved eastward to York Street in 1956 commensurate with the Negro population movement.

3. This 1956 change occurred after widespread community concern that it would be a segregatory change.

4. During the relevant period Manual was always under-utilized and no rational justification for this boundary change on the basis of capacity utilization exists. PX 210, A. 2048a.

Cole. In 1952 Cole was under capacity and predominantly black and Hispano while Smiley to the east was overcrowded and still an Anglo school. PX 215, 215A. Rather than shift the boundaries to relieve overcrowding at Smiley by adding whites to Cole, the board built additional classrooms at Smiley. 313 F. Supp. at 71. In 1956 as the black community moved eastward the Cole boundary was shifted to follow them, the boundary change being the same as that described previously for Manual in 1956. *Id.;* PX 211, 211A, 211B. Again in 1958 another addition was built at Smiley notwithstanding that Cole still had empty spaces. *Id.;* PX 215, 215A. These changes were opposed by the black community, and Mr. Traylor of the Urban League offered the board boundary proposals which would have the effect of integrating the schools to no avail. A. 580a-599a. PX 333, A. 2118a. This was during the period when the board asserted that it was not lawful for it to consider

race for the purpose of integrating students. A. 1370a-1371a.

Columbine. The board established a series of optional zones around Columbine in 1951 which increased the Negro enrollment because it set up options which "were apparently employed by Anglo students as a means of escaping from Columbine to the almost totally Anglo Harrington and Stedman." 313 F. Supp. at 72-73; PX 406, 407. Although the asserted purpose was to relieve overcrowding at Columbine the court found that actually "the effect of the administration's action was to slightly decrease overcrowding at Columbine while creating an overcrowded situation at Harrington and Stedman." 313 F. Supp. at 72.

5. *Optional Zones and Transfer Devices.*

The board has employed a variety of devices which have enabled parents to choose schools so as to achieve racial separation. Optional zones located in the border areas of mixed racial population between white and black schools functioned as an effective device to accommodate segregationist sentiment among the public. The two optional zones between East and Manual defined the racially mixed neighborhoods, and as soon as a neighborhood became all black it was shifted from an optional zone to a mandatory part of the Manual zone—Traylor testimony at A. 580a-592a; PX 203, 204; A 2044a; A. 2046a.

The use of optional areas for whites to escape black students at Columbine is discussed in the preceding section. The Cole-Smiley optional zone was identical to the Manual-East optional area. A. 502a-503a; PX 211, 211A, 212, 212A.

The Voorhees Committee Report denounced the board's use of optional areas and recommended that the board im-

mediately stop the practice "at the earliest possible date." PX 20, pages A-12 to A-13; A. 2013a. The report stated that the "use of optional areas forms no part in rational administration of the system for fixing boundaries which the Committee has recommended" *Id.* After this report the board eliminated the last optional zones in 1964 (A. 1347a), but in September 1964 instituted a Limited Open Enrollment (LOE) program which gave pupils freedom of choice to transfer out of the schools in their attendance zone to certain schools which were designated as open to LOE transfers. A. 299a; 304a.

Under LOE a student could transfer to any school where openings were listed as available but the student had to furnish his own transportation. There were in 1968 only 365 LOE spaces open at the elementary level. A. 541a; PX 87, 89, 90; A. 2032a; A. 2034a; A. 2036a. No priority was given to transfers that would promote integration nor was there any prohibition against transfers that would tend to promote segregation. Plaintiffs' evidence showed that the LOE program involved only about 267 elementary students out of 50,000 (A. 538a). It had negligible effect toward integration—a maximum of 29 pupils—while an estimated 58 to 77 white pupils left black schools to attend white schools. A. 538a; PX 99, 100. Plaintiffs showed that 10 Anglo schools which were under-capacity and receiving Anglo pupils by bus were not on the list reporting LOE openings. A. 539a-540a; PX 89, A. 2034a. Seven predominantly minority schools with an overall Anglo percentage of only 12 percent contained over 55 percent of the available LOE spaces (203 of the 365 elementary openings in the district). A. 541a; PX 90, A. 2036a. Although objective data shows that the white schools had space available, the principals were not reporting space as open for LOE purposes. PX 89, A. 2034a; PX 87, A. 2032a.

The Voluntary Open Enrollment (VOE) program adopted in the fall of 1968 and implemented in January 1969 was offered as an integration program. Shortly after the Board announced the program a group of white parents formed the idea of targeting Hallett school as a black school which might be integrated if a sufficient number of whites could be organized to volunteer to transfer in and an equivalent number of blacks could be organized to transfer out. A. 665a-683a. Their initial efforts were rebuffed by Deputy Supt. (now Supt.) Howard Johnson, who stated they had no duty to *promote* the VOE program but merely to make it available. A. 675a. Later in Resolution 1531 (April 1969) the board endorsed the idea of making Hallett a "demonstration integrated school as of September 1969, by use of voluntary transfer". A. 68a. After an intensive summer recruitment program (A. 687a-691a), VOE helped to change Hallett from 84% black in 1968 (Anglo pupils—76, black 634, Hispano 41) to 58.4% black in 1969-70 (Anglo pupils 290, black—444, Hispano—22). About 1500 pupils were involved in the VOE program in the entire city. A. 1769a. At the relief hearing in May 1970 the board offered its VOE program as the sole remedy to achieve integration. Judge Doyle, while permitting the VOE program to continue, refused to permit the Board to limit its integration program to this one technique.

6. *Curriculum, Level of Instruction and the Atmosphere of Segregated Schools.*

Manual Training High School was planned prior to 1953 to offer a curriculum designed for minority and other low income students. See *supra* pp. 23-24. Manual was planned as a lower caste school to meet the "special needs" of lower income and minority pupils about whom it was noted that "Fewer pupils got to college," "Fewer take college preparatory subjects," "More go to work immediately" and

"More go into unskilled and semiskilled labor." PX 356; A. 2086a. Such prophecies of course have a way of becoming self-fulfilling, and people who want to avoid the mold will try to avoid the school. Robert O'Reilly, one of plaintiffs' expert witnesses called this sort of thing "programming students into basically lower occupations than the whites are programmed into." A. 1964a.[21]

The community perception of Manual and its feeder school Cole Junior High was negative. The feeling in the black community was that Manual was a substandard school and that the quality schools were in other parts of the City according to George Brown, a black State legislator and former local newsman covering education subjects. A. 865a. The dropout rate was high and "even the name had its negative connotation" he said. A. 865a. Manual's black principal was aware of the community resentment toward the school and of the reluctance of employers to hire Manual graduates. A. 1847a. He attempted many program innovations, but acknowledged that Manual students scored in the 34th percentile in 1965 and had slipped to the 28th percentile by 1968 on standard achievement tests. A. 1874a.

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[21] The Court: Well, they're doing this at both Manual and Cole. They're making more or less specialized schools out of them and programs they have never done before. This is in self-defense.

The Witness: Well, this kind of thing really goes back over a hundred years. In a situation like this, why, where mostly black and Hispano students are getting that kind of program and whites are getting another kind of program—and you have a system where grouping occurs into special programs from the elementary on up through the secondary level, it finally ends up in vocational training. And amounts to, in my opinion, programming students into basically lower occupations than the whites are programmed into. The whites are programmed into another environment. And, you know, I don't know whether this is planned this way, that is my feeling.

The Court: This is a danger, you say?

The Witness: I think it's a very clear danger.

The principal of Cole Junior High School took office in January 1969 and found what he described as "turmoil, confusion and conflict". A. 1875a. The school had severe discipline problems and had three principals in three years. A. 1891a.

Judge Doyle, after hearing days of testimony, said of Manual and Cole:

> "Those two schools are sort of symbols, it seems to me, of segregation. I mean, they seem to, for some reason to—to have that character." A. 1687a.

Professor Dan Dodson described the problem of such schools in these terms:

> " . . . But I think that the point of takeoff would be that the school itself is reflective of the broader society or the dominant power arrangement of the community, and that when it comes to dealing with the children of minority, it has a problem of adjusting its programs that are designed for a majority to serve minority children for very definite reasons. Usually it is a teacher who is less experienced; usually it is a school that is older and so on. Usually it is a school by the time it becomes segregated that is looked upon by the whole community as being inferior. And when it is looked upon as being inferior this does make it indeed so, because you can't keep up the morale of the teachers nor the children, nor you can't keep up the expectations for performance and achievement in the schools. Teachers feel less privileged when they are sent there to teach and escape as quickly as they can. More than this, they come to look at these children as being less worthy and of whom less is expected. Consequently there has developed what's called the self-fulfilling prophesies; that because nothing is expected, no standards are held. And consequently the person comes

to fulfill the prophesy that you had of him in the beginning. Some evidence of this is that the differences are not this great between children when they first come to school between the majority and the minority, and that with each succeeding year these children of the minority tend to fall further behind. The alternative that I would pose to the position that the trauma resides—or the limitation reside in the pre-school experience, is that all this combines to teach these children of the minority that they are powerless people and consequently as all people tend to do when they feel powerless, they resign in apathy and that the limitations to learning is not in their cognitive apparatus nor abilities nor in the lack of pre-school stimulation, but resides instead in the apathy that stems from a pervasive powerlessness and impotence in the community.

A. 1473a-1474a.

Judge Doyle made findings about the interrelationship of these intangible factors which tend to label a school and reinforce the image of a school as a segregated institution:

At this point, the Negro community does not consider the segregated school as a legitimate institution for social and economic advancement. Since the students do not feel that the school is an effective aid in achieving their goal—acceptance and integration into the mainstream of American life—they are not motivated to learn. Furthermore, since the parents of these Negro students have similar feelings with respect to the segregated school, they do not attempt to motivate their children to learn. Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore, teachers expect low achievement from students at segregated schools,

and thus do little to stimulate higher performance. 313 F. Supp. at 81.

V. *Denver's Segregated Minority Schools Afford Their Minority Students an Educational Opportunity Inferior to That Afforded by Predominately Anglo Schools in the District.*

The evidence below demonstrated convincingly and the trial court found, as a matter of fact, that certain of Denver's segregated schools afforded an unequal and inferior educational opportunity to their minority students.

Much of the evidence covered September, 1963 through May, 1969, just prior to the lawsuit. However, there is ample basis for concluding that this inequality of opportunity has existed for so long as there have been segregated schools in Denver.

All of Denver's segregated[11] minority schools shared cer-

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[11] Plaintiffs' evidence and exhibits concentrated on comparing groups of Minority and Anglo schools selected on the basis of probability anlaysis (A. 701a-707a). Essentially the schools which had the greatest deviation from the district's overall ethnic compositions were selected. The schools compared were 21 Anglo elementary schools with 20 minority elementary schools, 4 Anglo Junior Highs with 4 Minority Junior Highs, and 3 Anglo Senior Highs with 3 Minority Senior Highs. (Two of the "minority" senior highs actually had slight Anglo majorities of 53-54 percent.)

All of these minority schools reflected the same deficiencies in teacher experience, teacher turnover, age of buildings, drop-out rates and low achievement.

In its opinion of March 21, 1970, in determining whether a school was "segregated" the trial court adopted a standard whereby a school had to have a Negro or Hispano enrollment of approximately 70% before it would be considered "segregated." Out of the 20 elementary schools identified by plainitffs, twelve met the court's standard. In addition, two additional elementary schools, Smedley and Elyria, based upon 1969 data, met the court's standard and were added to the court's list of "segregated" schools in its May 21, 1970, opinion. These 14 schools will be referred to herein as the "court-designated" elementary schools.

In discussing the statistics regarding the inferior schools, for the sake of consistence as to the referenced schools, we will generally

tain common characteristics reflecting their inferiority. These schools, when compared to predominately Anglo schools possessed none of the attributes necessary to learning or to the development of self respect and confidence in the minority children.

These deficiencies and disparities were tangible and intangible, objective and subjective, and included educational inputs as well as educational results. Much of the objective, tangible evidence of this inferiority came from the school district's own records and reports. In addition, several of this country's leading experts[22] testified as to the intangible, subjective characteristics of the environment of these segregated schools which tend to impede and destroy the academic progress as well as the self development of the minority children.

The record demonstrates that all of these characteristics inhere in the segregated school, regardless of how it became segregated. In combination they create a school and

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be referring to a group of 22 elementary schools: Boulevard, Bryant-Webster, Columbine, Crofton, Ebert, Elmwood, Elyria, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Hallett, Harrington, Mitchell, Smedley, Smith, Stedman, Swansea, Whittier, Wyatt and Wyman. At the junior high school level: Morey, Baker, Cole and Smiley; at the senior high school level: East, West and Manual.

Of the four junior high schools identified by plaintiffs, Morey did not meet the standard; of the three senior high schools, only Manual was found by the trial court to be segregated.

[22] Dr. Dan W. Dodson, Professor of Education, New York University; Dr. James Coleman, Professor of Social Relations, Johns Hopkins University, Director of the survey for the United States Commissioner of Education on equality of educational opportunity, which was published as "Equality of Educational Opportunity," PX 500; Dr. Neil Sullivan, Secretary, Massachusetts State Board of Education, former Superintendent of Schools, Berkeley, California; Dr. Robert O'Reilly, Chief, Bureau of School and Cultural Research, New York State Department of Education, author of "Racial and Social Class Isolation in the Public School," PX 506.

an educational environment which is inherently unequal and which seems programmed to produce the failure which results.

A. The Segregated Schools Have Homogeneous, Low Social Class Composition Which Deprive the Minority Children of an Important Element of Learning, a Heterogeneous Peer Group.

One of the most important educational attributes of a school is the peer group with whom the student attends school. The segregated school brings together children, most of whom are poor, who come from so-called deprived home environments, and whose parents have a relatively low level of education and employment.[24]

National studies[25] have demonstrated that this social class composition of the school is a more important source of learning than the teachers themselves.[26] Children learn as much or more from their peers than from the academic curriculum of the schools. The school with a heterogeneous social class composition, particularly one which is predominately middle class, offers the most advantageous learning environment to *all* of its pupils, both minority and majority.[27] Dr. Coleman made it clear that his research was concerned with the impact of other children upon a child's performance rather than the influence of that child's own background upon his performance. A. 1536a.

When this homogeneous low social class is combined with racially identifiable, isolated schools, the education oppor-

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[24] PX 20, pp. 2-8, A. 2000a-2004a; PX 20, Map No. 5; PX 20, pp. D1-D5, A. 2008a-2011a; PX 83.

[25] PX 500; PX 27.

[26] Coleman, A. 1531a-1535a.

[27] Coleman, A. 1535a; RH Tr. 74-75.

tunity afforded by the school is destined to be inferior. The district court, in discussing this evidence, stated as follows:

> Since Negro and Hispano children from low socio-economic families are typically not provided with this stimulation, a compensating stimulation must be provided by the peer group in the school. Where all children in the school come from families with similar low socioeconomic status, the negative effect produced by family background is reinforced rather than alleviated. 313 F. Supp. at 94.

B. The Quality, Experience and Stability of the Teaching Staffs at the Segregated Schools Are Significantly Inferior to That of Denver's Predominantly Anglo Schools.

The quality of education at a school is next most affected by the quality, experience and stability of its teaching staffs.[32]

1. *Teacher Experience.*

When compared to city-wide averages, the segregated minority elementary, junior and senior high schools over the years have had significantly higher percentages of teachers with no prior teaching experience in the Denver public schools.[33] These schools also had significantly higher percentages of probationary teachers,[34] while teachers with

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[32] PX 500; Coleman, A. 1531a-32a.

[33] PX 247, 260, 262, 263 (A. 2060a) as to elementary schools; PX 278, 291, 293, 294 as to junior high schools; PX 307, 320, 322, 323 as to senior high schools. Bardwell, A. 732a, 737a-738a, 742a-744a.

[34] Teachers with less than 3 years' experience in the Denver Public Schools. Compare PX 247 with PX 260, PX 278 with PX 291, PX 307 with PX 320.

ten or more years experience shunned these schools, preferring the predominantly Anglo schools.[21]

When the comparison of teacher experience was with the averages for the predominantly Anglo schools rather than the district average, the disparities were even greater:[22]

Percentages of Teachers with No Prior Denver Public Schools Experience, 1968[23]

	Average
22 Minority Elementary Schools	22.4%
20 Anglo Elementary Schools	9.8%
Total District	15.9%

The pattern was repeated at both the junior and senior high school level:

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[21] *Ibid.*

[22] Bardwell, A. 725a-745a.

[23] PX 260, PX 262. The disparity was as great in prior years:

Percentages of Teachers With No Prior Denver Public Schools Experience

	1964	*1965*	*1966*	*1967*
22 Minority	13.7	10.7	15.8	20.9
20 Anglo	6.2	4.8	9.5	6.9
District	11.3	8.6	13.9	16.2

Source: PX 263, 264 (A. 2062a), 265 (A. 2064a), 266 (A. 2066a).

Percentages of Teachers With No Prior Denver Public Schools Experience, 1968[34]

Junior High Schools	*Average*
4 Minority	34.8%
2 Anglo	15.3%
District	21.1%
Senior High Schools	
3 Minority	16.3%
3 Anglo	7.4%
District	10.3%

The trial court found that: "Faculty experience is an important factor in determining the educational opportunity offered at a particular school . . ." 313 F. Supp. at 79. Teacher salaries in Denver were based on the teacher's level of experience; the greater the experience the higher the salary. A. 1249. For example, salaries ranged from $6,300 to $9,900 for teachers with an A.B. degree. DX-HK, pp. 36-37. Salaries were an important allocation of the District's resources, accounting for some 69% of the total District budget. DX-HK, p. 17. Because of their higher concentration of experienced teachers, the predominately Anglo schools received a disproportionate share of these resources.

2. *Teacher Turnover.*

Because the District's policies on teacher transfers between schools were premised on seniority, the high turnover of teachers in the minority schools created more vacancies typically filled by new teachers. 313 F. Supp. at 80.

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[34] PX 291, 293, 294, 295, 296, 297 as to junior high schools. PX 320, 322, 323, 324, 325, 326 as to senior high schools.

The trial court held:

> The effect of teacher turnover on the quality of educational opportunity is twofold. First, a high teacher turnover rate tends to have a disorganizing effect on the school in question. Furthermore, and most important, the teacher turnover rate in a particular school significantly affects the experience of the faculty at that school. 313 F. Supp. at 80.

The trial court also recognized the destructive psychological impact of this high turnover on students, and its contribution to the aura of inferiority which prevails in the segregated school. 313 F. Supp. 81.

3. *Teacher Attitudes.*

The teachers in the minority schools are often afflicted with attitudes and expectancies which contribute to the inferiority of the educational opportunity.[35] The trial court recognized this factor:

> Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore teachers expect low achievement from students at segregated schools, and thus do little to stimulate higher performance. 313 F. Supp. at 81.

The matter of expectancy then becomes a self-fulfilling prophecy of failure.[36]

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[35] Dodson, A. 1473a.

[36] PX 27, pp. 93-100, 104-106; Dodson, A. 1473a.

C. Inequality of Facilities.

The trial court found that in general the segregated schools occupied older buildings and smaller sites.[37] 313 F. Supp. at 80-81. Dr. Dan Dodson testified that where minorities were relegated to these outdated, older facilities, "it stands as a symbol of their impotence in the community," it was a "place of less choice, and you go there only because you're not able to require that you be allowed to go someplace else." A. 1494a. The court concluded that, standing alone, such disparities were not substantial factors with respect to the educational quality of the school, but found that it did have a cumulative adverse impact:

> However, we do recognize that in schools which are segregated, have less experienced teachers and produce generally low achieving students, the fact that the physical plant is old may aggravate the aura of the inferiority which surrounds the school. 313 F. Supp. 81.

D. The Inferiority of the Segregated Schools Is Also Demonstrated by the Drastically Low Level of Academic Achievement Which They Produce.

The trial court's findings of the poor scholastic performance in the segregated schools concentrated on results of tests administered during the 1967-68 school year. 313 F. Supp. at 78-79, 86. The school district's own witnesses acknowledged that the results were typical, and that achievement data from earlier tests would disclose the same disparities.[38]

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[37] PX 268, 269, 270 (A. 2068a), 271 (A. 2070a) as to elementary schools; PX 298, 299, 300, 300-A for junior high schools; PX 327, 328, 329, 330, senior high schools; Dodson, A. 1494a.

[38] Oberholtzer, A. 1437a-1439a; Cavanaugh, A. 643a, 654a; PX 377, 378; A. 2098a; A. 2100a.

The trial court considered only schools which were approximately in excess of either 70% Negro or 70% Hispano, resulting in findings relating to 14 elementary, 2 junior and 1 senior high school. The evidence disclosed the same low level of achievement, teacher experience, etc. at Morey Junior High School and at 8 other elementary schools[39] whose combined Negro *and* Hispano enrollments ranged from 70% to as high as 98% in 1968.[40] However, the trial court refused to find such schools to be "segregated," and ordered no relief for them. 313 F. Supp. 77; 313 F. Supp. at 92.

With regard to the 14 elementary schools which the trial court did find to be both segregated and inferior, in 1968, at the third grade their mean achievement level was a half year behind the district average.[41] The disparity was of course greater when the minority schools were compared to a group of 20 predominately Anglo schools, whose mean achievement level was more than one and one-third years ahead of the minority students.[42]

By the fifth grade the minority students were nearly 2.2 grade levels behind students in the selected predominately Anglo schools:[43]

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[39] Boulevard, Crofton, Ebert, Garden Place, Gilpin, Swansea, Wyatt and Wyman; see PX 509 (A. 2122a), 510 (A. 2124a); Bardwell, A. 1603a-1614a.

[40] PX 510, A. 2124a.

[41] Grade level 2.97 compared with the 3.57 district average.

[42] PX 377 (A. 2098a), 380 (A. 2102a), 381 (A. 2104a), 382. The Anglo schools were at the 4.34 grade level.

[43] PX 376-R, 380, 381; A. 2096a; A. 2102a; A. 2104a.

	Grade Level Score 5th Grade
Minority Schools	4.30
District Average	5.22
Predominately Anglo Schools	6.45

Achievement at the ninth grade level is expressed as a percentile score based on national averages.[44] The trial court found that the district-wide average at the ninth grade was percentile 53.8; the two minority schools, Baker and Cole, were 25.6 percentiles behind at 28.2.[45] 313 F. Supp. at 79. Principal Morrison testified that out of approximately 325 seventh graders at Cole, 160 of them were reading three to four grade levels below normal. A. 1894a.

Similarly, the segregated senior high school, Manual, was achieving at the 30th percentile while the district-wide eleventh grade level was the 52nd percentile. 313 F. Supp. at 79.

Another characteristic of the impact of the segregated schools is the progressive regression in achievement as the minority child proceeds through the grades. This regression is illustrated in Exhibit 382, based upon test results in 1969. At the second grade the gap in achievement between selected Anglo and minority schools is not quite one full grade; by the third grade this gap has increased to 1.41; in fourth grade, to 1.86; by the fifth to 2.10. The average minority achievement in the fifth grade, which should

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[44] Thus at the 50th percentile one-half of those tested nationally scored above and one-half below that level; at the 75th percentile 75% of those tested scored below that level.

[45] Morey was at the 29th percentile. PX 83.

be at grade level of 5.6 is only at 4.42, while the children in the predominantly Anglo schools are achieving at a level of 6.53. The longer the minority child stays in the segregated school the further behind he gets, even though he "passes" progressively from grade to grade.[46]

E. Most of Denver's Minority Children Attend the Inferior Schools.

Exhibit 374 identifies 45 elementary schools achieving at or below the 40th percentile in the fifth grade, 1968. Over 86% of the District's Negro elementary school children and over 78% of the Hispano children attend these schools,[47] a total of 17,024 minority children. In contrast, Exhibit 375 identifies 22 schools achieving at or above the 60th percentile. While over 40% of the Anglo children in the District attend these schools, only 4% of the Negro and Hispano children attend them.

F. The Fact of the Inequality Has Been Known for Years by the School Administration.

Two committees appointed by the Board, one reporting to 1964 and the other in 1967, each recognized the inequality and concluded that there was a close relationship between the concentration of minority students and inequality of educational opportunity.[48] The 1964 Report noted:

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[46] PX 380 (A. 2102a), 381 (A.2104a), 382; Klite, A. 555a-556a; Dodson, A. 1473a-74a; Dodson, PH Tr. 311-313.

[47] PX 376-R, A. 2096a; Klite, A. 553a-554a. In the 1968-69 school year the 22 minority elementary schools contained 79.5% of the District's black elementary children (6,597) and 46.6% of Hispano children (5,858), but only 5.4% of the Anglo children (1,815). The 30 elementary school achieving at or below the 30th percentile contain 60.5% of the black children (5,022), 63.6% of the Hispano (7,989) and 12.5% of the Anglo children (4,205). See also, PX 241; Bardwell, A. 704a-706a.

[48] PX 20, A. 2003a; PX 21.

> There is abundant authority to the effect that "de facto" separation in schools may result in educational inequalities, and there is in Denver wide belief among the racial and ethnic minorities that the schools to which their children go are in some way unequal. 313 F. Supp. at 81.[49]

That the committee was able to discern this inequality is noteworthy, for the members were given none of the data on teacher experience, teacher turnover, drop-out rates or achievement on an individual school basis which led the trial court to its factual findings of inequality. Of course, the school administration reviewed the test results annually, and knew of the disparities.[50]

However, it was not until October of 1968, shortly after a new superintendent replaced a 20-year incumbent, that the school administration first made public comparative school achievement scores on a school-by-school basis.[51] Prior to that time not even board members had been furnished with this data. The revealed disparities had a strong impact on the attitudes of some members of the Board of Education with regard to the availability of equal educational opportunity in the minority schools. Board member Voorhees concluded "something was wrong" in the way minority children were treated in the system:

> I suppose what crystallized this change more than anything was the release by the Superintendent sometime last fall, I believe, of some test scores—comparative

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[49] See also, 313 F. Supp. at 81-82.

[50] Cavanaugh, A. 631a; Oberholtzer, A. 1330a-31a, A. 1437a-38a.

[51] Cavanaugh, A. 637a-638a. According to Mr. Cavanaugh the underlying reason for the prior policy against publishing comparative data was that such comparisons "would be detrimental to the esprit de corps." A. 638a.

test scores which indicated to me a direct correlation between concentration of poor children, minority children, and low achievement as compared to other schools where these conditions were not present. A. 145a.

For the first time the minority community could see what they had suspected all along—the clear inferiority of their schools.

C. The School Administration Obfuscated the Poor Achievement Results at Minority Schools.

Prior to 1968 the school administration had been less than candid about achievement levels in the minority schools. Their written reports, distributed to teachers and parents often described dismal results in glowing terms.[52]

The 1956 test results for 6th grade pupils at predominantly-Hispano Fairview Elementary School showed most students performing poorly and nearly 2 or more years below grade level. But in their 1956 report on these test results sent to Fairview parents and faculty the school administration stated: "The 1956 test results indicate a good consistent program of instruction at Fairview school. . . . The faculty should be pleased with these achievements."

Similarly dismal achievement results were experienced that year at predominately-Negro Wyatt Elementary School, but the report concluded that: "The faculty should be well pleased with these achievements." The record reflects numerous other examples of this pattern of reporting about minority schools.

The school administration's gloss also covered poor achievement at the junior high school level. In 1956, Cole Junior High School, predominately Negro, was achieving at the 21st composite percentile at 9th grade and below

[52] PX 379; Klite, A. 559a-562a.

expectation.[45] In spite of this poor performance, the school administration at Cole summed up the situation as follows: ". . . the general picture of this group is very similar to that of the group tested in 1953. In both years, pupils at all levels evidenced satisfactory achievements in the subject-matter area. The faculty should be pleased with these accomplishments." [46]

In 1958, 9th grade students at Cole on similar tests achieved at the 20th composite percentile, 5 points below expectation and 30 points below the national norm. Yet, the district's report to parents and faculty declared: "Two-thirds of the scores indicated on the accompanying chart fall at or about expectancy, a fact that indicates that the majority of 9th grade pupils at Cole Junior High School are making very satisfactory academic progress in the various areas measured by these tests." [47]

H. The District Established Low Achievement Standards for the Segregated Schools.

The reason for these accolades lies in another pernicious practice of the school administration, the establishment of levels of expected performance. Based upon the inter-quartile distribution of I.Q. scores for the class in the school,[48] the District set up low achievement expectancies for each of the minority schools.[49] This expectancy was

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[45] At predominately-Anglo Merrill, 9th graders were achieving at the 82nd composite percentile, 10 points above expectancy. The administration's summary for Merrill paralleled that of Cole: ". . . the faculty should be pleased with these attainments."

[46] Klite, A. 556a-559a; PX 379.

[47] PX 379.

[48] Cavanaugh, A. 635a-636a; Klite, A. 545a; 559a-562a.

[49] In the fourteen court-designated elementary schools, at the 5th grade level the school administration uniformly established the expectancy at the 23rd percentile. Thus 77% of the children tested

for failure. Officially excused for substandard academic performance the teachers in the minority schools could rest assured that the failure was not their fault; according to the District's standards it was not a failure at all.[44] The

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nationally achieved above this level. Only one of these schools actually achieved above the 30th percentile. In 1968 the median results were as follows:

	Fifth Grade 1968	
School	*Expectancy Percentile*	*Score Percentile*
Bryant-Webster	23rd	22nd
Columbine	23rd	19th
Elmwood	23rd	28th
Elyria	23rd	23rd
Fairmont	23rd	14th
Fairview	23rd	18th
Greenlee	23rd	17th
Hallett	23rd	32nd
Harrington	23rd	15th
Mitchell	23rd	12th
Smedley	23rd	19th
Smith	23rd	30th
Stedman	23rd	28th
Whittier	23rd	19th

For 9th graders at Baker and Cole in 1968 the overall median expectancy was the 25th percentile; at Morey, the 27th percentile; at Smiley, the 36th percentile.

For 11th graders at East High School the overall median expectancy was the 40th percentile; at West High School, the 33rd percentile; at Manual, the 21st percentile. As to Manual the school administration commented:

> "Eleventh grade pupils at Manual High School have achieved very commendable levels of academic accomplishment compared with expectancy. Even though the level of expectancy for these pupils is below national norms, they have, nevertheless, consistently achieved above the levels of expected achievement. It can be noted that Manual pupils achieved either at or above their expectancy on twenty-nine of thirty checkpoints. It is apparent that a good instructional program as well as effective pupil learning occur at Manual."

That year the actual median achievement level at Manual was the 29th percentile. PX 379.

[44] PX 379; Dodson, PH Tr. 313-314.

district's achievement reports emphasized test results in terms of expectancy rather than the grade equivalent which described the level where the children ordinarily would have been expected to perform. Often the expectancy was one or more grades below the grade equivalent. As noted above, the students and parents were reassured that the children were measuring up to their expectancy." With no comparable data readily available to them, minority parents had no way of finding out about the drastically low expectancies established for their children.

Mrs. Rachel Noel, only Negro to ever serve on the Board, recounted her experience with lower academic standards when at the fifth grade her daughter was transferred from predominantly-Anglo Park Hill Elementary School to predominantly-Negro Barrett when it opened in 1960. She noticed that her daughter had little homework and was losing interest at Barrett. Her daughter explained that she was being taught in the fifth grade at Barrett what she had already had in the fourth grade at Park Hill:

> "And I went to school and I talked to the teachers—to her teacher and I talked to the principal and—as a parent, trying to find out what it was. I sat in on the classes. And I wanted to see what it was. And to the best of my judgment and certainly my great concern based on her statements to me—it seemed that she was not getting what she should have gotten and what she would have gotten at Park Hill since she was having the same thing over in the fifth grade as she had had in the fourth." A. 87a.

Thus it was common, and still is, for minority children to be passed from grade to grade although falling farther and farther behind; entering first junior and then senior

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" PX 379.

high school with little hope that their academic performance would see them graduate from high school. As the school district observed when it was planning new Manual, the curriculum there had to reflect the fact that few if any Manual graduates would go on to college.[60] That expectancy had been established when the children entered elementary school. The prophecy was fulfilled.

I. Drop-Out Rates are Highest In the Segregated Schools.

Little wonder that the so-called drop-out rate for these minority secondary schools is so high.[61] In 1968 the prospects of finishing Manual High School for a minority child entering Cole Junior High School in the 7th grade were less than 23%; a child entering Morey Junior High School was even less likely to be graduated: only 18 out of every 100 would finish at East High School. The prospects of the combination of Baker Junior High School and West High School were little better: only 32 out of 100 would be graduated. A. 98a. Thus the system continuously creates another generation of future minority parents with a low level of education, and the cycle begins again.

J. The Trial Court Determined that a Cause of the Inequality was the Segregated Condition of the Schools.

The trial court found, as a matter of fact that the segregated schools were offering unequal and inferior educational opportunities to minority children. The trial court went on to find, as a matter of fact, that a cause of the inequality was the segregated condition of the school:[63]

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[60] PX 356: "For roughly three-fourths of the student body, college is virtually an impossibility." A. 961a.

[61] PX 400, 400-A; Bardwell, A. 776a-781a.

[63] Dodson, A. 1472a-1477a; PX 20, pp. 1-8, D-1-D-11 A. 1999a-2004a; A. 2008a-09a; PX 27; Dodson, PH Tr. 308-10; 312-315; 338-39.

"... [W]e cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity." 313 F. Supp. at 81.

"When we consider the evidence in this case in light of the statements in *Brown* v. *Board of Education* that segregated schools are inherently unequal, we must conclude that segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity." 313 F. Supp. at 82.

"... Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists." 313 F. Supp. at 83.

Finally:

"The evidence in the case at bar establishes, and we do find and conclude that an equal educational opportunity is not being provided at the subject segregated schools within the District. . . . The evidence establishes this beyond any doubt. Many factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns." 313 F. Supp. at 83.

In reaching this conclusion the trial court rejected the respondents' position that the inequality was in fact attributable to factors beyond their control, such as home environment, nutrition, educational level of parents, etc.[11]

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[11] Dodson, PH Tr. 339-43. Dr. Dodson characterized such excuses as being akin to "infant damnation", cliches which the majority community uses to excuse the failure to educate the minority child. PH Tr. 343-44.

K. The Respondents' Own Policies Resulted In Creating the Inequality of Opportunity.

While the respondents sought to put the responsibility for failure upon the minority children,[64] it is clear that many of the factors present in these schools which contribute to their inferiority are directly attributable to the policies and practices of the school administration.

The low level of teacher experience in these schools is the direct result of the respondents' policies regarding teacher assignment and teacher transfers.[65]

The high rate of teacher turnover in these schools is directly attributable to the respondents' teacher transfer policy.[66]

The teacher assignment policies for minority teachers, principals and assistant principals, concentrating them in minority schools, reinforced the image of those schools as segregated and inferior.[67]

The establishment of a low academic expectancy for the minority schools both created and reinforced the teachers' low expectancies, and became a self-fulfilling prophecy. The respondents' combined policies of failing to report comparative test data, the dissemination of misleading reports of test results and the passing of the children from grade to grade sought to justify the continuation of existing student assignment policies while at the same time dispelling the idea that there was a need for change.

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[64] Oberholtzer, A. 1329a-33a, A. 1357a-60a, A. 1362a-63a. 1970a-72a; Gilberts, A. 1710a-15a; A. 1831a-34a.

[65] Johnson, A. 308a-09a, A. 312a-17a, A. 320a.

[66] Johnson, A. 320a, A. 335a-36a.

[67] Johnson, A. 336a-38a; Oberholtzer, A. 1352a-53a, A. 1393a-97a; 303 F. Supp. 284-85.

Last, but by no means least, the respondents' adherence to the neighborhood school pupil assignment policy in the face of segregated neighborhood residential patterns knowingly continued to assign minority children to unequal schools.[44] As Judge Doyle said "It strikes one as incongruous that the community of Denver would tolerate schools which are inferior in quality." 313 F. Supp. at 83.

The trial court had abundant evidence to find the respondents responsible for the inequality of educational opportunity offered to Denver's minority students.

The Trial Court's Conclusions as to the Appropriate Remedy for the Inequality of Educational Opportunity.

After concluding that the inequality of educational opportunity violated the Fourteenth Amendment, the trial court next addressed itself to the issue of remedy. For this purpose an extensive separate hearing was commenced in May, 1970, at which the parties presented opposing plans for relief. Respondents advocated a remedy premised upon compensatory education, leaving the schools segregated. Petitioners' plans were premised upon three components: desegregation, integration and compensatory programs in a desegregated setting.

The trial court defined the issue before it as follows:

> The crucial *factual* issue considered was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects or whether desegregation and integration are essential to improving the schools in question and providing equality. The evidence of both parties has been directed to this question. 313 F. Supp. at 94.

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[44] PX 20, p. A-5 (A. 2003a); Oberholtzer, A. 1402a-03a, A. 1406a-07a, A. 1413a-14a; Perrill, A. 1088a-90a.

The trial court, after considering the evidence presented, resolved this issue in favor of the remedial components presented by petitioners:

> We have concluded after hearing the evidence that the only feasible and constitutionally acceptable program —the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment. 313 F. Supp. at 96.

In support of this conclusion were the following findings by the court:

1. The evidence was "overwhelming" that equality "can only be brought about by a program of desegregation and integration. 313 F. Supp. at 96."

2. "... [T]he segregated setting stifles and frustrates the learning process," and deprives the minority students of the benefits of a heterogeneous group of fellow students. 313 F. Supp. at 96-97.[70]

3. Compensatory programs, both nationally and in Denver's segregated schools have been uniformly unsuccessful, and the programs espoused by the respondents showed no greater promise. 313 F. Supp. at 97.[71]

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[69] Dodson, A. 1472a-74a; Sullivan, A. 1570a-71a; A. 1573a-80a; A. 1585a-87a; A. 1598a-1600a; Coleman, A. 1531a-37a, A. 1539a-44a, A. 1551a-52a; RH Tr. 74-75; O'Reilly, A. 1935a-41a, A. 1950a-55a.

[70] *Ibid.*

[71] O'Reilly, A. 1910a-35a; Reamer, A. 1905a-10a; Ward, A. 1853a; A. 1868a-69a, A. 1873a-74a, Morrison, A. 1890a, A. 1893a-94a; Gilberts, A. 1817a-18a, A. 1822a, A. 1827a-29a, A. 1831a-34a.

The evidence at the hearing on relief centered upon the issue of whether, standing alone, compensatory education programs in the court-designated schools would raise the quality of the educational opportunity which they offered. Petitioners' experts uniformly asserted that these compensatory programs carried out in segregated settings had failed to significantly affect or improve achievement levels of the minority children.

Dr. James Coleman stated that studies of the effects of these compensatory programs "have not been very encouraging with regard to their effects." A. 1537a. Coleman summed up the weakness of these programs as follows:

> I think that the major problem with compensatory programs is that it's much more difficult and, if possible, much more expensive to introduce such environmental changes in the child's environment, not only within the classroom but outside the classroom when the actual social environment that he experiences in the sense of other children he talks to remains homogeneous with his past. A. 1543a.

The practical experience of Dr. Neil Sullivan while Superintendent of Schools at Berkeley, California, confirmed the thesis of the ineffectiveness of compensatory programs in segregated settings.

For four years prior to the institution of the desegregation of Berkeley's schools the district had attempted to improve the segregated schools, nearly doubling the tax rate "in order to have many, many millions of dollars to pour into these black schools." Emphasis was placed on lowering class size, new electronic equipment and materials, the use of para-professionals, cultural enrichment programs, and programs designed to build the minority child's

self-esteem. As Sullivan said: "You name it and we tried it." A. 1577a. Despite these efforts the programs "had no effect" upon minority achievement, and "overall there was retrogression in all the black schools in achievement." A. 1578a. Sullivan reached the conclusion that the best compensatory education program was integration. A. 1576a.

Dr. Sullivan also testified as to how integration in Berkeley solved many of the problems of teacher turnover and low teacher experience. Teachers enjoyed teaching in an integrated school and stayed with the system. A. 1585a. Classroom discipline problems which had inhered in the segregated black schools were greatly alleviated. A. 1586a. Integration had no adverse effect upon Anglo achievement and unlike the experience with compensatory programs, minority achievement improved.

Dr. Robert O'Reilly also presented evidence about the lack of efficacy of compensatory programs in segregated settings. O'Reilly was Chief of the Bureau of School and Cultural Research for the New York State Education Department, and as such had directed a study of the efficacy of segregated compensatory programs throughout the United States. More than 1,200 different programs had been reviewed and evaluated. The results of these comprehensive evaluations were published in 1970, appearing in the record here as PX 508, "Racial And Social Class Isolation in the Schools."

The respondents' proposals for compensatory education then before the trial court included elements such as additional teaching staff, lowering of teacher-pupil ratios, use of paraprofessionals and teachers' aides, diagnostic laboratories, group counseling, use of staff psychologists, cultural understanding programs, programs directed toward improving the child's self-image, increasing parental in-

volvement, remedial reading and mathematics, programs designed to motivate minority children and to make the curriculum more relevant, use of multimedia teaching aids, field trips and differentiated staffing.

O'Reilly testified that the 1,200 programs he had studied typically had these elements; that there was really nothing new or innovative about the respondents' proposal. Further, it was his opinion that segregated compensatory programs did not raise minority achievement:

> My opinion is, after reviewing the studies and their results that there are no general practical effects accruing to students' educational development as a function of compensatory education programs which typically include these kinds of components. A. 1929a.

O'Reilly had also studied and evaluated the effects of integration upon minority achievement. Based upon analysis of some forty integration programs, it was his opinion that integration improved minority achievement. While not recommending any "doctrinaire approach," [72] and stating that integration was not a "cure-all," [73] O'Reilly concluded:

> . . . [T]he results generally show that the educational development of the desegregated minority students tends to be facilitated or tends to improve within a year or two after the desegregation experience is initiated. A. 1937a.

Comparing the effect of segregated compensatory programs with integration,

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[72] A. 1933a.

[73] A. 1935a.

> . . . [T]he results here tend to show that the integrated students perform at higher levels on achievement tests as compared to students in segregated schools receiving compensatory education. A. 1937a.

The principals at three minority schools, Greenlee Elementary, Cole Junior High and Manual, had testified that they believed compensatory programs in their schools were effective. O'Reilly dismissed this attitude as being typical:

> I don't think you can judge [the effectiveness of these programs] from what a person has to say about his opinions. Teachers typically and school administrators typically think what they're doing is great. A. 1956a.

This opinion was borne out by Denver's experience with compensatory programs. None of them had any demonstrable effect upon minority achievement. Mr. Ward, principal at Manual, described the programs he had established beginning in September, 1966, when he became principal.[74] While he was enthusiastic about these programs[75] he admitted that during this period the level of academic achievement at Manual declined from the 34th percentile in 1965 to the 28th percentile in 1968.[76]

In its opinion of May 21, 1970 (313 F. Supp. 90), the trial court did not decree a specific remedy or plan for implementation, but rather established guidelines which the detailed plan would have to meet. These included desegregation of 7 of the 14 court-designated elementary

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[74] A. 1845a-1853a.

[75] A. 1853a.

[76] A. 1874a.

schools in September, 1971; desegregation of the remaining 7 schools in September, 1972; desegregation of Baker and Cole Junior High Schools commencing in September, 1971, with implementation to be completed by the following September. By September, 1972, Manual Senior High School was to be transformed into a city-wide open school with offerings emphasizing vocational education and pre-professional training. 313 F. Supp. at 97-99.

In addition to desegregation the trial court's guidelines included integrative programs directed to the attitudes of teachers, parents and children; orientation in the fields of minority cultures, teaching programs relating to minority children in an integrated environment and community education about the educational benefits of the desegregation program. Finally, the court accepted the compensatory programs recommended by respondents, but in the setting of integrated rather than segregated schools. 313 F. Supp. at 99.

Events Subsequent to the Trial Court's Opinion of May 21, 1970.

The details of the plans necessary to implement the desegregation called for in the guidelines was left for the parties to mutually resolve. By March, 1971, the board drew up six alternate plans for desegregation of 7 of the fourteen designated elementary schools. Each of the six plans used a different combination of minority schools; each also used a different group and quantity of predominantly Anglo receiving schools. All six plans were based on the concept of satellite zoning, whereby portions of the minority schools' attendance areas were carved up and assigned to Anglo schools. After a series of public meetings the board later selected one of these, "Plan B," for presentation to the court.

At the secondary level the board proposed to desegregate Baker, and to make both Cole and Manual "magnet schools."

All of the proposals were represented to be workable, reasonable, and within the financial and administrative capabilities of the school district. The board also represented that it could implement their proposals by the September, 1971 deadline established by the court.

Being unable to agree with most of the board's proposals, the petitioners developed several alternate pairing proposals for the desegregation of the fourteen minority elementary schools, pairing them with quality predominantly Anglo schools. At the secondary level petitioners developed proposals for the desegregation of both Baker and Cole. Petitioners adopted the magnet concept for Manual.

In May 1971, a second relief hearing was held, and the opposing plans were presented. At the close of the hearing the court selected a plaintiffs' modification of one of the board's six alternate elementary plans, and adopted the board's proposals for Baker, Cole and Manual.[11] All of these plans were to be implemented in September, 1971.

A few weeks later, the issuance of the opinion of the court of appeals on June 11, 1971, nullified the implementation of these remedial orders. 445 F.2d 990.

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[11] No appeal was prosecuted from the oral order of the trial court at the close of the second relief hearing, and no review of that proceeding is sought in this Court. The original transcript of that hearing has been filed with the Clerk of the Court.

Events Subsequent to the Issuance of the Court of Appeals Opinion on June 11, 1971.

While not relevant to the issues here, for the sake of completeness we will relate the other judicial action which took place following the Court of Appeals decision.

That decision affirmed the trial court's conclusion that the Hallett and Stedman elementary schools had been intentionally segregated by the board. Those schools received no relief under that portion of the trial court's orders which were affirmed by the Tenth Circuit, as they were not included in Resolution 1531. On June 23, 1971 petitioners requested the trial court to order respondents to file a desegregation plan for Hallett and Stedman to be implemented with schools' opening in September, 1971. Respondents opposed this motion, and the trial court on July 28 denied it without prejudice, stating that it was unclear from the decision whether such relief was contemplated by the Court of Appeals. On August 2 petitioners filed a "motion seeking clarification" of this question, and on August 30 the Court of Appeals issued an order stating that such desegregation relief would be appropriate and directing the trial court to hear the matter "and determine the proper relief to be granted." A. 1986-87a.

At the trial court's hearing on September 8, 1971 the court selected plans for Hallett and Stedman and ordered them to be implemented by November 8, 1971. The order was reduced to writing and entered on September 28, 1971. Thereafter, respondents' notice of appeal was voluntarily dismissed when pursuant to stipulation the order was modified and implementation rescheduled. The new order, entered October 19, 1971, was implemented at the beginning of the second semester in January, 1972.

Summary of Argument

Petitioners are seeking a district-wide plan of relief for segregation and inequality of educational opportunity in School District No. 1. In support of this relief, petitioners contend as follows:

I.

A. That the findings of the trial court as to a ten-year segregation policy affecting a substantial part of the Denver system, which findings were affirmed below, justify and necessitate a plan of relief which is not limited to the few schools which were most recently and overtly affected by this policy. While the courts below thus restricted the remedy, it should be extended to the entire Denver District. Only system-wide relief promises to effectively remedy the effects of the past discriminatory policy and to prevent its reoccurrence in the future, particularly where the District's segregatory practices in the past have been carried on covertly under the cover of a racially-neutral, "color blind" neighborhood school policy.

B. The courts below employed erroneous notions of petitioners' burden of proof on the issue of purposeful segregation by not requiring that respondents justify their segregatory actions by showing them necessary to achieve a compelling, nonracial state objective. If this proper standard had been applied, the record here required a finding of even more purposeful segregating action than was found by the courts below. The courts below erred and saddled peitioners with an impossible burden of proof by taking as excuse or justification for segregatory effects any merely *rational* nonracial excuse which respondents offered. This error was particularly palpable as applied to the evidence of boundary changes increasing the attendance areas of Cole Junior High School and Manual Train-

ing High School to include and coincide with the areas of most recent Negro neighborhood expansion. Similarly, the courts below ignored the record as well as common experience by refusing to give effect to the impact of schools decisions upon the racial composition of affected neighborhoods, thus allowing later neighborhood segregation to excuse prior segregatory acts because there was no direct and immediate causal relationship. The court below also ignored the impact of faculty segregation practices.

C. Where the school authorities have been found guilty of intentional segregation as to some actions, other actions having a similar segregatory result should not be clothed with any presumption of legitimacy but rather should be considered prima facie illegal unless justified by the showing of a nonracial compelling state interest. Had the courts below employed this test it would have compelled a finding of more pervasive segregation throughout the system, further justifying the necessity for district-wide relief.

II.

With regard to the unequal educational opportunity systematically being provided to Denver's minority students, the trial court properly held such deprivation to constitute denial of equal protection and fashioned an appropriate remedy for it, in light of the evidence and the traditional powers and duties of a court of equity. While the remedy was proper, it was improper to withhold it from other minority schools displaying the same inequalities and inferiority as those to which the trial court extended relief.

In reversing, the appellate court misconceived the standards of equal protection which applied, requiring a show-

ing that the State had deprived minorities of equal educational opportunity intentionally, that is to say, with odious intent, whereas all that is required is a showing that state action has resulted in a racial discrimination. If not justified by compelling state interest, the racial discrimination will deny equal protection. Furthermore, the appellate court's inability to find that the inequality was the result of any state action was derived from ignoring the variety of decisions made by the school administrators which contributed to the inequality of opportunity in and the inferiority of these minority schools. The Tenth Circuit also either rejected the trial court's evidentiary findings as to the cause of the inequality in violation of the "clearly erroneous" standard of Rule 52(a), or it incorrectly concluded that the district court had employed a *per se* rule of equating segregation with inequality, whereas Judge Doyle's finding was essentially factual and fully supported by the evidence.

III.

Finally, the combination of the two constitutional violations found by the trial court should be remedied together in a comprehensive, district-wide plan.

ARGUMENT

I.

Racial Segregation in the Denver School System Violates the Fourteenth Amendment and Should Be Remedied by a Comprehensive System-Wide Desegregation Plan.

Introduction

This case presents the situation of covert racial segregation practiced by state officials in violation of the state's own laws[18] as well as this Court's ruling that "racial discrimination in public education is unconstitutional." *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and 349 U.S. 294 (1955) (*Brown II*). Colorado law lends no support to a practice of racial segregation or discrimination. Indeed, Colorado's Supreme Court held in 1927 that a Denver practice of excluding black students from school programs at Manual High School and Morey Junior High violated state law. *Jones* v. *Newlon*, 81 Colo. 25, 253 Pac. 386 (1927). At the time of *Brown*, Denver had no fully developed "dual system" of entirely separate schools for blacks and whites but black pupils in Denver were concentrated in a few schools.[19] The Superintendent

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[18] An example of similar violations soon after *Brown* is *Clemons* v. *Board of Education of Hillsboro*, 228 F.2d 853 (6th Cir. 1956).

[19] The most complete data in the record about the pre-*Brown* distribution of pupils in Denver by race is data for the 1946-47 school year. PX-336, A. 2084a. There were only 1,832 Negroes (3.6%) in a school system of 50,999 regular daytime pupils. Nevertheless, the concentration of Negroes in three elementary schools, one junior high and one senior high was severe. Whittier Elementary School was 90% black and enrolled 50% of the black elementary students in Denver. It was the first, and until 1944 the only school to have any black teachers. A. 2106a, PX-410. Mitchell had 13% and Gilpin had 12% of the black elementary

of Schools concluded, despite this racial concentration, that the *Brown* decision "did not apply to us" (A. 1400a) but only applied to "separate school systems for the Negro and the Anglo. A. 1310a. Superintendent Oberholtzer took the view that no racial statistics should be maintained (A. 1399a), and that it violated the Colorado Constitution to take any action to relieve the concentration of Negroes in Negro schools. A. 1370a. It never occurred to the Superintendent to inquire whether the practice of assigning minority teachers to minority pupil schools violated the state or federal Constitution.[10] But see *Swann* v. *Board of Education*, 402 U.S. 1, 18 (1971); *United States* v. *Montgomery County Board of Education*, 399 U.S. 225 (1969); *Bradley* v. *School Board*, 382 U.S. 103 (1969); *Rogers* v. *Paul*, 382 U.S. 198 (1969).

Notwithstanding the board's denials of racial motivation and vigorous defense to the charge, the district court concluded that the Denver authorities "carried out a segregation policy" during a ten year period up until the filing of this lawsuit in 1969. 303 F. Supp. at 287. The findings of deliberate acts designed to accomplish racial segregation, which were affirmed on appeal, are all the more remarkable considering the strict burden of proof

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students; both latter schools were predominantly minority (Hispano and black) schools. Cole Junior High was 20% black and enrolled 88% of the blacks in Denver junior high schools. Manual Training High was 23.4% black and 86% of the blacks at the high school level attended this one school.

[10] Article IX, Section 8 of the Colorado Constitution provides: "Section 8. Religious test and race discrimination forbidden—sectarian tenets.—No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color."

placed on plaintiffs by the courts below which decided that only a showing that board action was a sham or subterfuge and that no rational criteria could support a given board action would suffice to establish sufficient circumstantial evidence to prove an intent to segregate.

The courts below regarded this deliberate policy of segregation carried out by official acts of local school officials as a plain violation of *Brown*. That result is consistent with the view of other courts which have condemned segregation resulting from covert policies of administrative officers and local school boards as unconstitutional in a growing body of decisions.[31] This Court has several times taken note of the policies of resistance and evasion of *Brown* which developed in southern states in the years since 1954. *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Griffin* v. *School Board*, 377 U.S. 218 (1964); *Swann* v. *Board of Education*, 402 U.S. 1, 13 (1971). The pattern of covert racial discrimination in the Denver schools revealed by this record merits equally vigorous condemnation.

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[31] *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y. 1961), *appeal dismissed*, 288 F.2d 600 (2nd Cir. 1961), 195 F. Supp. 231 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2nd Cir. 1961), *cert. denied*, 368 U.S. 940 (1961); *Clemons* v. *Board of Education of Hillsboro, Ohio*, 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956); *Davis* v. *School District of City of Pontiac*, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971); *Bradley* v. *Milliken*, 433 F.2d 897 (6th Cir. 1970), 438 F.2d 945 (6th Cir. 1971), —— F. Supp. —— (E.D. Mich. Sept. 1971); *United States* v. *School Dist. No. 151*, 286 F. Supp. 786 (N.D. Ill. 1967), *affirmed*, 404 F.2d 1125 (7th Cir. 1968), *on remand*, 301 F. Supp. 201 (N.D. Ill. 1969), *affirmed*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States* v. *Board of School Commissioners of Indianapolis*, 332 F. Supp. 665 (S.D. Ind. 1971); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970).

In Part I-A of this Brief, we submit that the district court's findings of various acts of unlawful segregation which were affirmed on appeal are sufficient to require that Denver be dealt with as a segregated school system and require that the courts in the exercise of their remedial function provide system-wide relief and not merely relief limited to certain individual school situations.

In Part I-B we urge that the unlawful segregation practices in Denver were even more extensive than the courts below found and that findings that segregation at some schools was not unlawful were based on the application of wrong legal standards and perspectives.

In Part I-C we suggest that where intent to segregate has been demonstrated as to some of the board's actions, other decisions whose effect is segregatory should be presumptively unlawful unless supported by a compelling nonracial justification and not merely an available nonracial explanation.

A. Denver's Unconstitutional Ten Year Policy of Racial Segregation Necessitates a Requirement for System-wide School Desegregation.

The district court found that the Denver officials had carried out a ten year policy of racial segregation in the Denver schools. Although the principal findings related mainly to eight schools, the findings establish systemic discrimination which affected the entire black school population. Racial discrimination in the assignment of black teachers was shown to have been system-wide and to have been the policy[22] since the first black teacher was hired in 1934 (PX 410, A. 2106a). The eight schools upon which the district court focused the findings of unlawful discrimination enrolled 5,139 black children, more than a

[22] See Statement *supra*, pp. 11-13, 19-21.

third of the black children in the City, including one-fourth of black elementary children, over two-thirds of the black junior high pupils and two-fifths of black high school pupils.[33] Thus, the findings of deliberate manipulations to accomplish segregation do not pertain to an isolated or trivial fragment of the system. Rather, they relate to a substantial part of the black community including the community where black population growth was concentrated and where there was thus the most opportunity for discrimination during recent years.

The findings of discrimination relate to all of the mechanisms by which the system controlled pupil assignment. Racial segregation was the hidden motive of Denver school officials and their undeviating policy when they made decisions affecting the Northeast Denver schools about such matters as size and location of new buildings and additions to buildings, capacity utilization, location of mobile classrooms, transportation policies, attendance area boundary decisions, optional zones and transfer policies. See Statement, *supra* at pp. 13-37; see also Argument II, *infra* at 93-101.

The interrelation of assignment practices at various schools is an obvious and established fact. As a former board president who testified for the defendants put it, "Once you change the boundary of any one school, it is affecting all the schools and so we had a concern about all of these changes." A. 951a-952a. It is equally obvious that a practice of concentrating blacks in certain schools by structuring the pupil assignment process with racial considerations has a reciprocal effect of keeping other schools all white. Furthermore, such a policy is aimed at Negroes as a racial group and not merely at particular

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[33] See footnote 13, *supra*, p. 17.

Negroes. Discrimination in Denver was against blacks as a group although it was manifested in different ways against blacks in different situations. The ten year segregation policy was effective everywhere in Denver that it was needed to accomplish segregation. In Park Hill where blacks were moving into white neighborhoods in the 1960's the segregation policy was most overt and visible. Naturally it was less visible where schools were already segregated, and nothing new needed to be done to keep them segregated.

Plaintiffs have sought system-wide relief from the filing of the complaint which asked that the board (A. 31a-32a):

> . . . be required to submit . . . a comprehensive plan for the School District as a whole, and for each school therein where such condition exists, which will effectively:
>
> (i) Remove the segregation and separation of school children by race and ethnicity within and among such schools;

The piecemeal approach of trying to cure segregation at only those schools where there is proof of a deliberate policy of segregation and leaving other schools segregated is plainly inappropriate where the segregation is a part of a policy which inevitably affects all students and schools, white or black, either directly or indirectly. Such a piecemeal approach might be appropriate if an act of deliberate discrimination was truly isolated and unconnected with the rest of a school system. But the district court's findings of a segregationist *policy* negate any such notion in Denver.

The rescission of the three 1969 desegregation proposals which would have changed attendance patterns at schools

attended by one-third[24] of the children in Denver was the "climactic and culminative act" of the board's segregation actions and there was "no gainsaying the purpose and effect of the action as one designed to segregate." 308 F. Supp. at 285. The district court found that the rescission of Resolutions 1520, 1524 and 1531 was an action of deliberate racial segregation entirely unrelated to any nonracial considerations, done in haste, without study, without any nonracial educational justification, and over the opposition of the school superintendent. Judge Doyle wrote:

> The rescission of Resolutions 1520, 1524 and 1531 was a legislative act which had for its purpose restoration of the old status quo and was designed to perpetuate segregation in the affected area. This act in and of itself was an act of de jure segregation. It was unconstitutional and void. 303 F. Supp. at 295.

The rescission of the three resolutions demonstrates a general policy of segregation affecting schools in every part of Denver which would have been involved in the desegregation effort planned by the Superintendent and were left segregated by the rescission.

Petitioners do not read the district court's final decision on the merits as rejecting the idea of system-wide relief. To be sure the court held that plaintiffs failed to prove deliberate discrimination as to certain schools in regard to boundary changes and optional zones. But the court simultaneously ordered desegregation of those and other schools on another theory—the inequality theory discussed in Part III of the opinion (313 F. Supp. at 77,

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[24] See chart at 445 F.2d 1008-1009, which indicates that 31,767 pupils would have attended the schools involved in Resolutions 1520, 1524 and 1531 if they were implemented.

et seq.)—and thus had no need to decide whether desegregation of those same schools might not be required to remedy the effects of the board's general policy of discrimination or prevent it from being carried forward in the future.

We submit that it ought to be entirely obvious that school segregation resulting from shams, subterfuges and surreptitious practices can only be rooted out and prevented if equity courts approach the problem of eliminating the effects of past discrimination and preventing future discrimination with a view to the practicalities of the situation. It has long been accepted that it is necessary to adopt a pragmatic approach to eleminating dual systems created by state laws because of the problems courts have encountered in enforcement of the *Brown* decision. See, *e.g., Green* v. *County School Board*, 391 U.S. 430, 438, n. 4 (1968); *Swann* v. *Board of Education*, 402 U.S. 1, 26 (1971). A fortiori there is need for a similarly practical view and for remedial action extending beyond the narrow area of proven violations in the case of a school district with a history of segregation by underhanded subterfuges. There might once have been some room for assumptions that dual school systems would generally obey *Brown* with good faith efforts, but there is by definition no basis for any such assumptions about a school district which has been found guilty of deliberate violations of *Brown* by covert segregation practices.

In the *Green* case, the Court cites precedents in voting rights, labor law and anti-trust cases as supporting the duty of an equity court to "eliminate discriminatory effects of the past as well as bar like discrimination in the future." *Green, supra*, 391 U.S. at 438, n. 4. Similarly well-established remedial principles support the notion that an equity court ought to attempt a remedy for school segregation

created by sham and subterfuge which looks beyond the particular cases of proven illicit activity.

In enforcing the anti-trust laws the federal courts have, because of practical necessities of enforcement, ranged beyond the narrow area of proven violations and where necessary enjoined licit as well as illicit conduct in order to enforce the law. See, *e.g.*, *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457 (1957); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 724 (1944); *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76 (1950); *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Los Angeles Local 626* v. *United States*, 371 U.S. 94 (1962); *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2nd Cir. 1945) (opinion by Judge Learned Hand).

The practical necessity of a district-wide approach to school segregation in Denver stems from various aspects of the situation. One aspect is the presence in the school system of the large Hispano minority group. It is necessary to avoid a remedy for segregation against blacks which disadvantages Hispano. The problem is obvious considering the fact that the dominant Anglo community can remain separated from blacks either by keeping blacks in all-black schools or keeping them in Black-Hispano schools. The current existence of a number of Black-Hispano schools where the pattern of inequality of educational opportunity is identical to that in all black schools is discussed below in Part II-C. A piecemeal approach to correcting the constitutional violations caused by deliberate discrimination might either aggravate the segregation of blacks and Hispanos or lead to the segregation of Hispanos in all-Hispano schools.

Another problem of a remedy without a system-wide perspective is to avoid steps which tend to create or encourage white citizens to change their schools to remain

segregated. Planning with a system-wide perspective can attempt to deal fairly with all groups and segments in the community and attempt to insure that any remedy is one with some chance of permanent impact.

Covert segregation practices in the past have obviously set in motion community responses. On the simplest level where a school is designated as a black school this may often cause various types of responses by whites to avoid the school thus designed as a black school. Furthermore, the systematic segregation of blacks in schools outside the older black areas demonstrates to blacks living in the older core areas the futility of seeking to escape school segregation by moving. Mrs. Palicia Lewis, a black parent, testified about her family's move from the predominantly minority Ebert in the central city to the Smith area in Northeast Denver at a time when Smith was integrated. As Smith became crowded and predominantly black, she and other Smith parents were offered the choice of accepting mobile classrooms at Smith to contain the new black pupils moving into the area or being bussed—possibly back to Ebert from which she had just moved. A. 691a-697a. The Northeast Denver segregation policy inevitably affected black people in the core city area. It gave them a signal that they would be in segregated schools no matter where they lived in Denver.

Only a systematic approach involving many schools can undertake to eliminate the racial identifiability of a few schools. See, for example, the large number of Anglo schools involved in the Resolution 1531 (A. 60a) plan to desegregate a few black schools. We should also point out that the fact that Resolutions 1520, 1524 and 1531 did not address the entire school system, reflects only that when the board was planning for integration it did so on a step-by-step basis. The board's Noel Resolution contemplated

"a comprehensive plan for the integration of the Denver Public Schools" (A. 1991a), and Superintendent Gilberts' responsive submission "Planning Quality Education" (DX-D; excerpts at A. 2128a, *et seq.*) envisioned an approach which would comprehensively address the problems of the entire school district. Resolutions 1520, 1524 and 1531 were the first three beginning steps in the overall process of designing a plan for integrating the Denver schools. A. 227a-239a.

Moreover, a system-wide approach is necessary in view of the need for a desegregation plan which also operates to relieve the problems of inequality in the provisions of resources to minority schools (see Argument II, *infra*). Such problems as high teacher turnover and low teacher experience in segregated schools as well as the concentration of minority teachers in minority schools are all problems which suggest that a district-wide remedial plan is necessary and appropriate.

We submit that the court of appeals erred in reversing those parts of the district court's final decree which did not relate specifically to schools where there was a finding of deliberate illicit acts. A rule of law limiting the remedy for school segregation to only those schools in a system where specific illicit acts are proved is so impractical as to promise no real reform of segregated situations. Such a limited remedy is comparable to the long-rejected arguments in dual school systems that courts were empowered only to grant relief to individual named plaintiffs who sued for admission to specific white schools. If such a rule of law had prevailed, segregation would still be the way of life in southern school systems. That dual systems have been considerably alleviated is due to the practical approach mandated by *Green* v. *County School Board*, 391 U.S. 430 (1968). Only a similar practical approach

can have any appreciable impact on segregation accomplished by surreptitious and underhanded practices.

B. Unlawful Segregation in Denver Is Even More Extensive Than the Courts Below Recognized.

The decisions of the courts below actually understate the extent of the unlawful racial segregation shown on this record to have been accomplished by decisions of the Denver school authorities. The courts below erred by giving the wrong legal significance to discriminatory acts of the board which occurred prior to the *Brown* decision, and also by excusing some discriminatory actions on the ground that plaintiffs failed to show that the past discriminatory conduct was the cause of present segregated patterns.

Plaintiffs' position is not based on a challenge to the particulars of the district court's fact finding. Rather, we challenge a few of the mixed factual and legal conclusions (or middle level facts) which are determinative of the constitutional issue. We invoke the principle that this Court makes its own independent examination of a record to insure that federal rights are not lost because of distorted fact-finding, or fact-finding influenced or induced by erroneous principles of law. *Haynes* v. *Washington*, 373 U.S. 503, 515-517 (1963); *Spano* v. *New York*, 360 U.S. 315, 316 (1959); *Stein* v. *New York*, 346 U.S. 156, 181 (1953).[11] We submit that such legal errors plainly affected the decision that certain segregation in Denver was lawful.

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[11] See *Oyama* v. *California*, 332 U.S. 633, 636 (1948):

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

Manual Training High School is the capstone of Denver's segregated pattern. The evidence that New Manual was earmarked for black students when it was opened in 1953 is overwhelming. It comes from the mouths and documents of the school officials. See, *e.g.*, PX-356; excerpts at A. 2086a. See Statement, *supra*, pp. 22-24. Former Superintendent Oberholtzer's testimony about the planning for New Manual makes the point:

> Q. Was there any doubt in your mind that, when new Manual opened, Doctor, it would be predominantly minority in its composition? A. It appeared to be so at that time, yes.
>
> • • • •
>
> Q. Now, did you consider what might happen to the racial composition of new Manual in the event you had built it larger, for example, during the planning stages for new [2030] Manual? A. Racial factors and ethnic factors were not a part of our consideration in the construction or location of schools.
>
> Q. And I take it your answer is the same with regard to a possible change in the boundary between what has been that for old Manual and that for new Manual? A. I would give you the same answer.
>
> Q. Well, you're not telling me, are you, Doctor, that you were in fact, when you built Manual, building a separate but equal school, are you? A. I don't know the import of this question.
>
> The Court: What he's asking you is, just so I think you will be aware, is whether this was built to be a Negro school and planned as such, although you were determined, undoubtedly, to give it equal facilities. That's the essence of what he's asking you.
>
> Mr. Greiner: That's correct.

A. We were again building a school to house the children of that particular area, and there was, as you have said, a high percentage of Negro pupils in that area, yes.

Q. Well, for example, the whole curriculum at Manual was tailored, was it not, for these minority students? A. It was tailored to the students who were attending [2031] that school, yes.

Q. And those were minority students. You don't deny that, do you? A. No, I'm not denying it. (A. 1406a-1407a).

See also similar testimony at A. 1404a-1405a.

The evidence about the subsequent boundary changes at Manual, about the optional zones, about the capacity utilization of Manual and East and about the curriculum at Manual "tailored for minority students" is all set out in great detail in other parts of this Brief and will not be repeated here. See pp. 22-24, 29-30, 31, 33-35 *supra*. Manual has at all relevant times been *the* black high school in Denver.[46]

The district court's ruling on plaintiffs' contentions about Manual was that (1) it was opened prior to the *Brown* decision, the location had the consent of the people in the neighborhood and at that time there was "much less concern about minority concentration" (313 F. Supp.

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[46] In 1946-47, Old Manual had 86% of the City's black high school students and in 1968-69 it enrolled 49% of the black high school students. In 1947-48 the black students were 2.9% of the high school population in the District and the black students at Manual were 23% of the total. In 1968-69, black students were 12% of the high school population and the black students at Manual were 76% of the total. See PX 336, A. 2084a and PX 302, A. 2078a. In 1949, Manual became the first Denver high school to have a Negro teacher. PX 410, A. 2106a. In 1968-69, Manual had 25 of the 44 Negro high school teachers. PX 275, A. 2075a.

at 69-70); and (2) the 1956 boundary changes at Manual cut off the option of some blacks at Manual to attend East and was resisted by the black community which proposed changes that would integrate Manual, but this integration "would have been temporary only because in a few years this neighborhood became Negro" 313 F. Supp. at 70. The court made no finding that the decisions about locating Manual or changing its boundaries were rational, neutral or legitimate. It merely said plaintiffs did not show the "acts were clearly racially motivated" and that much of the black population concentration in the area occurred in later years between 1963 and 1968.

The district court restated the first point listed above elsewhere in the opinion:

> It should also be kept in mind that prior to Brown v. Board of Education, *supra*, it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community. Time and again the Board members testified to the fact that in making decisions they held hearings and finally bowed to the community sentiment. Thus, they say they did not intend to segregate or refuse to integrate. They just found the consensus and followed it. 313 F. Supp. at 73.

We believe that this repeated reference by the court to the acceptance of racial decisions and racial concentration of Negroes in schools prior to *Brown* represented a confused and incorrect approach to the problem presented.[87] The district court should have sought to determine whether the board intentionally made racial decisions and discriminated.

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[87] This aspect of the decision below is discussed in Comment, 48 Denver L. J. 417 (1972).

Instead, the court seems satisfied that the board did not intentionally violate the "law of the land" prior to *Brown* when "there was much less concern about minority concentration." 313 F. Supp. at 70. This kind of approach would not even have desegregated a southern dual system.

The district court's finding of no racial motivation with regard to the establishment of Manual is explicable only in terms of this kind of legal error. The trial court reached precisely the opposite conclusion on substantially similar—perhaps weaker—facts with respect to the 1959 establishment of Barrett. The establishment of Barrett was seen by the trial court as plainly unlawful because it occurred after the *Brown* decision. See 303 F. Supp. at 284-285. The establishment of Barrett may have been more blameworthy than the establishment of Manual because one occurred before and the other after *Brown*. But both cases involved the establishment of a school designed to fit a racial population group and planned to be segregated. Both are in "the classic pattern of building schools specifically intended for Negro or white students." *Swann* v. *Board of Education*, 402 U.S. 1, 21 (1971). Both are equally unlawful under *Brown*.

The district court's other point about Manual boundary decisions not causing segregation reflects another error of law. It seems clear that there was no rational neutral justification for the 1956 Manual-East boundary changes and the district court found none. (The same boundary changes applied to Cole and Smiley Junior High Schools and the board's explanation in that case that it was related to the new Hill Junior High School was found by the district court to be false. 313 F. Supp. at 71, n. 14.) The district court found that the Manual boundaries followed the black population and that alternatives proposed by the

black community but rejected by the board would have alleviated crowding at East while desegregating Manual. 313 F. Supp. at 70. However, the court found that assigning a white neighborhood to the Manual zone would have had an integrating effect at Manual but it "would have been temporary only because in a few years this neighborhood became Negro." 313 F. Supp. at 70.

The court's reasoning ignores the effect of such boundary decisions and decisions to designate a school as black on neighborhood residential patterns. Schools decisions change neighborhoods. This Court pointed out in *Swann* v. *Board of Education*, 402 U.S. 1, 21 (1972), the interrelationship between school establishment decisions and neighborhood patterns, and that a segregation policy "may well promote segregated residential patterns which, when combined with 'neighborhood zoning', further lock the school system into the mold of separation of the races."

The United States Commission on Civil Rights has observed the same relationship. PX-27, Racial Isolation in the Public Schools, A Report of the U. S. Commission on Civil Rights, 1967. Plaintiffs' expert Dr. Dodson testified about the phenomenon of school policies being a major cause of housing segregation:

> . . . I would also say that policies of schools become a factor, too. I was in a case in Little Rock, Arkansas, in the federal court on desegregation and here the board's policy of ringing off their school and the next one to it as the neighborhood expanded as being black schools and so on, meant that the housing arrangement —the schools' policies created segregated patterns within the city itself and was the major contribution to the segregation within the residential pattern of living. A. 1505a

See also A. 1490a-1491a. The experience of various black Denver residents who testified at the trial confirmed aspects of the interrelationship between school segregation and housing segregation.[28] A policy of establishing segregated schools in neighborhoods where blacks move in, does more than encourage whites to move out—the familiar white flight pattern. Such segregation also demonstrates to blacks that wherever they move they will be segregated and tends to further impact segregation in established black residential areas.

This relationship is also the answer to the district court's reliance on the fact that the Negro population at Manual and Cole increased over 20 percent between 1963 and 1968 —long after the boundary changes and during a period when the board was engaged only in inaction with respect to those schools. Cole and Manual were firmly established and identified as the secondary schools in Denver for Negroes as early as 1947 when blacks were still in the minority (PX 336, A. 2084a). The decisions in 1956 insured that they would become *predominantly* Negro as well as have a *concentration* of Negroes. It can be no defense for the board's discriminatory action in 1956 that this process did not culminate in a majority Negro school for a number of years. It is enough that the likely effect of

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[28] See testimony of Mrs. Palicia Lewis, A. 691a-697a; testimony of Senator George Brown, A. 871a-876a; testimony of Mrs. Rachel Noel, A. 85a-88a. As we have described above in the text at p. 77 Mrs. Lewis found that moving out of the core city to an integrated area provided only temporary integration, since the board offered a choice of accepting mobile units at the integrated schools—which tended to segregate it—or accepting busing back to the core city. Senator Brown found that his move to a white area, followed by other blacks, was accompanied by a board decision removing the option of his children to attend a white school and including them in the mandatory area of Manual and Cole. Mrs. Rachel Noel found that living in the area where her child was bused to Anglo schools in Park Hill provided only temporary integration as Barrett School was constructed with the result her child was resegregated.

the board's discrimination would be to set such a process in motion and that there is no showing *by the board* that current segregation is not the product of its past discrimination. *Cf. Swann* v. *Board of Education*, 402 U.S. 1, 26 (1971).

Finally, of course, the position that a nonracial integrative step of adding Northeast Denver areas, which were then Anglo, to Manual in 1956 would have been futile, ignores the district court's other findings about what did occur in Park Hill. The very school areas which might have been added to Manual to integrate it are the same Northeast Denver areas—the corridor of black population movement to the east, served by such schools as Barrett, Stedman and Hallett. These are the very areas where other discriminatory action by the board occurred. We can only speculate about what pattern the black population movement in Northeast Denver would have taken if there had been no policy of racial containment and separation in the school system. But surely any uncertainty in this regard must be resolved against the discriminators. It is the board's burden to prove that its discriminatory action did not have the intended effect and cause the existing segregated situation. The district court's decision misplaced the burden of proof on the issue of the cause of segregation. It should have followed a rule similar to that in *Swann* v. *Board of Education*, 402 U.S. 1, 26 (1971), which places the burden on school boards dismantling dual systems to show that any schools that are substantially disproportionate in their racial composition are not the result of present or past discriminatory action on their part. A similar burden ought to be placed on a school board shown to have engaged in some covert segregating with respect to each and every act of discrimination.

Another pervasive error by the court of appeals is the fact that the court gives no weight to the fact that the

Denver system engaged in a policy of assigning minority teachers only to minority schools for many years, and continued up to the time of the lawsuit to concentrate minority teachers in schools with minority pupils. Faculty segregation is an obvious means by which the white and black schools were identified as such. Courts have used the fact of a pattern of racial discrimination in teacher assignment as a telling point in showing an identification of some schools as black schools. *Swann* v. *Board of Education*, 402 U.S. 1, 18 (1971); see, e.g., *Spangler* v. *Pasadena Board of Education*, 311 F. Supp. 501, 513-517 (C.D. Cal. 1970); *Davis* v. *School District of Pontiac*, 309 F. Supp. 734, 743-744 (E.D. Mich. 1970), *affirmed*, 433 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971); *United States* v. *School District 151*, 301 F. Supp. 201, 228 (N.D. Ill. 1969), *aff'd*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971). The Tenth Circuit's excusing of faculty assignments by race, because it was based on "the prevailing educational theory of the day that Negro pupils related more thoroughly with Negro teachers,"[49] simply does not alter the fact that the practice served to racially identify the schools. The appeals court reasoning also ignores the trial court's finding that the faculty assignment policy was based on resistance of whites to minority teachers in white schools. 303 F. Supp. at 284-285.

C. Petitioners Proved a Prima Facie Case of Unlawful Racial Segregation, But the Courts Below Incorrectly Defined the Burden of Proving Constitutionally Actionable School Segregation.

As this Court recognized in *Swann* v. *Board of Education*, 402 U.S. 1, it is school officials who by their decisions about a variety of matters control the racial composition of the schools:

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[49] 445 F.2d at 1007.

> The construction of new schools and closing of old ones is one of the most important functions of local school authorities and one of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. *The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system.* Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. 402 U.S. at 20-21; emphasis added.

The record in the Denver case illustrates the general proposition recognized in *Swann* that the multiplicity of decisions made in planning and operating school systems have racial effects—and that those racial effects are generally predictable. The Denver record shows also that the board has achieved one uniform result by its actions; they have minimized integration and maximized the separation of black pupils from white pupils. We urge that this proved a prima facie case of unconstitutional segregation. It is entirely unworldly to suppose that a board which has been caught making a number of decisions which are explicable only as subterfuge for racial segregation (See Part I-A, *supra*) made all of its other decisions in a color-blind fashion. The fact is that the district court did not find more instances of discrimination simply because whenever there was more than one possible explanation for a decision, the

district court gave the board credit for the nonracial ones. But obviously the board was consistently discriminating; the difference from decision to decision is only that, as to some, they could get away with discriminating by reason of the availability of possible nonracial explanations. As complex as school system management is, a school board can almost always find a post-facto justification for its decisions on some rational basis. It is amazing that petitioners were able to establish a few cases of discrimination so blatant, and school management so distorted by racial considerations that the board could not present any convincing rational explanation. Plaintiffs will seldom, perhaps never, be able to make such a showing for every school in a system with a covert segregation policy.

We submit that at least in a case where the court has found some racially discriminatory factors and practices in a system, and there is a general pattern of racial separation consistent with discrimination, the burden must shift to the school authorities to explain the segregation not merely by the availability of some rational explanation, but by a compelling state interest, which could not be served by less segregatory practices.[39]

In many other types of race discrimination cases—such as, for example, jury discrimination cases—it is accepted doctrine that a certain type of showing of discriminatory results is sufficient to shift the burden to a defendant to establish some compelling state interest sufficiently substantial to negate the presumption of discrimination. Whatever may be the precise type of showing of such proof needed in a school case where there is no proof of intent, certainly in a case like Denver where the fact of segregatory

[39] See Dimond, *School Segregation in the North: There is but One Constitution*, 7 Harvard Civil Rights-Civil Liberties Law Review 1 (1972).

intent has been found, then the burden of proof ought to shift to the defendants to explain conduct having a discriminatory result consistent with the pattern of intentional discrimination already found.

The court of appeals' response to plaintiffs' argument was that it would be incongruous to require the school board to prove the non-existence of an illicit intent and that in southern school disestablishment cases there was merely a burden to show conversion to a unitary system. 445 F.2d at 1005. The court said that such an "onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent." *Ibid.* In the first place, this ignores that Denver *was found to have had segregatory intent.* In the second place, it fails to focus on the burden which plaintiffs' prima facie case would place on the board which would be the burden of showing a compelling state interest justifying the segregatory result rather than a burden of proving some secret state of mind.

The board might attempt to satisfy the burden of rebutting a prima facie case by various showings including reference to its neighborhood school policy. But the neighborhood school policy is certainly not an automatic justification for segregation, considering the impact of school segregation on neighborhood segregation and other factors. *Swann* v. *Board of Education*, 402 U.S. 1 (1971).

School board decisions constantly define the neighborhood served by any school. The range of opportunities for control by various mechanisms has been demonstrated on this record and described in the Statement, *supra* at pp. 18, *et seq.* With such a broad range of controls and the readily availability of *post facto* explanations for segregation, a rule which focuses the test of constitutionally actionable

segregation on proving that conduct is a sham to hide illicit motives, will not go far to remedy the evil of covert school segregation. Such an approach fails to recognize that "patterns of racial discrimination are entrenched throughout this country," that "all school segregation is largely traceable to such racial discrimination," and that "dominant white majorities everywhere are hostile to association with blacks, especially in schools and residential neighborhoods." Dimond, *School Segregation in the North: There Is But One Constitution*, 7 Harvard Civil Rights-Civil Liberties Law Review 1, 4-5 (1972). The record in this case discloses that no compelling state interest was present to justify the pervasive pattern of segregation in Denver. There certainly was no showing of any justification for the complained of acts at Manual High School and Cole Junior High—the pivotal black schools in the core city area—and the district court found none. A conclusion that segregation was also actionable at Manual and Cole[91] ought inevitably to lead to system-wide relief because these important schools have a history of a feeder relationship with the all-black elementary schools in the core city area. Beyond these particulars the proof of a prima facie case of covert discrimination should place on the school board the same burden *Swann* places on a board which asserts it has dismantled a dual system. The board should bear the burden of justifying racially disproportionate schools. Denver school officials have the means

[91] It is of course true that segregation at Cole was found actionable by the district court because of the recission of the 1969 resolutions. The court of appeals affirms relief aimed at desegregating Cole even though it is not clear what its theory is since its opinion states the court does not reach the issue of whether the recission was unconstitutional. 445 F.2d 999, 1002. This points up the inconsistent results which are inevitable under a piecemeal approach to a system-wide problem. Also, finding segregation actionable at Cole and lawful at Manual produces an incongruous and anomalous result which ignores the historic relationship of these two schools.

readily available to desegregate every school in the system. This can be accomplished by the same type of control of the racial composition of schools which has brought about the present segregated system. The board made no showing to justify maintaining the segregated system created in Denver by racially discriminatory actions of public officials.

II.

Denver's Systematic Disparate and Discriminatory Educational Treatment of Minorities Violates Equal Protection and Entitles Petitioners to System-Wide Relief.

The record in this case discloses a continuous disregard of the known result of respondents' education policy and practices—the unequal provision of educational opportunity to Denver's minority children.

In Part II-A-1 of this Brief we submit that the evidence and the findings of the respondents' system-wide and continuously disparate treatment of minorities in the effectuation of educational policies and practices, resulting in what amounts to a segregated and unequal educational caste system for Negroes and Hispanos violates the Equal Protection Clause.

In Part II-A-2 of this Brief we assert that the trial court's conclusion of equal protection violation was clearly correct under the law. In reversing, we respectfully urge that the Tenth Circuit misconstrued the basis of the trial court's conclusions, and more importantly, erred in its perceptions of the standards of equal protection appropriate to this case. The result of these errors, we maintain, is to wrongly deny the equal protection of the laws to Denver's black and Hispano school children by condoning, in the name of "neighborhood schools" the continuous, unequal provision of public education to them.

In Part II-B of this Brief, we support the trial court's remedial aproach to these educational disparities as being well within the bounds of proper judicial discretion and equitably appropriate to eliminate the violation prospectively while attempting to cure the injury already inflicted.

In Part II-C of this Brief we contend that while the trial court's remedy was proper, it was improperly withheld from certain other predominantly minority schools equally afflicted with inequality, and urge that relief be extended to these schools.

A. Denver's Disparate, Unequal Treatment of Minorities in the Provision of Public Education Violates Equal Protection.

1. *The Evidence and Findings Below Demonstrate That in Denver Minority Children Were Consciously Treated Differently and Discriminatorily by Respondents' Policies and Practices When Compared to Anglo Children.*

The record is replete with a panoply of actions and decisions of the District wherein racial considerations resulted in the disparate educational treatment of minority children. To summarize:

The following educationally-relevant matters were wholly within the control of respondents:

(1) The initial assignment of minority teachers.—The minority schools always ended up with concentrations of minority teachers; in the face of announced contrary policy from 1964 on concentration in some minority schools actually increased.[11] Thus the assignment of Negro teachers to Anglo schools was treated differently than their assignment to Negro schools or the assignment of Anglo teachers to any

[11] See pp. 11-12; 19-20, *supra*.

school. The accelerated dispersal of minority teachers to Anglo schools coincided with the bringing of this lawsuit.[93]

(2) The initial assignment of teachers.—The administration was aware of the level of teacher inexperience in the minority schools; it purported to hire only teachers ready and willing to serve in the core city schools; of the teachers new to the Denver system, they asserted that a high proportion came with experience from other systems.[94] But respondents failed to show, although they had recourse to records which could have demonstrated, if true, that these teachers with prior experience were assigned to the minority schools.

(3) The transfer of teachers between schools.—While the administration had the power to initiate, approve or disapprove requests for transfer on the grounds that they were not in the best interests of the District, they never exercised this power to improve the quality of faculty in the minority schools.[96]

(4) Teacher turnover.—In 1966 the District abandoned the only policy then in existence which helped alleviate turnover in the minority schools—the policy that new teachers were expected to serve their 3-year probationary period in the school to which they were initially assigned.[96] The administration also abstained from any effort directed toward encouraging teachers to stay in the minority schools.[97] It was content to let nature take its course.

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[93] DX-DA, A. 2143a.
[94] Johnson, A. 331a-34a, 337a-38a. DX-DB, A. 2144a.
[95] PX 26; DX-E; Johnson, A. 322a-23a.
[96] PX 26; DX-E; Johnson, A. 320a-21a.
[97] Johnson, A. 320a-21a.

(5) Achievement expectancies.—The administration established low expectancies for the minority children at these schools and then both concealed and praised the expected poor results of this prophecy, while it established high expectancies for Anglo schools.[98]

(6) Performance and course content standards.—The administration at least condoned if not encouraged lower standards of performance and course content in the minority schools.[99]

(7) Career expectancy.—The administration acted upon and enforced an expectancy that minority children would not be going on to higher education, thus directing them into semi-skilled vocational education and out of college preparatory courses.[100]

(8) Location of schools, boundary changes.—While in selecting the site of schools exclusively for Anglos, the administration and the board were guided only by educational considerations, where race was a factor educational considerations were subordinated to political pressures and majority will. Similarly, boundary changes were influenced by racial and political considerations rather than the consistent application of such neutral criteria as building capacity, distance, availability of transportation, growth projections, etc. When faced with choices between integration and segregation, the board, knowing in advance what the result would be, "searched" for the consensus and then followed

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[98] See pp. 49-53, *supra*.

[99] See PX 356, A. 2086a; Oberholtzer, A. 1406a-07a.

[100] PX 356, A. 2086a.

it.[101] That public hearings were not intended to develop operative facts is demonstrated by Mr. Traylor's testimony about the board's intransigence about the facts of the administration's Manual and Cole boundary change proposals in 1956.[102]

(9) Transportation of students and deployment of mobile units.—When Anglos were brought into the District by annexation, the District did not take the nearest existing school and add mobile units to it to accommodate these children, but rather, transported them clear across town to other Anglo schools with available space, often directly past minority schools with available space. However, where minority enrollment increased within the attendance area of an existing minority school, these minority children were not accommodated by being transported to these Anglo schools where space was available, but rather, were consistently confined in mobile units at the nearest existing minority school.[103] When new Anglo schools were opened creating spaces in the former Anglo receiving schools, minority students were kept in these mobile units rather than being transported to the Anglo receiving schools—all of these events occurred after February, 1966[104] when the board officially endorsed transportation to relieve overcrowding.[105]

(10) Transporting students.—When Anglos were transported to receiving schools, either to relieve over-

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[101] 313 F. Supp. at 73. See pp. 16; 31-32, *supra;* Mrs. Johnson, A. 928a-29a; A. 932a-33a.

[102] See pp. 29-31, *supra.*

[103] See pp. 24-27, *supra.*

[104] Johnson, A. 361a; PX 29; Johnson, A. 362a-66a.

[105] Bardwell, A. 770a-71a, A. 773a-75a; PX 390-B.

crowding or to furnish new students with a school, each receiving school was filled to rated capacity or more before the next was utilized. In the few instances when minority students were transported they were brought into each Anglo receiving school in very small numbers, completely unrelated and disproportionate to the number of openings at the Anglo school.[106]

(11) The "Neighborhood School Policy."—Before the minorities began their expansion out of the core city there were so many attendance options available to students through optional zones and permissive transfer policies as to cast doubt as to whether there was a policy of "neighborhood schools." Optional zones were not considered by the administration as controlling devices for capacity utilization, but rather, as a politic acquiescence in parental choice.[107] Yet these zones persisted, particularly in transition areas such as between Cole and Smiley, Manual and East, until finally publicly denounced by the Voorhees Report. But they were immediately replaced in 1964 by LOE which accommodated white flight just as expeditiously.[108] When VOE was finally implemented in January, 1969, LOE was not cancelled; students enrolled in the LOE program were allowed to continue, and some are still continuing today.[109]

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[106] Bardwell, A. 769a-76a; PX 390, 390-A, 390-B.

[107] See pp. 31-32, *supra;* A. 1422a-23a.

[108] See pp. 32-33, *supra.*

[109] Thus a hypothetical Anglo child living in the Smith Elementary district in 1968 could have transferred to all-white Fallis and gone into and remained in that predominately Anglo system of feeder schools, Fallis, Place Junior High and George Washington High.

(12) School capacity.—The administration applied different capacity criteria, depending upon whether the school was predominately Anglo or predominately minority. Under this policy, Anglo schools were not considered overcapacity until their enrollments exceeded 120% of rated capacity, whereas minority schools were considered fully utilized when at less than 80% capacity.[110] It was this double standard which the administration used to justify busing Anglos past minority schools which were under their rated capacity.[111] The double standard also was employed in the administration's rejection of using available space in minority schools to relieve adjacent overcrowded Anglo schools.[112] The capstone of its employment was the building of Anglo schools in new areas while ignoring space in existing minority schools, thus further entrenching segregation in both schools and neighborhoods.[113]

(13) "Long range" and "short range" planning.—The administration inconsistently applied planning criteria when race was a consideration. The respondents' defense of their decisions regarding the 1956 boundary changes at Cole and Manual are entirely inconsistent with the criteria they employed to justify the size and attendance boundaries of Barrett.

Mrs. Lois Johnson[114] stated that in 1955 adminis-

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[110] Oberholtzer, A. 1409a-10a; see pp. 24-26, *supra*.

[111] PX 390, 390-A, 390-B; Bardwell, A. 765a; Armstrong, A. 1263a-70a.

[112] See pp. 26-27, *supra*.

[113] PX 273, 346, 347; Bardwell, A. 757a-65a.

[114] It may be recalled that Mrs. Johnson served on the board from 1951 through 1963; in 1962 and 1963 she was the President of the Board. A. 896a.

tration projections were that Manual and Cole, both then substantially under capacity, would not reach their capacity until 1960. In contrast, the projections showed that both East and Smiley, then already at capacity, would be at nearly 170% of capacity by 1960. According to Mrs. Johnson the District was strapped for funds and "[W]e were in a very difficult situation to have enough classrooms for all the incoming children." A. 900a. Nevertheless, in refusing to move the Cole and Manual boundaries to accommodate the expected overcrowding at Smiley and East the board consciously refused to utilize the space available at Cole and Manual, *rejecting* the alternative as being too short term.

Yet, when Barrett was being considered the population was also growing just east, across Colorado Boulevard. Rather than reflect the long-term projections by making Barrett large enough to accommodate the increase, the board here *embraced* a short-term solution,[115] consciously building for only the immediate needs of the small Barrett "neighborhood," and refusing to accommodate Anglos overcrowded in adjacent Stedman.

In these two instances, both occurring in a span of but two years, the board was willing to use totally inconsistent criteria. Only the *result* is consistent: the avoidance of sending Anglo children to Negro schools. As Mrs. Johnson put it: "We were not building with integration as our idea, of course." A. 937a.

(14) Adherence to "Neighborhood Schools."—The respondents maintain that throughout the twenty-two year period preceding this suit, they were simply

[115] Mrs. Johnson, A. 912a.

administering a neutral "color blind" policy of neighborhood schools. We will ignore arguendo the doubt which the combination of the thirteen factors discussed above must cast on that contention.

Taking the assertion at face value, the school administration, with the political complicity of the board, has continued to insist upon neighborhood schools imposed upon segregated housing patterns, even though it was consciously aware of

—the racial results in the schools created by the policy;[116]

—the inferiority of these schools, whether measured by inputs or results;[117]

—the increase in the number of inferior schools and in the number of minority children exposed to and confined in them;[118]

—the failure of segregated compensatory programs to improve the schools.[119]

While acknowledging that historically public education in Denver and throughout the United States has taken (white) children from low socioeconomic areas, whose parents were disadvantaged and managed to provide them with an education, the respondents point to these same factors as imposing a nearly absolute barrier to the education of Negroes and Hispanos. It is clear that the school administration's perceptions of and attitudes toward Negroes and Hispanos is different than toward Anglos. This point was made perfectly in the following exchange between Mr. Ris and Dr. Dodson during cross-examination:

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[116] See pp. 47-50, *supra*.

[117] See pp. 40-44; 48-50, *supra*.

[118] Oberholtzer, A. 1393a-94a, A. 1402a-04a.

[119] See pp. 61-62, *supra*.

Q. Now, with regard to the handicap, a child coming from a family in a neighborhood and a lower socioeconomic status, you wouldn't deny that those children are handicapped as compared to me, would you, before they ever get into [2221] school? A. I would deny that the experience that they have brought with them, the experience through which they have come by the time they are of school age, has so impaired their sensory mechanisms that they do not have the capacity to acquire and organize, experience in ways comparable to what you or I might have done at a comparable stage of our lives. I would be planting corn in East Texas today if teachers had seen the low socioeconomic status kid and the limitations of him and his inability to learn because he didn't have all these things and had believed them.

Q. You aren't alone in the courtroom in that regard. . . . A. 1498a.

The district's control and implementation of the policies enumerated above always achieved some result which discriminated against Denver's minority students; the major results were that these children were assigned to and then confined in racially identifiable, isolated, inferior schools; educationally relevant matters such as teacher assignments, location of new schools and boundary changes were saddled with educationally irrelevant considerations such as the will of the majority community and its racial prejudices; the perception of the minority student as somehow different, and the establishment of lower standards and expectations for him created an educational caste system.

Even standing alone this discriminatory, conscious difference in respondent's policies, practices, attitudes and perceptions relating to the education of minority children

for over twenty years constitutes a clear denial of equal protection based upon race and ethnicity, for it is exactly the type of invidious, disadvantaging discrimination at which the Fourteenth Amendment was directed. This distinctive and disparate racial treatment would violate equal protection even if the minorities were somehow able to overcome these obstacles and obtain educational results equal to Anglos: the creation of obstacles in and of itself denies equal protection.

But where as here the evidence and the trial court's findings demonstrate that these obstacles in fact adversely affect the quality of education of minority children as measured by the educational result—low achievement and high dropout rates—the denial of equal protection is manifest.

Not only did the racially-disparate treatment of the matters enumerated above create obstacles for minority students which were not imposed upon Anglos seeking effective education, but these obstacles actually resulted in the denial of an equal educational opportunity by the creation and perpetuation of inferior schools for Negroes and Hispanos.

At the trial the inferiority of these schools was established by every conceivable means, some of which have already been alluded to above: traditional tangible educational inputs such as teacher experience and stability of teaching staff; administration-established expectancies as to the level of achievement and administration acceptance and condonation of the resulting low achievement; the age of school facilities.[130]

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[130] Evidence of the inequality of a less traditional input, a socio-economically heterogeneous peer group in the school, was also considered and found to be inferior in these schools.

The inferiority extended to such intangible factors as the attitudes of the entire community, as well as of the minority community and the teachers and students in the schools, attitudes created by the segregated, racially identifiable character of the schools. The school's racial isolation also created feelings of low self esteem, political impotence, isolation and inferiority, both in the minority children and their parents.

Finally, the inferiority was reflected in the ultimate educational product of the Denver Public Schools, the minorities' drastically low level of academic achievement and cruelly high level of dropouts.

The expert testimony concluded that the above factors demonstrated that these schools were affording an unequal educational opportunity to minority children, and that the primary reason for the inequality was the segregated, racially-isolated and racially identifiable condition of the school.[121] It was the segregated condition of the school which made it a place of "less choice" for parents, students and teachers, and "a symbol" of inferiority and impotency for the minority community. It was looked upon by the whole community as being inferior, and "this makes it indeed so." [122]

Thus, petitioners' evidence of *violation* of the Equal Protection Clause was directed toward the factual establishment of three matters:

(1) The fact that an inequality existed between the educational opportunities[123] offered to Denver's mi-

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[121] See pp. 33-37, *supra*.

[122] Dodson, A. 1478a.

[123] Petitioners have never claimed nor did the district court's decision in any way rest upon some notion that educational opportunity was solely related to, or demonstrated by, an equivalent performance by every student. Obviously students will have, on an

nority students when contrasted with that offered to majority students;

(2) The fact that the respondents' actions were the responsible cause of the inequality;

(3) The fact that less discriminatory means were reasonably available to respondents in their provision of educational opportunity, a matter not really contested by respondents, whose position was that since their current system was *not* discriminatory, they should not be required to change it.

The trial court's findings of fact sustained the petitioners' contentions on both of these contested issues.[114]

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individual basis, different aptitudes and will perform, ideally, to the full extent of their varying capabilities. What is significant about the tangible measure of output here, such as achievement test scores, is two things. *First*, they establish a consistent and systematic differential between white schools and minority schools of such magnitude as to vitiate any suggestions that the observed pattern is merely the result of the interplay of different individual capacities. *Cf. Stell* v. *Savannah-Chatham Board of Education*, 318 F.2d 425 (5th Cir. 1963), 333 F.2d 55 (5th Cir. 1964). *Second*, they confirm the testimony of petitioners' expert witnesses that such segregated schools characteristically produce educationally undesirable effects upon the children and the teachers and can be expected to adversely affect the educational opportunity afforded the students.

[114] As to the fact of inequality:

OBJECTIVE FACTORS:

"Extensive and detailed evidence has been presented establishing the inferiority of plaintiffs' target schools." 313 F. Supp. at 77.

"The above material summarizes plaintiffs' evidence and our findings as to the objective indicia of inequality at the schools for which they seek relief." 313 F. Supp. at 81.

SUBJECTIVE FACTORS:

". . . [B]y the time a school becomes segregated it is looked upon by the whole community as being inferior.

"At this point the Negro community does not consider the segregated school as a legitimate institution for social and economic advancement. Since the students do not feel that the

2. *The Trial Court's Determination of Violation Resulted From the Proper Application of Equal Protection Principles.*

In its determination of violation the trial court applied traditional equal protection analysis. It recognized, as did *Brown*,[135] that education is a fundamental interest, the deprivation or impingement of which must be closely scrutinized. Further the trial court reasoned that where

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school is an effective aid in achieving their goal—acceptance and integration into the mainstream of American life—they are not motivated to learn. Furthermore, since the parents of these Negro students have similar feelings with respect to the segregated school, they do not attempt to motivate their children to learn. Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore, teachers expect low achievement from students at segregated schools, and thus do little to stimulate higher performance." 313 F. Supp. at 81.

Finally:

"The evidence in the case at bar establishes, and we do find and conclude, that an equal educational opportunity is not being provided at the subject segregated schools within the district. . . . The evidence establishes this beyond doubt." 313 F. Supp. at 83.

As to the cause of the inequality:

". . . [W]e cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity." 313 F. Supp. at 81.

As to the respondents' responsibility:

"Many factors contribute to the inferior status of these schools, but the predominate one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns." 313 F. Supp. at 83.

[135] "We must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

"In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. 492, 493.

the impact of the deprivation fell upon the poor, and ethnic and racial minorities, a suspect classification was involved which also had traditionally triggered close judicial review and required strong justification by the State for its actions.[126]

The only justifications put forth by the respondents was their good faith (which the trial court held irrelevant in the face of the proven discriminatory result),[127] the convenience and tradition[128] of the neighborhood school policy and the majority community's preference for the continuation of that policy.[129]

The trial court apparently found in these proffered justifications no compelling state interest sufficient to excuse or justify the discriminatory result, and concluded that the petitioners were being denied equal protection of the laws in violation of the Fourteenth Amendment. 313 F. Supp. at 83.

We submit that the trial court was correct in concluding that this systematic deprivation of the minority's right to equality of educational opportunity violated the Equal Protection Clause.

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[126] Citing *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D. D.C. 1967).

[127] 313 F. Supp. at 82, n. 25.

[128] In view of the numerous optional attendance zones surrounding Denver's schools until 1964, and the absence of requirements for student transfers which existed for many years (Biddick, A. 697a-99a), one could question whether there was a tradition of "neighborhood schools."

[129] A preference which persisted despite the findings of the two study committees that its continuation might result in the inequality of educational opportunity for the District's minority children. PX 20, A. 1999a-2004a; PX 21, p. 36.

The whole basis of the Fourteenth Amendment historically was to prevent the systematic disadvantaging of minorities. Thus the first Fourteenth Amendment cases to reach this Court held all racial classifications unconstitutional: *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).[139]

While the separate-but-equal doctrine diluted the main thrust of equal protection, it was premised upon failure to find inequality in the fact of separateness.

Subsequent decisions here relating to separate-but-equal education began an independent analysis to determine if there was inequality. *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950).

This inquiry culminated in *Brown*, which found that racial classifications in public education inherently produced unequal educational opportunity.

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[139] *Strauder* v. *West Virginia*, considered a Negro's plea of denial of equal protection. Strauder had been convicted of murder by a state court jury in West Virginia. West Virginia law disqualified Negroes from service on either grand or petit juries. This Court declared that the Fourteenth Amendment should be "construed liberally to carry out the purpose of its framers." 100 U.S. at 307. The court continued:

> "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." 100 U.S. at 307-08.

More recently, the Court has sharpened its perception of illegal discrimination under the Equal Protection Clause in ways clearly applicable to the facts of this case.

It can be argued that the neighborhood school policy is neutral and nondiscriminatory because it is applicable to Anglos and minorities alike. But this line of contention has been rejected in various contexts where racial classifications were defended as non-discriminatory because they applied to both blacks and whites. *Cf. McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

As demonstrated above, when race was a factor the respondents consistently acted differently than when race was not an issue. This disparate racial treatment in itself required the showing of a compelling, nonracial reason for its discriminatory, segregatory result.

It is also clear from the evidence described above that this disparate treatment in the administration of an apparently neutral policy resulted in the systematic imposition of burdens upon Negroes and Hispanos but not upon Anglos. Thus it was the Negroes and Hispanos who were required to attend these unequal schools. "Class legislation, discriminating against some, and favoring others is prohibited . . ." *Yick Wo* v. *Hopkins*, 118 U.S. 356 at 368 (1886), quoting *Barbier* v. *Connolly*, 113 U.S. 27 (1885).

Even before *Brown* this provision of an unequal opportunity for public education to minorities would violate the Fourteenth Amendment under *Plessy*.[131] As noted in *Brown*,

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[131] *Sweatt* v. *Painter; McLaurin* v. *Oklahoma State Regents, supra.* Tangible inequalities in the provision of lower public education were consistently struck down. *Corbin* v. *County School*

> Such an opportunity [for education] where the state has undertaken to provide it, is a right which must be made available to all on equal terms. 347 U.S. 493.

Thus the Equal Protection Clause is violated simply by the District's actions which systematically made it more difficult for minority children to receive an education where such difficulties were not imposed upon Anglo children. This result would obtain even if the minority student somehow managed to overcome the burdens. As noted in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), where the state action "places special burdens on racial minorities . . . ," it is "no more permissible than denying them the vote, on an equal basis with others. . . ." 393 U.S. at 391-92. In *Hunter*, the Court in determining whether there was a racial classification looked behind the apparently equal application of the law to everyone and found the "reality" to be "that the law's impact falls on the minority." 393 U.S. at 391.

Hunter is another of a line of equal protection cases where the Court has struck down state action which merely impinged upon a right without requiring a showing that the right was actually denied. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Dunn* v. *Blumstein*, —— U.S. ——, 40 U.S.L.W. 4269 (Mar. 21, 1972); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966).

It of course follows where as here the board's actions had an actual adverse impact upon the educational result for minority children unable to overcome the obstacles and burdens which were created by the board, there has been a clear denial of equal protection. This is the teaching of an unbroken line of decisions invalidating actions which

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Board, 177 F.2d 924 (4th Cir. 1949); *Carter* v. *School Board of Arlington County, Virginia*, 182 F.2d 531 (4th Cir. 1950).

denied equal rights to minorities in the use of public facilities, in voting, jury selection, and numerous other areas.[122]

Similarly, where the action denied or impinged upon a fundamental interest such as procreation and marriage,[123] voting,[124] or access to the criminal appellate procedure,[125] even where there was no racial classification involved this Court has required the State to come forward with compelling reasons for its denial of the right. *Harper* v. *Virginia State Board of Education*, 383 U.S. 663, 670 (1966):

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which *might* invade or restrain them must be closely scrutinized and carefully confined. . . . (Emphasis added.)

It seems apparent that the right to an equal opportunity for public education is such a fundamental interest.

The trial court was correct in concluding that the respondents' systematic denial to Negroes and Hispanos of the fundamental right to an equal opportunity for public education, a denial unjustified by the absence of less discriminatory alternatives and unexcused by the presence of a compelling state interest violated the Equal Protection Clause of the Fourteenth Amendment.

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[122] *Muir* v. *Louisville Park Theatrical Association*, 347 U.S. 971 (1954); *Mayor and City Council* v. *Dawson*, 350 U.S. 877 (1955); *Gayle* v. *Browder*, 353 U.S. 903 (1956); *Johnson* v. *Virginia*, 373 U.S. 903 (1963); *Lee* v. *Washington*, 390 U.S. 333 (1968) *(per curiam)*; *Norris* v. *Alabama*, 332 U.S. 463 (1946); *Turner* v. *Fouche*, 396 U.S. 346 (1970).

[123] *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

[124] *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Kramer* v. *Union Free School District*, 395 U.S. 699 (1969).

[125] *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).

The Court of Appeals in reversing held that "racially imbalanced schools . . . established and maintained on racially-neutral criteria . . ." did not deny equal protection. 445 F.2d at 10005. It reached this result[126] while apparently accepting the premise that unequal educational opportunity would violate equal protection, "provided the state has acted to cause the harm. . . ." 445 F.2d 1004.

The opinion reveals no open disagreement with the trial court's findings of fact that an unequal educational opportunity was being provided to minority children. As to the cause of the inequality some disagreement is apparent, but it is not supported by any appellate determination of clear error, but rather conveniently ignored or mischaracterized as a legal conclusion based upon a *per se* concept of inherent inequality stemming from any kind of segregation.[127] Overall, however, while there is no clear reversal of findings there is reflected in this section of the opinion the same piecemeal, fragmenting approach to the record which we have commented upon elsewhere in this Brief.[128]

We summarize the appellate court's treatment of the facts in the footnote below.[129] The court of appeals treat-

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[126] We are unable to state with confidence exactly how this result obtained, but we will nevertheless attempt to demonstrate that regardless of the process employed by the appellate court, the result is unsupportable.

[127] See p. 113, *infra*.

[128] See pp. 73-79; 91, n. 9, *supra*, 115-116, *infra*.

[129] The court agreed that the evidence sustained the finding of comparatively low teacher experience in the minority schools, but gave it no legal effect, 445 F.2d at 1004. High teacher turnover and its relationship to the district's transfer policy was not discussed by the appellate court. It agreed with the findings of low academic achievement and high dropout rates, but apparently interpreted these as being "indicative of a flaw in the system" rather than evidence of unequal opportunity. 445 F.2d at 1004. Smaller sites and older buildings were not discussed. As far as the intangible factors in the segregated school, the court stated that it could not dispute

ment tended to mix the separate issues of the fact of inequality and its cause, treating them as one issue.[140]

As to the issue of the causation of the inequality the appellate court rejected the trial court's finding that it was the segregated condition of these schools which was a major and predominant factor in producing inferior schools and unequal educational opportunity.

Either of the two possible explanations for this result indicate its error.

The first explanation is that the appellate court rejected the trial court's findings of fact as to causation and substituted its own judgment as to causation.[141] The trial court's findings were supported by substantial evidence and

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"the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation in fact may create an inferior educational atmosphere." 445 F.2d 1004. Nevertheless the court gave no weight to the fact of this inferior educational atmosphere. 445 F.2d at 1004-05.

[140] See 445 F.2d at 1004-05.

[141] The appellate court stated:

> "Thus it is not the proffered objective indicia of inferiority which *causes* the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs." 445 F.2d 1004. (emphasis ours).

Of course, as the trial court properly understood, the "objective indicia of inferiority" were not presented to nor used by the trial court as evidence of causation, but rather as evidence that these schools were in fact inferior. Some of these indicia did contribute to the inferiority but they were not asserted as being its principal cause. As the trial court summed it up:

> The above material summarizes plaintiffs' *evidence* and our findings as to the objective indicia *of inequality at the schools* for which they seek relief. Although plaintiffs claim that factors such as inexperienced faculty tend to contribute to the inferior educational opportunity provided at these schools, their main argument is that the segregation which exists at many of these schools makes a *major contribution to their inferiority*." 313 F. Supp. at 81. (Emphasis added.)

their rejection violated the "clearly erroneous" rule of appellate review prescribed in Rule 52 of the Federal Rules of Civil Procedure.

The second explanation is that the appellate court either misunderstood or mischaracterized the trial judges factual finding of causation as though it were a legal conclusion. Thus the appellate court apparently believed that Judge Doyle had held that as a matter of law all segregated schools were inferior, regardless of how they became segregated.

The trial court specifically rejected this *per se* approach:

> "... [P]laintiffs are not entitled to relief merely upon proof that de facto segregation exists at certain schools within the School District." 313 F. Supp at 77.

It is therefore apparent that the Tenth Circuit's perception of the basis of the trial court's findings as to causation was erroneous. The trial court did not invoke a *per se* rule; indeed it expressly recognized that the Tenth Circuit's prior decisions in *Downs*[142] and *Dowell*[143] prevented such an approach. 313 F. Supp. at 76-77. Rather it seems clear that Judge Doyle's findings of inequality and causation were based entirely upon the evidentiary record before him.

Regardless of the correctness of these contentions as to the appellate court's treatment of causation, the decision reflects two pervasive errors for which the reinstatement of the trial court's decree is the only appropriate solution.

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[142] *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

[143] *Board of Education* v. *Dowell*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 913 (1967).

The first prevasive error is the appellate court's narrow perception of the application of the Equal Protection Clause to public education. The gravamen of the appellate court's result is that the Fourteenth Amendment is limited to the peculiar facts of *Brown*, and a misreading of *Brown* as requiring an intent to provide unequal opportunity to minorities.

The rationale of *Brown* is not based upon any concept or finding that in creating dual school systems the states' intended purpose was to disadvantage Negroes. Rather, *Brown's* finding is that the states intended to accomplish segregation and must therefore be held responsible for inequalities caused by the segregation. Similarly in the instant case there is no requirement that petitioners demonstrate that the respondents' purpose or motive was to disadvantage minorities but merely that the effect or result of their intended actions was discriminatory as to Negroes and Hispanos.

The denial of equal protection condemned by the Fourteenth Amendment requires only that the discrimination be the result of intended state action. Of course, where odious intent is shown as where it is clear that the only purpose was to discriminate, equal protection is also denied. But it is clearly error to reason that all violations must therefore be intentional in that sense. Rather, as shown by the authorities discussed above[144] the central theme of equal protection is that where state action results in a racial discrimination, the Fourteenth Amendment is violated unless the state can show a compelling nonracial reason for continuance of the discrimination. This proposition was well stated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 706 (1961):

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[144] *Supra*, pp. 105-110.

> But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them *whatever the motive may be.* It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. *Id.* at 725 (emphasis added).

The appellate court's restrictive interpretation of equal protection was clearly wrong, and at the heart of the appellate court's reversal.

The second pervasive error arises from the appellate court's complete disregard of the multiplicity of decisions and policies by the board and the school administration which created, contributed to, condoned and continued the educational disadvantagement of Negroes and Hispanos. These practices and policies, and their discriminatory effect have been recounted elsewhere in this Brief and will not be again repeated here. In failing to give effect to the entirety of the District's actions, but rather taking a piecemeal view of the record, the appellate court arrives at the rather startling conclusion that the inequality is completely divorced from any state action:

> As stated in the first instance then the trial court's findings stand or fall on the power of federal courts to resolve educational difficulties *arising from circumstances outside the ambit of state action.* 445 F.2d at 1004 (emphasis added).

Finally, the appellate court also failed to give any weight to at least two factors each of which this Court has determined to constitute denials of equal protection. As to intangible factors contributing to inequality, the court not only ignored *Brown*, but *Sweatt* and *McLaurin* as well, all decisions finding denial of equal protection in the pres-

ence of intangible factors which disadvantaged the minority's right to equal educational opportunity.

Secondly, the board's unequal provision to minorities of such an important educational input as the quality, experience and stability of teachers clearly violates every concept of equal protection from *Plessy* to *Swann*.[145]

We submit that it must be apparent from an overview of the numerous ways which the board and administration controlled school location, size and boundaries, pupil assignment and educational inputs that the respondents were responsible for the inequality of educational opportunity and the inferiority of the minority schools which resulted from their policies. We have contended elsewhere in this Brief that many of these acts and policies were demonstrative of segregatory intent. But regardless of that contention, that these policies led to inequality and inferiority satisfies in full the state action requirement of the Fourteenth Amendment. The appellate court's inability to locate state action was a substantial, if not sole, basis for its conclusion that there was no denial of equal protection. We submit that the appellate court erred.

B. The Remedy Formulated by the District Court for the Provision of Equal Educational Opportunity Was Fully Supported by the Record and Within the Bounds of Proper Judicial Discretion.

The breadth and flexibility inherent in equitable remedies was well stated in *Hecht Co.* v. *Bowles*:[146]

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flex-

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[145] See 402 U.S. at 18-19.

[146] 321 U.S. 321 (1944).

> ibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconcilation between the public interest and private needs as well as between competing private claims. 321 U.S. at 329-30.

In school cases arising under the Equal Protection Clause the principles of *Hecht* have often been endorsed by this Court, from *Brown II*[147] to *Swann*.[148] As noted in *Brown II*, in the exercise of this equitable power the district courts might have to eliminate "a variety of obstacles . . . in a systematic and effective manner." 349 U.S. at 300.

Brown had found that racial segregation inherently caused unequal educational opportunity for Negroes, and remedial efforts under *Brown* have been directed toward eliminating all vestiges of the dual system "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 438 (1968).

In the instant case the remedial objective was perceived to be somewhat different than under *Brown* and its progeny. The violation found was not cast in terms of racial segregation but rather as the State's unequal provision of public education to Denver's minority children. Thus the remedial objective went beyond the elimination of segregation and included the equalizing of minorities' educational opportunities.

Certainly the principles established since *Brown* are relevant to this case, for here too the racial identity of schools was found to be an important contributing factor to the inequality.

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[147] *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955).

[148] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).

These principles include:

1. The remedy must promise "realistically to work." [149]

2. The remedy must be thorough in its elimination of the violation and in guarding against its reoccurrence; it must be eliminated "root and branch." [150]

3. The remedy must treat all vestiges of the violation; pupil assignment, faculty and staff assignment, transportation, extracurricular activities, or any other factor contributing to the racial identity of the school; Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, "a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann, supra,* 402 U.S. at 18.

   Tangible inequalities and different treatment on the basis of race must be eliminated. *Ibid.*

4. "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation . . ." *Swann, supra,* 402 U.S. at 26.

5. "It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress. . . . It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. . . . Of course the availability to the board

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[149] *Green* v. *County School Board,* 391 U.S. at 439.

[150] *Id.* at 438.

of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preferences for an apparently less effective method." *Green supra*, 391 U.S. at 439.

6. The constitutional principles of equality "cannot be allowed to yield simply because of disagreement with them," [151] nor are the minority's constitutional rights "to be sacrificed or yielded to . . . violence and disorder . . . ," [152] nor can they be nullified "ingeniously or ingenuously." [153]

Just as the foregoing principles apply to the objective of the elimination of segregation, they are equally applicable to the objective of equalizing educational opportunity.

The trial court properly applied these principles in formulating a varied remedy. The board's proposals were limited to segregated compensatory education programs and the Denver version of freedom of choice.

Judge Doyle properly rejected compensatory education in a segregated setting where the record demonstrated the ineffectiveness of such programs.

In accepting compensatory education in an integrated setting the trial court selected a feasible, "more promising" program.

In rejecting the board's freedom of choice program as the exclusive means for ending the racial identity of

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[151] *Brown II, supra*, 349 U.S. at 300.

[152] *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958).

[153] *Id.* at 17.

schools, the trial court's judgment as to the inadequacy of this approach was indirectly endorsed on appeal. The appellate court stated:

> . . . [A] realistic appraisal of voluntary transfer plans has shown that they simply do not fulfill the constitutional mandate of dismantling segregated schools. In fact the voluntary transfer plans previously employed in Denver have had a minimal effect on the segregated status of the Park Hill area schools. 445 F.2d at 1002.

In mandating desegregation and integration, Judge Doyle implemented several important principles. The first was to remove the racial identity of the inferior schools. The second principle was that of timing; the mandatory plan would accomplish the objective much faster than a voluntary plan. Thirdly, desegregation and integration removed some of the principal causes of tangible inequalities in terms of teacher experience, teacher turnover, teacher expectancies and adequate facilities, as demonstrated by the Berkeley experience described by Dr. Sullivan. Finally, the trial court was recognizing not only that integration by itself assisted in raising minority achievements, but further that it furnished the best possible environment for compensatory education. The board's proposals ignored all of these factors, and were properly rejected by the court.

Finally, that the proposal to leave these schools segregated would have majority community support would not excuse failure to select an effective plan for the provision of equal opportunity.

The foregoing facts demonstrate that the board has defaulted in its duty to come forward with a realistic, effective plan. The trial court properly exercised its responsibilities in going forward and devising a remedy which on

the basis of the record before it offered superior potential for success.[154]

The trial court selected a variety of components, including desegregation, programs directed toward improving understanding of minority culture and history, raising teacher expectancies, raising the level of teacher experience, transportation, magnet schools, voluntary transfer and community education. The remedy exemplifies the equitable principles of fairness, flexibility and the balancing of interests. The remedy was fully within the administrative and financial competence of the District.

C. The Remedy Should Have Been Extended to All of the District's Predominantly Minority, Inferior Schools.

While as demonstrated above the trial court's formulation of the remedial plan was proper, we urge here that Judge Doyle should have extended the remedy to certain other schools in the District.

Eight elementary and one junior high school are involved in this contention.[155] As of September, 1969, these schools contained nearly 4,000 minority students and 860 Anglos, distributed as follows:[156]

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[154] *Swann, supra,* at 16:

"In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system."

[155] Boulevard, Crofton, Ebert, Garden Place, Gilpin, Swansea, Wyatt and Wyman; Morey Junior High.

[156] DX S-1, A. 2166a.

Racial Composition of Subject Schools

	Anglo		*Negro*		*Hispano*	
	No.	*%*	*No.*	*%*	*No.*	*%*
Boulevard	118	29.9	2	0.5	269	68.1
Crofton	23	7.1	121	38.4	162	51.5
Ebert	35	10.6	115	34.6	174	52.4
Garden Place	138	17.0	140	17.2	525	64.7
Gilpin	22	3.2	252	36.4	411	59.4
Swansea	197	29.2	24	3.6	450	66.6
Wyatt	9	1.9	223	46.4	248	51.5
Wyman	103	27.5	142	38.0	111	29.7
Total	645		1,019		2,350	
Morey Jr. High	215	26.8	419	52.4	149	18.6
Total	860		1,438		2,499	

The eight elementary schools contain 12% of the Negro and 18% of the Hispano elementary population. Morey contains over 13% of the Negro junior high population.[157]

[157] These schools contain less than 2% of the Anglo population. DX S-1, A. 2166a.

All of the tangible inequalities found in the court-designated schools are present to the same degree in these nine schools. Indeed, some of them are even worse than the average of the schools selected for relief.[118] On the average in 1968 the two groups of schools were nearly identical in their inequality:

	New Teachers	*Probationary Teachers*	*Median Yrs. Teachers Experience*	*Achievement 5th Grade Percentile 1968*
Subject Schools	20%	42%	3.7 yrs.	20th
Court Schools	23%	48%	3.5 yrs.	21st
District Average	15.9%	37%	5.6 yrs.	43rd
Selected Anglo Schs.	9.8%	25.6%	9.1 yrs.	75th

The evidence showed that the same low expectancies were established for these schools.[119] The expert testimony

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[118] Comparison of the Subject Schools to the Average Court-Designated School*

	Teacher Data			*Median Achievement 1968, Percentile Grade 5*
School	*New Ct. Avg. (23%)*	*Probationary Ct. Avg. (48%)*	*Median Experience Ct. Avg. 3.5 Yrs.*	*Ct. Avg. 21st Percentile*
Boulevard	17%	50%	3.0	20
Crofton	21	43	4.0	18
Ebert	21	42	3.0	18
Garden Place	18	37	4.0	16
Gilpin	25	42	4.5	23
Swansea	18	36	3.5	22
Wyatt	14	27	6.0	15
Wyman	22	50	4.0	24
	Avg. 20	Avg. 42	Avg. 3.7	Avg. 20

* PX 509, 510; A. 2122a, A. 2124a.

[119] PX 83.

was that the homogeneous peer group effect[159] and the adverse psychological attitudes[161] were the same in predominantly minority schools as in schools which were either predominantly Negro or predominantly Hispano.

In short, there was no basis in the record for the trial court's distinction between schools which were either 70% Negro or 70% Hispano on the one hand, and those whose combined Negro and Hispano enrollment exceeded 70%. Yet the trial court found one group to be denying equal protection and declined to find a violation as to the subject schools. 313 F. Supp. at 69, 77.

Neither is there any legal basis for the distinction. It is clear that the protection of the Fourteenth Amendment is not limited to Negroes[163] and extends to Hispanos.[163]

While the violation here was unequal provision of opportunity rather than intentional segregation, it would make little rational sense to declare that a formerly separate tri-racial system of Anglos, Negroes and Hispanos could be "desegregated" by simply integrating the Negroes and Hispanos and leaving the Anglos in racially identifiable, all-white schools.[164]

The distinction leads to other irrational results. The effect of the distinction is that it is unconstitutional

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[159] Coleman, A. 1534a; O'Reilly, A. 1952a-54a. PX 83.

[161] Dodson, A. 1473a-76a, A. 1498a-99a; O'Reilly, A. 1952a-53a.

[163] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Korematsu* v. *United States*, 323 U.S. 214 (1944).

[163] *Hernandez* v. *Texas*, 349 U.S. 475 (1954); *Cisneros* v. *Corpus Christi Indep. School District*, 324 F. Supp. 599, 606 (S.D. Tex. 1970), appeal pending.

[164] In *Cisneros*, *supra*, n. 163, the federal district court determined that such "desegregation" did *not* meet the disestablishment requirements of *Brown*, and ordered integration of Anglos as well. 324 F. Supp. at 616, 628.

to discriminate against Negroes *or* Hispanos, but not against them together. It simply does not make sense to invalidate actions taken against Negroes or Hispanos separately while declaring the same actions legal if taken against them together.

The constitutional violation affected these nine subject schools; the remedy was equally appropriate for them. The trial court erred in failing to extend the remedy to these schools.

III.

Considered Together the Proven Racial Segregation and the Proven Inequality of Educational Opportunity in Denver Require a System-Wide Remedial Approach.

Considered separately, the constitutional violations discussed in parts I and II of the Argument, *supra*, would each support the relief sought by petitioners. Considered together they reinforce the need for a systematic remedy and a thorough remedy. Considered together they show the full magnitude of the constitutional deprivation imposed by the current system. The depth of the wrong inflicted on the victims of discrimination is more clearly seen when the practice of covert racial segregation is seen in connection with the operation of a caste-type separate and unequal educational system in the segregated schools. There can be no doubt that such a combination of wrongs inflicts serious injury and justifies extraordinary remedies.

CONCLUSION

Wherefore, petitioners respectfully submit that the judgment of the court of appeals should be reversed insofar as it reverses the judgment of the district court, and that the case should be remanded to the district court with directions that the court grant the prayers of the complaint requesting implementation of a comprehensive desegregation plan for the Denver school system.

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WILFRED KEYES, *et al.*,

Petitioners,

vs.

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND ANNEXED BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The undersigned, as counsel for the above-named organizations, respectfully move this Court for leave to file the accompanying brief *amici curiae*.

Interest of the *Amici*

The B'nai B'rith was founded in 1843 and established its Anti-Defamation League as its educational arm in 1913. The American Jewish Committee was founded in 1906 and the American Jewish Congress in 1918. All three of these organizations are concerned with preservation of the secu-

rity and constitutional rights of Jews in America through preservation of the rights of all Americans. They believe that the welfare of Jews in the United States is inseparably related to the extension of equal opportunity for all.

This case raises an important issue under the Equal Protection Clause of the Fourteenth Amendment, involving a form of discrimination recognized by this Court as abhorrent nearly eighteen years ago—segregation in public education. Here, the City of Denver, Colorado is maintaining what amounts to a segregated school system wherein minority students are being denied an equal educational opportunity.

The *amici* view the effect of the Denver school board's actions in administering its schools as having the same legal consequences as if separate schools were mandated by the board. Since these three organizations have consistently fought for equal opportunities for all, regardless of race, color, creed or national origin, and have opposed racial segregation in schools, they are deeply concerned about the impact of the decision in this case on future efforts to correct segregation in public schools.

The accompanying brief *amici curiae* is based on extensive concern and experience of the three organizations in matters involving discrimination against minorities. We argue that the harmful effects of segregation operate whether or not it is imposed by the state. In this connection, we show that this Court's conclusion in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) that segregated schools are inherently unequal rested on studies most of which apply equally to *de facto* and *de jure* segregation.

We argue further that measures designed to correct past illegal discrimination cannot be confined to the narrow area directly affected by the discrimination but must be broad enough to insure elimination of the effects of discrimination from all of the operations conducted by the discriminator.

We have sought the consent of the parties to the filing of a brief *amici curiae*. Counsel for petitioners have consented. Counsel for respondents have informed us that the Denver school board had directed counsel to consent to requests to file *amicus* briefs only "upon written assurance that the person or organization requesting the consent will file a brief supporting the position of the school district."

May 1, 1972

Respectfully submitted,

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SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE*

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

Interest of the *Amici*

The interest of the *amici* is set forth in the attached motion for leave to file.

Opinions Below

The opinions of the District Court are reported at 303 F. Supp. 279 and 313 F. Supp. 61. The opinion of the Court of Appeals is reported at 445 F.2d 990.

Statement of the Case

This case arises out of a school desegregation action brought by Denver school children and their parents in Federal District Court against the school board of School District No. 1, Denver, in 1969. Their complaint sought complete desegregation of the Denver public school system and provision of equal educational opportunities to all Denver school children.

The litigation was initiated after a newly elected school board rescinded a partial desegregation plan prepared by the outgoing board. That plan sought to alleviate high concentrations of Negro and Spanish-surnamed students in some schools and high concentrations of white students in others.

Evidence was introduced in the District Court to show a pattern of unconstitutional activity by the school board not only in the rescission of its desegregation plan for the Denver schools but also in its administration of the school system over the years (in its school site policies, attendance zones, etc.). In deciding on a motion for a preliminary injunction, the court ruled that the board had acted unconstitutionally, with respect to the Park Hill area in northeast Denver, in its action rescinding the original desegrega-

tion plan, and it preliminarily directed the school officials to implement the terms of the rescinded plan (App. 1a).*

These findings were reiterated by the District Court in its opinion on permanent relief (App. 44a). However, it there held that, as to the rest of the Denver schools, there had been no sufficient showing of a segregation policy on the part of the school board. It reached this conclusion even though it found that segregation existed in those schools as it did in those schools in which a segregation *policy* had been in existence (App. 66a).

The District Court also found that certain of the minority dominated schools were failing to offer their students an educational opportunity equal to that afforded white students in other Denver public schools (App. 89a). Because the court concluded that these schools were unequal largely because of their segregated character (App. 86a-87a), and also because, in a hearing on the question of remedy, the court found that desegregation was a necessary element in equalizing the educational opportunity (App. 112a), it directed the school board to desegregate and otherwise equalize the educational offering at these schools.

On appeal, the Court of Appeals for the Tenth Circuit agreed with the District Court both as to the segregation policy in northeast Denver (Park Hill) and as to the lack of a showing thereof as to other Denver schools (App. 122a-139a, 147a-150a). However, it modified the lower court's order to desegregate, insofar as it applied to schools out-

* References to (App.) are to the Appendix to the Petition for Certiorari.

sids the Park Hill area, holding that the court could not order desegregation of schools which had not been segregated by official policy (App. 144a). The Court of Appeals thereby declined to overrule *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), cert. den., 380 U.S. 914 (1965).

Questions to Which This Brief Is Addressed

This brief *amici curiae* is addressed to the following questions:

1. Does the inferiority of facilities of those schools in the Denver school district attended predominantly by Negro and Hispano students of itself establish a violation of the Equal Protection Clause of the Fourteenth Amendment?

2. Does racial segregation in the public schools operated by respondents constitute discriminatory state action in violation of the Equal Protection Clause, irrespective of the intent of the policies pursued by respondents?

3. Should the remedial order in this case be limited to that part of the school system operated by respondents in which intentional segregation was found?

Summary of Argument

I. The record here plainly establishes the inferior quality of those Denver schools attended predominantly by Negro and Hispano students. The unconstitutionality of such unequal treatment was recognized even prior to 1954 and is sufficient, by itself, to require corrective action here.

II. Racial segregation, *per se*, is harmful to Negro students. To the extent that it is brought about by state action, it results in a denial of equal protection.

A. This Court held in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), that segregated schools are inherently unequal. *Brown* establishes that racial classification brought about by state action is *per se* a denial of equal protection.

B1. If racial segregation is brought about by state action, the Constitution is violated even if there is no showing that segregation was the intended effect of the state action. It is the result, not the motive, that determines the constitutionality of the program in question.

B2. Unconstitutional state action is shown where state agencies are intertwined in a racially classified program under circumstances in which the power of the state could be used to prevent or eliminate the racial classification.

B3. This Court's conclusion, in the *Brown* case, that segregated schools are inherently unequal was announced in the context of deliberately imposed segregation. However, there is no basis for assuming that it was confined to that context. In fact, of the six authorities cited by this Court for its conclusion, four applied equally to *de facto* segregation. Recent decisions in the lower courts have increasingly rejected the *de facto-de jure* distinction.

III. Any desegregation plan must encompass the entire school district and not merely those schools where an official segregation policy is shown to have had demonstrable ef-

fects. Beginning with this Court's decision in the *Brown* case, remedial orders in school desegregation cases have encompassed entire school districts. This is consistent with the general practice under antidiscrimination laws, under which violators are required to take remedial steps with respect to all their operations. It is consistent also with the practical consideration that effective desegregation requires involvement of the entire school district.

ARGUMENT

POINT ONE

Inequality of public educational facilities is a violation of equal protection.

Even prior to this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), it had long been established that inequality of racially separate, public educational facilities was prohibited by the Equal Protection Clause of the Fourteenth Amendment of the Constitution. See, e.g., *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sweatt* v. *Painter*, 339 U. S. 629 (1950). That is, as Judge Skelly Wright noted in *Hobson* v. *Hansen*, 269 F. Supp. 491, 496 (D.C., 1967), aff'd *sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969):

> To the extent that *Plessy's* separate-but-equal doctrine was merely a condition the Supreme Court attached to the states' power deliberately to segregate school children by race, its relevance does not survive *Brown*. Nevertheless, to the extent the *Plessy* rule, as strictly construed * * * is a reminder of the responsibility entrusted to the courts for insuring that dis-

advantaged minorities receive equal treatment when the crucial right to public education is concerned, it can validly claim ancestry for the modern rule the court here recognizes.

Similarly, the District Court in this case noted that, "if the school board chooses not to take positive steps to alleviate *de facto* segregation, it must at a minimum insure that its schools offer an equal educational opportunity" (App. 89a). Judge Doyle went on to find that such equal educational opportunity is not being provided. Thus, he listed 15 schools, all of which have at least 70-75% Negro and/or Hispano students, which fail to meet the absolute minimum Equal Protection standards (App. 76a). He cited factual data relating to achievement (App. 78a), teacher experience (App. 80a), teacher turnover (App. 82a), pupil dropout rate (App. 81a), and building facilities (App. 83a) in support of his conclusions.

Teacher experience is a key example. At the Anglo schools, nearly half the teachers have over ten years experience; the figure for the Negro/Hispano schools is less than one-fifth. In addition, nearly twenty-five per cent of the teachers in the Negro/Hispano schools have no previous experience in the Denver school system; less than ten per cent of the teachers in the Anglo schools have no previous experience (App. 80a).

We submit, therefore, that, even by pre-*Brown* standards, the Denver school board has deprived the students under its jurisdiction of the equal protection of the laws. This Court should therefore affirm the District Court's decision on the Second Count of the Second Cause of Action and reverse the Court of Appeals' reversal of that decision.

POINT TWO

Racial segregation discriminates *per se* against black pupils and, if brought about by state action, is a violation of the Fourteenth Amendment.

A. Segregated Schools Are Inherently Unequal.

In 1954, this Court held in *Brown, supra,* that separate schools are inherently unequal. 347 U. S. at 485. The Court plainly stated that segregated schools are incapable of providing quality education. It also said that the effect of segregation in the school system was to place an indelible stamp of inferiority on those Negro children who were compelled to attend "Negro" schools.

Since 1954, numerous court decisions and a number of socio-educational studies have reinforced the conclusions reached in *Brown.* One of the most important studies is "Equality of Educational Opportunity," published in 1966 by the United States Office of Education, which was prepared under the supervision of Dr. James Coleman. Section 30 of the Coleman Report is of particular relevance to the issue of segregated schools. It notes, at page 302, that "attributes of *other students* account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff." The Report further found that middle-class children have a heightened sense of motivation which induces a classroom atmosphere most conducive to learning and that Negro children showed educational improvement when introduced to such an atmosphere.

The Report also noted, at page 321, that school achievement was closely related to the student's sense of confidence and belief in the control of his own destiny. For many reasons, Negroes and other minority students are likely not to have confidence in themselves. By exposing them to the motivation to learn and sense of confidence of other (middle-class) children, their academic performance can be improved. And the only way to gain this exposure is by integration.

Several years earlier, this view had been expressed by the Board of Regents of the University of the State of New York. In a statement issued at its meeting of January 27-28, 1960, the Board said:

> Modern psychological knowledge indicates that schools enrolling students largely of homogeneous, ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education and is wasteful of manpower and talent, whether this situation occurs by law or by fact.

A third, more recent study, by the United States Commission on Civil Rights, entitled "Racial Isolation in the Public Schools," concluded in 1967 (at 193):

> The central truth which emerges from this report and from all of the Commission's investigations is simply this: Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be * * * Negro children believe that their schools are stigmatized and regarded as inferior by the

community as a whole. Their belief is shared by their parents and by their teachers. And their belief is founded in fact.

The case law uses very much the same language:

> Racial concentration in his school communicates to the Negro child that he is different and is expected to be different from white children. Therefore, even if all schools are equal in physical plant, facilities, and ability and number of teachers, and even if academic achievement were at the same level at all schools, the opportunity of Negro children in racially concentrated schools to obtain equal educational opportunities is impaired * * * *Barksdale* v. *Springfield School Committee*, 237 F. Supp. 543, 546 (Mass. 1965), rev'd on other grounds, 348 F. 2d 261 (1st Cir. 1965).

> (I)t is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white. *Lee* v. *Nyquist*, 318 F. Supp. 710, 714 (W.D.N.Y. 1970), aff'd, 402 U.S. 935.

Therefore, it must be concluded in the words of Judge Doyle, that "segregation regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity" (App. 86a).

The net effect of the *Brown* decision, as these authorities show, is that racial segregation—and any form of racial classification or separation—constitute discrimination *per se* which, if brought about by state action, violates the Equal Protection Clause. It is the classification itself which violates the constitutional mandate because it nec-

essarily creates inequality. *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969), and cases there cited.

In this case, the record is clear that the school attendance districts, as established by the respondent school authorities, are racially segregated. Those acts of the respondents that determined the school districts, and the resultant segregation, established a racial classification of the very kind prohibited by the Fourteenth Amendment, as interpreted in the *Brown* case.

B. Racial Segregation Brought About by State Action Is a Denial of Equal Protection.

1. If the segregation is caused by state action, it is the effect that matters, regardless of motive or purpose.

As the *Brown* decision held, state action by legislative fiat causing segregated schools is violative of the Fourteenth Amendment. It is not only legislative action in support of segregation that is in violation.

> Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation. The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil.

Davis v. *School Dist. of the City of Pontiac*, 309 F. Supp. 734, 742 (E.D. Mich., 1970), aff'd, 443 F. 2d 573 (6th Cir. 1971), cert. denied, 404 U.S. 913 (1971).

The concept of purposeful state action is not limited to an intent to cause segregation on the part of state officers.

If the action was taken with knowledge of the consequences and the consequences were not merely possible but were substantially certain, then the action is wilful and purposeful state action. This concept is well recognized in torts. *Restatement, Second,* Torts §500, comment f; *Mountain States Telephone and Telegraph Co.* v. *Horn Tower Construction Co.,* 147 Colo. 210, 363 P.2d 175, 179 (1961); *Commonwealth* v. *Welansky,* 316 Mass. 621, 55 N.E. 2d 902, 909 (1944). It has also been applied in criminal law. *People* v. *Conroy,* 97 N.Y. 62 (1884).

Furthermore, state action, even if not purposeful, violates the Constitution if it results in racial separation with its resultant inequality. There is no need to show motive, ill will or bad faith in invoking the protection of the Fourteenth Amendment against racial discrimination. *Sims* v. *Georgia,* 389 U.S. 404, 407-8 (1967). Furthermore, this Court has held, in a long line of cases dealing with equal protection of the laws, that racial discrimination may be established by proof of either purpose or effect. See *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886) and, more recently, *Reitman* v. *Mulkey,* 387 U.S. 369 (1967) and *Hunter* v. *Erickson,* 393 U.S. 385 (1969). "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725 (1961). Requirements which appear neutral on their face and theoretically apply to everyone, but have the inevitable effect of tying present rights to the discriminatory pattern of the past, are unlawful. *United States* v. *Louisiana,* 380 U.S. 145 (1965).

The concept that it is the effect rather than the intent that is of critical importance in assessing governmental

behavior with respect to the Fourteenth Amendment was applied to a public school desegregation case in a concurring opinion by Circuit Judge Stewart in *Clemons* v. *Board of Education of Hillsboro*, 228 F.2d 853, 859 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956):

> The Board's subjective purpose was no doubt, and understandably, to reflect the 'spirit of the community' and avoid 'racial problems' as testified by the Superintendent of Schools. But the law of Ohio and the Constitution of the United States simply left no room for the Board's action, *whatever motives the Board may have had* (emphasis supplied).

In areas other than race, this Court has invalidated discriminatory action by a state despite a lack of evidence of purposeful activity. Thus, there was no suggestion of intention to inhibit the poor in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966). In the reapportionment cases, this Court held that the motive behind the challenged scheme of apportionment was immaterial. *Reynolds* v. *Sims*, 377 U.S. 533, 581 (1964). *Cf. Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).

It follows that a state may not excuse action placing Negro citizens under a severe, unjustifiable disability on the ground that the action was inadvertent and without discriminatory intent. As Justice Clark said in *Kennedy Park Homes* v. *City of Lackawanna*, 436 F. 2d 108, 114 (2nd Cir. 1970), cert. den., 401 U.S. 1010 (1971): "Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under a severe disadvantage which it

cannot justify." That case involved a suit to compel the City of Lackawanna to allow the development of a low-income housing project at a certain location in the city. Just as the Denver school board, by the way it has drawn attendance district lines, has kept the minorities educationally segregated, the city in *Kennedy* had effectively kept Negroes residentially isolated in one area of the city through rezoning and other techniques. The Circuit Court called for an end to this course of action and for a conscious effort to alleviate segregation.

We submit that the law was correctly stated in *Hobson*, *supra* (269 F. Supp. at 497):

> Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of the Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a wilful scheme.

So, here, the Denver school board cannot argue that it did not intend the system to become segregated and unequal. If segregation and the resulting inequality exist as a result of the school board's failure to remedy the situation, the Equal Protection Clause has been violated.

2. *The Equal Protection Clause is violated if the state is entwined in the management of a discriminatory program.*

State action containing racial classifications outlawed by the Equal Protection Clause also arises when the state is "entwined in the management or control" of the private enterprise which discriminates. *Evans* v. *Newton*, 382 U.S.

296, 301 (1966). Or as was stated in a leading case involving school desegregation, responsibility for discrimination arises upon "state participation through any arrangement, management, funds or property." *Cooper* v. *Aaron*, 358 U.S. 1, 4 (1958).

That this is present in Denver is evident. The school board's every-day operations as well as its long-range planning show state participation in every aspect of the school operations.

The criterion for finding discriminatory state action violating the Equal Protection Clause is involvement of the state "to some significant extent" in any of the manifestations of discrimination. *Burton, supra*, 365 U.S. at 722 (1961). This Court said in that case: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance" (*ibid*).

The issue in the *Burton* case was whether the Equal Protection Clause was violated by discriminatory action of a restaurant which had leased its premises from the Wilmington Parking Authority, a public agency. The state court held that the restaurant was acting in "a purely private capacity" under its lease, that its action was not that of the Parking Authority and was not therefore state action within the contemplation of the prohibitions contained in the Fourteenth Amendment. This Court disagreed. After discussing the various activities, obligations and responsibilities of the Parking Authority with respect to the restaurant, the Court found "that degree of state participation and involvement in discriminatory action

which it was the design of the Fourteenth Amendment to condemn". 365 U.S. at 724. It observed that the Parking Authority could have affirmatively required the restaurant to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation.

This brings the question of so-called *"de facto"* segregation here into focus. By its activities, the Denver school board has allowed and is allowing segregation, with its resultant inequality, to exist in the Denver schools. As in *Burton*, a public authority—the school board—has abdicated its responsibility. The Court there held that the involvement of the state in the discriminatory action of the restaurant was significant enough to warrant the conclusion that the Authority had violated the Equal Protection Clause. Similarly, state support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

3. So-called "de facto" segregation in public schools constitutes unconstitutional discrimination within the scope of the Brown *decision.*

We submit that a school system where, as a result of a segregated residential pattern, white and black pupils generally attend different schools, amounts to a dual system which is in conflict with the Equal Protection Clause as interpreted in *Brown, supra*. This conclusion is rooted in language in *Brown* to the effect that (347 U.S. at 494):

> To separate [Negro pupils] from others of similar age and qualifications solely because of their race generates

> a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

The issue before the Court in that case was "the effect of segregation itself on public education" (at 492). The Court said (at 493):

> We come to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does.

As we noted above, the decision had the effect of equating state action that classified by race with a denial of equal protection.

The Court reached this conclusion in the context of deliberate imposition of a dual system by the school authorities. But it certainly did not hold that the constitutional prohibition of racial segregation is limited to segregation deliberately imposed by public authority. In fact, this Court accepted the finding that "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of the law" (347 U.S. at 494; emphasis added).

This language does not permit the conclusion that this Court was drawing a line, for constitutional purposes, based on whether the segregation had formal state sanction. This conclusion is reenforced by the fact that this Court, in concluding that "separate educational facilities are inherently unequal," relied on authorities that support that

conclusion regardless of the origins of the segregation. 347 U.S. at 494, footnote 11. When the six references in this footnote are examined, it appears that, in four of the six, nothing limits the finding to the case of deliberate official segregation.

The first authority cited is K. B. Clark, "Effect of Prejudice and Discrimination on Personality Development" (Mid-Century White House Conference on Children and Youth, 1950). This is a study showing that existing practices of segregation and discrimination damage the personality development of children. Its results do not depend in any way on whether the segregation found to be harmful has official sanction.

In the second authority, Witmer and Kotinsky, "Personality in the Making" (1952, c. VI), the chapter cited is entitled, "The Effects of Prejudice and Discrimination." It is in no way restricted to legally enforced segregation; indeed, that concept, is not even considered. On the other hand, the harmful effects of the kind of segregation involved herein is specifically noted in the following passage (at pages 136-7):

> Nevertheless, there are rural areas and sections of large cities in which Negroes and Mexicans, for example, rear their children considerably apart from others, and in which tradition gives stability to life. For children brought up in such circumstances the early stages of personality development are probably passed through with relative equanimity, so far, at least, as the influence of prejudice and discrimination is concerned.

> Difficulties for children so reared come when they leave home or when they move out of the close family circle to mingle with other youths in small towns and cities. Such a change is likely to take place at adolescence, the time at which a sense of identity should be in the making. Sudden exposure to the fact that they are not considered as good as other people is very disrupting to personality development.

The next two works cited are Deutscher and Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," 26 J. Psychol. 259 (1948), and Chein, "What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities" (3 Int. J. Opinion and Attitudes Res. 229 (1949)). These studies were concerned only with "enforced segregation"; hence, they neither support nor negate the proposition that segregation not resulting from official action is likewise harmful.

Brameld, "Educational Costs," in *Discrimination and National Welfare* (MacIver, ed., 1949), 44-48, is similar to the first two works cited. This author is particularly concerned with what he describes as "concomitant learnings." He says (at page 46):

> They are learnings that cause boys and girls to develop prejudice, distrust, guilt feelings; that cause them to substitute over-simplified, stereotyped thinking for honest, particularized thinking about their fellow human beings. They are learnings that do not happen so much through books as through association on playgrounds, in corridors, in swimming pools, at parties, in the everyday experiences of living association *or of non-association.* (Emphasis supplied.)

The author concludes his recommendations for action (page 48):

> Finally, and perhaps most imperative, let us develop much more closely than we have thus far as an audacious conception of education which flows with the magnetic vision of an order in which all people are at last equal and free, not merely in theory, but in every aspect of day by day practice.

The portion of the sixth authority cited, Frazier, *The Negro in the United States* (1949), 674-681, is entitled, "Effects of Discrimination on the Negro." It is in no way restricted to enforced segregation. Indeed, it contains some observations squarely applicable here. Thus, the author states (page 677):

> One of the truly remarkable phases of race relations in the United States is the fact that whites and Negroes do not know each other as human beings. * * * Nor has the Northern white known the Negro since he has only reacted to a different stereotype. White Americans do not know Negroes for the simple reason that race prejudice and discrimination have prevented normal human intercourse between the two races.

The last sentence in the preceding quotation has particular significance for one aspect of this case. The school board has suggested that the separation of Negro and white children in Denver schools is merely the unfortunate result of race prejudice and discrimination, manifest in the form that restricts Negroes in the sale and rental of housing. As Frazier makes clear, the resulting segregation is harmful. The *Brown* decision in turn establishes that this harm is compounded when the pattern of segregation extends to the public schools.

School authorities have the obligation to avoid or minimize the harmful effects of school segregation. This obligation is an important factor to be considered in establishing construction policies and attendance zones. This the Denver school board has clearly failed to do. It is hardly reasonable to suggest that the Negro children in the Denver schools must continue to suffer the resulting harm merely because the school board did not expressly order that they go to segregated schools.*

Frequently the distinction is made between segregation imposed by the school board and segregation merely tolerated by the school board. But it is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.

The students involved in this action are in a publicly supported, mandatory state educational system. They must have the civil right not to be segregated, not to be compelled to attend a school in which all of the Negro children are educated separate and apart from anywhere from 70% to 99% of their white contemporaries.

The Denver situation *is* segregation by law, the law of the school board. It formulates attendance policies; it makes decisions as to school sites; it assigns teachers to

* School authorities "have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our early opinions distinguishing between integration and desegregation must yield to this affirmative duty being now recognized." *U.S.* v. *Jefferson County Board of Education*, 380 F.2d 385, 389 (5th Cir. 1967), cert. den., 389 U.S. 840.

various schools. In light of Judge Doyle's findings, the continuance of the board's policies amounts to nothing less than state-imposed segregation.

The lower Federal and state courts have increasingly recognized that whatever a school system does is state action and that "de facto" is a term used to justify avoidance by school boards of their responsibilities. Cf. *Barksdale, supra; Hobson, supra; Blocker* v. *Board of Education of Manhasset*, 226 F. Supp. 208 (E.D.N.Y. 1964); *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 871, 31 Cal. Rptr. 606, 382 P. 2d 878 (1963); *Branche* v. *Board of Education of Hempstead*, 204 F. Supp. 150 (E.D.N.Y. 1962); *Booker* v. *Board of Education of Plainfield*, 45 N.J. 161, 212 A. 2d 1 (1965); *Brewer* v. *School Board of the City of Norfolk*, 397 F. 2d 37 (4th Cir. 1968); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970), aff'd 427 F. 2d 1352 (9th Cir. 1970); *Crawford* v. *Board of Education of the City of Los Angeles*, Civil Docket No. 822-854 (Superior Court for County of Los Angeles, Feb. 11, 1970); *Bradley* v. *Milliken*, 433 F. 2d 897 (6th Cir. 1970), 438 F. 2d 945 (6th Cir. 1971), Civil Action No. 35257 (E.D. Mich. Sept. 27, 1971).

The *Blocker* case, *supra*, involved the action of a school board in New York in simply continuing an attendance pattern wherein all of the black elementary school children went to one school while virtually all of the white elementary school children attended two others. The Court said (226 F.Supp. at 223):

> The Fourteenth Amendment does not cease to operate once the narrow confines of the Brown-type situation are exceeded; the Supreme Court has made it clear that

it is the duty of the courts to interdict "evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" Cooper v. Aaron, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed. 2d 5 (1958), and has reaffirmed that objective in a recent decision on the subject. See Goss v. Knoxville Board of Education, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed. 2d 632 (1963). Viewed in this context then, can it be said that one type of segregation, having its basis in state law or evasive schemes to defeat desegregation, is to be proscribed, while another, having the same effect but another cause, is to be condoned? Surely, the Constitution is made of sturdier stuff.

The recent decision in *Spencer* v. *Kugler*, 326 F. Supp. 1235 (N.D. N.J. 1971), aff'd without opinion, 92 S. Ct. 707 (1972), might be viewed as inconsistent with this trend, since its effect was to leave a segregation situation undisturbed. However, *Spencer* is distinguishable from the instant case on two points. First, plaintiffs there sought to impose a state-wide desegregation plan across city and district lines. The court held that municipal lines were a reasonable standard for setting up school districts. 326 F.Supp. at 1240. Plaintiffs in the instant case are concerned with one district and one municipality only. Secondly, plaintiffs in *Spencer* sought to establish racial balance in the schools. Plaintiffs in the instant case are not seeking this. They do not ask for a certain ratio of black and white children but only the elimination of segregated schools.

More consistent with the current trend in the lower courts is the recent case of *Davis, supra*, which resembled more clearly the case at bar. The school board in Pontiac had engaged in a series of discriminatory practices, such as placing teachers in schools according to race and locating

new schools in such a manner so as to perpetuate existing segregation rather than remedy it. The court ruled that school districts may be held accountable for the natural, probable and foreseeable consequences of their policies and practices and that, where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that the policies are based on educationally required, nonracial considerations.

POINT THREE

Any desegregation plan must encompass the entire school district and not merely isolated schools.

The outgoing Denver school board recognized serious deficiencies in many of the Denver schools, particularly the existence of segregation throughout most of the system. As a corrective measure the board passed Resolutions 1520, 1524 and 1531. The new board rescinded those plans but the District Court ordered them reinstated (App. 44a).

Amici urge that these plans, even if put into effect, are insufficient because they focus on only the all- or virtually all-Negro and Hispano schools.

In *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 21 (1969), this Court noted that desegregation plans must be designed to insure "a totally unitary school system for all eligible pupils without regard to race or color." A system can be said to be unitary when the schools are no longer racially identifiable. *Robinson* v. *Shelby County Board of Education*, 330 F. Supp. 837 (W.D.

Tenn. 1971). There *are* virtually two separate school systems within the Denver school district. Judge Doyle noted that at least fifteen schools had Negro-Hispano populations of over 70% (App. 76a). Moreover, 73.5% of all the white students in the system attend schools which are over 75% white (Pet. for Cert. p. 4). These schools are racially identifiable and, surely, a system-wide solution is called for.

Even historically separate school districts, where shown to be created as part of a state-wide dual school system or to have cooperated in the maintenance of such a system, have been treated as one for purposes of desegregation. *Haney* v. *County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969); *United States* v. *Crockett County Board of Education*, Civ. Action 1663 (W.D. Tenn., May 15, 1967). The situation in Denver is tantamount to a dual system within the same district. Hence, it is more clearly necessary to treat its schools uniformly.

A further example is the case of *Pate* v. *Dade County School Board*, 434 F. 2d 1151, 1153 (5th Cir. 1970), cert. den. 402 U.S. 953 (1971), where a desegregation plan which left twenty-two schools all- or virtually all-Negro was found "unacceptable". The case is analogous to Denver because the solution proposed by Judge Doyle would leave the schools in northeast Denver all- or virtually all-Negro and Hispano.

In *United States* v. *Watson Chapel School District No. 24*, 446 F. 2d 933 (8th Cir. 1971), a freedom of choice plan was found unconstitutional where 94% of Negroes stayed in all-Negro schools. The Denver percentage may not be quite as high, but the principle is the same.

When this Court issued its decision in the *Brown* case, applicable to four separate school systems, it did not direct the lower courts to search the record to determine which part of each system had been affected by the statutorily imposed requirement of segregation. It was taken for granted that the corrective measures to be imposed would apply to each system as a whole. Since then, desegregation cases, whether *de jure* or *de facto*, have resulted in system-wide desegregation plans. See, e.g., *Davis* v. *School District of City of Pontiac, supra; Dandridge* v. *Jefferson Parish School Board*, 332 F. Supp. 590 (E.D. La. 1971).

The principle that arises out of the cases cited above, we submit, is that the pool of resources for the correction of unconstitutional segregation in a school district is the whole district—not just the particular part where the impact of a segregation policy was shown. If correction of past illegal segregation cannot be achieved without involving the whole district, the whole district must be involved.

This is fully borne out by this Court's most recent decision on the scope of remedy in desegregation cases, *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971). That case involved a challenge to a desegregation plan which treated the City of Mobile as if it were two cities. The eastern portion of Mobile had a 94% Negro population and the schools were 65% Negro; in the western part of the city, the schools were 88% white. The desegregation plan treated each area separately, leaving nine elementary schools in the east 90% Negro and over half of the junior high and senior high school Negro students in all- or virtually all-Negro schools. This Court said (at 38):

On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of metropolitan Mobile in isolation from the rest of the school system, and that inadequate consideration was given to the possible use of bus transportation and split zoning. For these reasons, we reverse the judgment of the Court of Appeals as to the parts dealing with student assignment, and remand the case for the development of a decree "that promises realistically to work and promises realistically to work *now*." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968).

There is nothing novel about the concept that measures designed to remedy racial discrimination may appropriately apply to all of the operations of the discriminator. Administrative agencies enforcing antidiscrimination laws do not confine their remedial orders to the narrow area affected by a particular act of discrimination. The owner of an apartment house who has illegally denied an apartment to an applicant because of his race is not told merely to stop discriminating with respect to that apartment. He is barred from discriminating with respect to the entire building. Normally, indeed, he must keep the antidiscrimination agency advised of vacancies in other apartments so as to ensure that the complainant or other applicants of the same race are given an opportunity to obtain suitable accommodations. Analogous procedures are used in the case of an employer who violates a fair employment law. His entire payroll is reviewed and kept under supervision to ensure that the administrative agency's corrective order effectively terminates discrimination throughout the operation.

So, here, effective action against the unconstitutional discrimination found by the trial court requires action dealing effectively with segregation throughout the school sys-

tem operated by the respondents. Nothing less, we submit, would achieve desegregation.

Desegregation orders rest on the conclusion, aptly stated by Judge Wright in *Hobson, supra* (269 F. Supp. at 504-5) that:

> Segregation "perpetuates the barriers between the races; stereotypes, misunderstandings, hatred, and the inability to communicate are all intensified." (Footnote omitted.) Education, which everyone agrees should include the opportunity for biracial experiences, carries on, of course, in the home and neighborhood as well as at school. In this respect, residential segregation, by ruling out meaningful experiences of this type outside of school, intensifies, not eliminates, the need for integration within school.

We submit that comprehensive segregation would not be the result of the plan for the City of Denver approved by the court below. The result will be, rather, continued segregation and the maintenance of all-Negro and all-white schools. We believe that, for the reasons stated above, this Court should not stop short of a solution that encompasses the entire Denver school system.

Conclusion

Even on the narrowest grounds, this Court should reverse the Court of Appeals. There is clear evidence here of unequal facilities in at least 15 of the Denver public schools and, under any standard of Equal Protection, these schools require remedial attention.

But this case goes farther than that. Nearly 18 years ago, this Court condemned racial segregation in public

education and ordered its elimination. These rulings dealt with the hard fact that Negro students in predominantly Negro schools get an education which is inferior to the education which they would receive, and which white students do receive, in schools that are integrated or predominantly white.

Whom are we dealing with here? In Denver, we are dealing largely with children in grades kindergarten through 6, i.e. from age 5 to 12. They are not capable of distinguishing between the total separation of all Negroes pursuant to a State statute based on race and the almost identical situation prevailing in their schools by reason of school districting and other policies followed by respondents. Simply stated, *amici* urge this Court to recognize that the operation of a public school system is state action and that, when a school system tolerates separation of the races and the resulting offering of inferior education, there is a denial of equal protection to the isolated minority group students.

We urge this Court that it is time to declare that, as to schools operated by public agencies, there is no such thing as *de facto* segregation. The segregation in the Denver schools stems from state action in one form or another. *"De facto"* is merely a term invented to justify school boards in ignoring the racial consequences of their actions.

Approval now of the *de facto-de jure* distinction would undermine 18 years of progress in the educational field since *Brown*. It would defeat attainment of the goal implicit in this Court's decisions since *Brown*—to protect school children and offer them as equal an education as possible within a given district. The statutes and regulations explicitly requiring dual systems have disappeared.

Yet segregated and therefore unequal educational opportunities within the same city and within the same districts still exist. And they exist despite the knowledge by local school boards that their actions intentionally or inadvertently, but necessarily, maintain and widen the educational gap between the races. This Court can make it clear in this case that the Constitution bars this manifestation of inequality in public affairs, as it bars all others.

For the reasons stated above, we respectfully submit that the decision below should be reversed.

Respectfully submitted,

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May, 1972

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-507

WILFRED KEYES, et al., *Petitioners,*

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund moves this Honorable Court for leave to file the attached Brief Amicus Curiae.

Petitioners' attorney has granted consent for the filing of this brief. The consent of Respondents' attorney was requested but refused.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a non-profit corporation organized under the laws of the State of Texas whose

purpose is the protection of the civil rights of Spanish surnamed people in the Southwest. In pursuance of this purpose MALDEF has represented clients in matters involving employment discrimination, voting rights, and public accommodations discrimination. However, it is in the area of improving the educational process that MALDEF has devoted much of its resources.

Although *Mendez v. Westminster School District*, 64 F.Supp. 544 (C.D. Cal.) aff'd 161 F.2d 774 (9th Cir. 1947) held that school segregation against Chicanos* violated the equal protection clause, there has never been a holding by this Court to that effect. The Chicano community in the Southwest continues to attend segregated inferior schools.

This community believes that a quality educational program in an integrated setting provides the only hope for equal educational opportunity. As a result of this mandate MALDEF is counsel for Chicano parents and children in lawsuits throughout the Southwest including Dallas, Houston, Austin, El Paso and New Braunfels, Texas; Fullerton, California; Glendale, Arizona; Portales, New Mexico. These cases attack segregated schools and discriminatory treatment. Consequently, the whole Chicano community and MALDEF are vitally interested in the outcome of this case.

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*Hispano is the word used in the record to denote Spanish speaking people in Denver. However, Chicano is the preferred name for Spanish speaking people in the Southwest.

MALDEF requests permission to file this brief in order to present an issue only touched upon by Petitioners; why Chicanos are an identifiable class for Fourteenth Amendment purposes. In addition, Amicus believes the constitutional wrongs which Chicanos have suffered over the years need elucidation before this Court.

Wherefore, MALDEF prays that this Court grant leave to file the attached Brief Amicus Curiae.

Dated, May 4, 1972.

Respectfully submitted,

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In the Supreme Court
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OCTOBER TERM, 1971

No. 71-507

WILFRED KEYES, et al., *Petitioners,*

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund is a non-profit corporation established in 1968 under the laws of the State of Texas. Its purpose is to represent Spanish surnamed people in the Southwest whose civil rights are being violated. MALDEF offices are located in San Francisco, Los Angeles, San Antonio and Denver.

A primary goal of the organization since its inception has been to end the patterns of ethnic isolation and inferior schools that pervade the Southwest. To

this end MALDEF is representing clients throughout the Southwest. See the Motion for Leave to File an Amicus Brief. Since it is likely that these cases will be strongly affected by the outcome of this case, MALDEF has an immediate direct interest in this lawsuit.

SUMMARY OF THE ARGUMENT

Amicus curiae make the following argument:

Chicanos in the Southwest are subject to deeply ingrained patterns of economic, political and educational discrimination. As a result, they are entitled to be considered an identifiable class for equal protection clause purposes. The demographic data and the evidence in this record prove that Chicanos in Denver have been discriminated against in this traditional Southwestern manner.

The District Court erred in refusing to find that Chicanos had been segregated by policies and practices of the Denver school district. The record showed a consistent unlawful pattern of discrimination in student and faculty assignment practices. The District Court correctly ruled that inequalities in education existed at minority schools. However, it erred in distinguishing between schools that had over 70% of one minority and schools that had over 70% of the two minorities, Negro and Chicano, for purposes of relief. The purposes of desegregation are not accomplished by integrating two economically and educationally disadvantaged minority groups.

The Court of Appeals erred by rejecting the equalization plan adopted by the District Court. The District Court's plan in regard to Spanish language training, teaching of Chicano culture and use of teacher aides was an appropriate use of his equitable powers to correct a proven constitutional wrong.

ARGUMENT

I. INTRODUCTION

The Chicano[1] is the forgotten minority.[2] He is the largest minority group in the Southwestern United States. He is the field hand. He is the janitor. Much as the Negro was forceably made part of this nation as a slave and still today bears the badges of this servitude, *Jones v. Albert Mayer & Co.*, 392 U.S. 409 (1968), so too were Chicanos forceably made part of this nation—they were the vanquished remnants, conquered heirs of the Spanish Conquistadores. Their vanquishment has made them exiles in their own land —the dominant Anglo[3] society has treated them as second class citizens.

Chicanos in Denver and the Southwest generally receive an inferior education, suffer occupational discrimination, and are deprived of crucial political rights and power that would allow them to change

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[1]Hispano is the word used in the record to denote Spanish speaking people in Denver. However, Chicano is the preferred name for Spanish speaking people in the Southwest.

[2]The Southwest for purposes of this brief includes Arizona, California, Colorado, New Mexico and Texas.

[3]An Anglo is a non-Spanish surnamed member of the Caucasian race.

their socio-economic status through the political process. The opinion of the courts in this case does not overtly describe this exclusion of the Chicano. The purpose of this brief is to inform the Court of the plight of the Chicano and to help the Court understand why the remedies of desegregation and equalization are so important to him.

II. CHICANOS COMPRISE AN IDENTIFIABLE CLASS FOR PURPOSES OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Chicano in the Southwest Has Suffered Social, Economic and Political Discrimination

The Chicano has been subjected to the traditional methods used to create second class citizenship. He has been segregated in swimming pools,[4] hospitals,[5] movie theaters,[6] toilet facilities.[7] Racial and ethnic restrictive covenants in real estate deeds regularly included Chicanos.[8] The result was segregated barrios[9] and little opportunity to move into Anglo neighborhoods.

The administration of justice has been infected with the evil of second class citizenship for the Chi-

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[4]Beltran v. Patterson, U. S. District Court for the Western District of Texas, No. 68-59-W.

[5]*Cisneros v. Corpus Christi Independent School District*, 324 F.Supp. 599, 613 (S.D. Tex. 1970) appeal pending.

[6]*Perez v. Sonora Independent School District*, U. S. District Court for the Northern District of Texas, No. CA-6-224.

[7]*Hernandez v. Texas*, 347 U.S. 475, 480 (1954).

[8]*Clifton v. Puente*, 218 S.W.2d 272 (Court of Civil Appeals Texas 1948). ref.

[9]That part of town where Chicano homes are concentrated.

cano.[10] The Texas Rangers hired their first Chicano two years ago. There are few Chicano district attorneys, judges,[11] or even law students.[12] Employment discrimination has been documented extensively.[13]

Political rights were for a long period suppressed but only recently have the courts opened up the political process.[14]

It is in the area of education that the Chicano suffers extraordinary deprivation. Segregation practices are widespread.[15] The reasons for the discrimination are much like those used to justify segregation

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[10]U. S. Commission on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest*, 1970.

[11]*Ibid*, p. 48.

[12]Reynoso, Cruz, La Raza, The Law and the Law Schools, 170 U.Tol.L.R. 809 (1970).

[13]Schmidt, Fred, *Spanish Surnamed Employment in the Southwest* published by U. S. Civil Rights Commission. Burma, John, *Mexican Americans in the United States*, 1970 p. 147-208. For case law see *Marquez v. Ford Motor Co.*, 440 F.2d 457 (8th Cir. 1971). *Urquidez v. General Telephone Co.*, 2 EPD ¶10,145 (D.C. N.Mex. 1969), *U. S. v. Longshoremen's Union*, 4 EPD ¶7687 (S.D. Tex. 1970).

[14]Texas had a poll tax which keep the Chicano poor from the polling place, *U. S. v. Texas*, 252 F.Supp. 234 (W.D. Tex. 1966) and a restrictive registration procedure which excluded Chicanos, *Beare v. Smith*, 321 F.Supp. 1100 (S.D. Tex. 1971). California had literacy requirements which prevented even those fully literate in Spanish from voting, *Castro v. State*, 3 Cal.3rd 223, 466 P.2d 244 (1970). Arizona similarly had stringent literacy requirements. Ariz. Revised Stat. §16-101. See also *Regester v. Bullock*, U. S. District Court for the Western District of Texas, No. A-71-CA-143 (Holding multi-member state representative districts discriminated against Chicanos).

[15]For information about the isolation of Chicano school children see U. S. Commission on Civil Rights, *Mexican American Study Project Report No. 1;* Salinas, Guadalupe, Mexican Americans and the Desegregation of Schools in the Southwest, 8 Houston L.R. 929 (1971); Hearings before the Select Committee on Equal Educational Opportunity of the U. S. Senate, 91 Congress Second Session, Part 4, Mexican American Education, Aug. 18-21, 1970.

in the South.[16] The result of this segregation with its creation of inferior status has been a dismal record of achievement in the schools. In 1960 in the Southwest the median years of school of Chicanos 25 years and older was 7.1 as compared to 12.1 for Anglos and 9.0 for non-whites.[17] Drop-out rates for Chicanos even today are considerably higher than for any other racial or ethnic group.[18] Later portions of this brief will reveal that the Denver school system fits too easily into this Southwestern pattern of segregation and inferior education.

The Chicano is living this legacy of a conquered people. Applying the words of a Texas Federal Court to the Southwest generally:

> "Because of long standing, educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called de jure and some of a so-called de facto character, the Mexican American population of Texas . . . has historically suffered from and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others."[19]

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[16]Carter, Thomas, *Mexican Americans in School; A History of Educational Neglect*, 1970, pp. 67-74.

[17]*Ibid.*, p. 23.

[18]U. S. Commission on Civil Rights, *The Unfinished Revolution*, Mexican American Study Series Part II 1971, p. 20.

[19]*Rogester*, supra, Note 14, p. 45.

B. The Courts Have Held Chicanos To Be A Class Protected By The Equal Protection Clause

This Court, shortly before deciding the landmark case for Negro Americans, *Brown v. Bd. of Education*, 347 U.S. 483 (1954), recognized for the first time that Chicanos are also entitled to Fourteenth Amendment protections. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the total exclusion of Chicanos from grand juries was proven. The Court in finding this unconstitutional stated:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the law. But community prejudices are not static, and from time to time other differences from the common norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class' theory—that is, based upon differences between 'White' and 'Negro'." 347 U.S. at 478.

The Chicano community was at first slow to use the potent combination of *Hernandez* and *Brown* to remedy the pervasive discrimination described in Section II A above. But in recent years, one court after another has held that the constitutional guarantees of

the Fourteenth Amendment apply to Chicanos no less than to Negroes. For example, the *Hernandez* rule regarding discrimination against Chicanos in the composition of grand juries has been applied to a large Texas city, *Muniz v. Beto,* 434 F.2d 697 (5th Cir. 1970). Chicano political rights are now being protected under the Fourteenth Amendment, see *Regester,* supra, Note 14, *Castro v. State,* supra, Note 14. Employment discrimination under Title VII of the Civil Rights Act of 1964 has been proven, see cases cited in Note 13, supra.

Because education is at the root of many of the socio-economic problems of the Chicano, there has been considerable litigation attempting to undo school segregation. Courts have been most diligent in elaborating upon the reasons for considering Chicanos an identifiable class for equal protection purposes in these cases. In *Cisneros v. Corpus Christi I.S.D.,* 324 F.Supp. 599, 607 (S.D. Tex. 1970) appeal pending, the Court observed:

> ". . . [I]t is clear to this Court that these people for whom we have used the word Mexican Americans to describe their class, group, or segment of our population, are an identifiable ethnic minority in the United States, and especially so in the Southwest [and] in Texas . . . This is not surprising; we can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course, their Spanish surnames. And if there were any doubt in this court's mind, this court could take notice, which it does, of the congressional enactments, government studies and commissions on this problem."

See also *U.S. v. Texas,* U.S. District Court for the Eastern District of Texas, No. 5281 (E.D. Tex. 1971); *Soria v. Oxnard School District Board of Trustees,* 328 F.Supp. 155 (C.D. Cal. 1971); *Alvarado v. El Paso Independent School District,* 445 F.2d 1011 (5th Cir. 1971). Even where courts have refused to find that de jure segregation has been practiced against Chicanos, they have held that Chicanos are an identifiable minority group, cf. *Tasby v. Estes,* U.S. District Court for the Northern District of Texas, No. 3-4211-C, appeal pending. *U.S. v. Texas Education Agency* (Austin I.S.D.), U.S. District Court for the Western District of Texas, No. A-70-CA-80, appeal pending.[20]

The legal reality of the Chicanos' situation in the Southwest has seen courts remedy past legal deprivation only recently. Political, economic and educational freedoms have only now begun to receive constitutional protection by the courts. A holding that Chicanos are not a separate identifiable class would have widespread repercussions in all areas of the law as it is developing in the Southwest. For these reasons Amicus urge this Court to reaffirm *Hernandez*; to hold that Chicanos are, historically, a deprived class, and are thereby, an identifiable group, entitled to receive protection under the Fourteenth Amendment.

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[20]School financing systems have also discriminated against Chicanos. *Rodriguez v. San Antonio I.S.D.*, 337 F.Supp. 280, 282 (W.D. Tex. 1972) appeal pending U. S. Supreme Court. See also *Chance v. Bd. of Examiners*, 330 F.Supp. 203 (S.D.N.Y. 1971) aff'd ___ F.2d ___ (2nd Cir. 1972) where an examination for an administrative position in the public schools was held to discriminate against Puerto Ricans.

III. CHICANO STUDENTS HAVE BEEN SEGREGATED AND DENIED AN EQUAL EDUCATIONAL OPPORTUNITY IN THE DENVER SCHOOL SYSTEM AND THEREFORE APPROPRIATE REMEDIES MUST BE CREATED TO ALLEVIATE THIS DENIAL OF EQUAL PROTECTION.

A. Chicanos In The State of Colorado And The City of Denver Have Suffered The Same Discriminatory Treatment As Chicanos In Other Parts of The Southwest

The most comprehensive study about the condition of the Chicano in Colorado ever written concludes:

"In general, the average Spanish surnamed resident of Colorado belongs to most of the following minority groups and possesses the traits associated with these groups.

1. The poor;
2. The poorly educated;
3. The unhealthy;
4. The victims of discrimination;
5. The illhoused;
6. The rural folk;
7. The Spanish-Mexican-American tradition;
8. The law violator;
9. The legally unprotected;
10. The politically unrepresented."[21]

These conclusions are borne out by the available data.

In the area of employment, Chicanos are underrepresented at all levels of the job rolls and over-

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[21] Colorado Commission on Spanish-Surnamed Citizens, *Report to the Colorado General Assembly: The Status of Spanish Surnamed Citizens in Colorado*, Jan. 1967, p. 15.

represented on the unemployment rolls.[22] "Employment rosters within Colorado public institutions generally show a very low incidence of Spanish-surnamed employees." "It is clear from this data [on municipalities] that the Spanish-surnamed population is extremely under-represented in public employment in general."[23] A recent study shows that in Denver the same pattern prevails. Although 9.3% of the total work force in three of the most important industries in Denver are "Officials and Managers", only 1.3% of the Chicanos are in this category. 82% of employed Chicanos in these industries are in blue collar jobs, nearly twice the percentage in the total work force.[24]

Health conditions reveal "a serious differential between the Spanish-surnamed and the general population."[25] Mortality rates show that Chicanos die on an average of ten years earlier than the rest of the population.[26]

Housing segregation in Denver is acute and is worse than the Southwest generally.[27]

B. Chicanos Have Been Segregated and Denied An Equal Educational Opportunity in Denver

The education afforded Chicano students in the defendant school district mirrors the inferior educa-

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[22] *Ibid.*, p. 27, "The figures show that the percent of all unemployed which is Spanish surnamed is, in most countries, significantly higher than the percent of the labor force which is Spanish-surnamed."

[23] *Ibid.*, p. 35.

[24] Schmidt, supra, Note 13, p. 16.

[25] Colorado Commission, supra, p. xviii.

[26] Schmidt, supra, p. 55.

[27] Grebler, Moore, Guzman, *The Mexican American People: The Nation's Second Largest Minority*, 1970, p. 277.

tion provided in the Southwest generally. Ethnic isolation and unequal treatment pervade the Denver school system.

Chicanos are in large part isolated from the majority Anglo community. Several schools are almost totally Chicano (App. 2040a). Many Chicano children attend school with Negroes, the other disadvantaged minority in Denver. 31.6% of Chicano elementary students attend schools that are over 75% minority (App. 2038a). 28 out of 93 elementary schools in the district are over 50% minority (App. 2040).

The sources of this racial and ethnic isolation are the policies and practices of the defendant school district. The district assigned minority faculty to minority schools because the Anglo community refused to permit these teachers in the Anglo schools (303 F.Supp. at 294). The district maintained a neighborhood school policy that was shot through with optional zones to allow Anglo children to escape minority schools. The district constructed the predominantly minority New Manual High School with just enough capacity to insure that it would remain a minority school. The district maintained enrollment at minority schools under capacity while overcrowding Anglo schools to avoid mixing the two groups (313 F.Supp. at 71).

Whatever nonracial explanations are conjured up for these actions, the simple fact remains, the operative effect of the school board assignment policies was to exclude Negroes and Chicanos from Anglo schools and to place Negroes and Chicanos together in predominantly minority schools.

Along with segregation, the school district provided distinctly unequal educational opportunities for minority students.

Looking first to teacher assignment policies, the record reflects that in 1968: 1. The minority schools had almost twice as many probationary teachers as the Anglo schools (App. 2062a); 2. The minority schools had less than one half as many teachers with 10 or more years experience in the Denver public schools than the Anglo schools (App. 2064a); 3. The median years of Denver public school experience of teachers in minority schools was less than half that of Anglo schools (App. 2066a).

Turning next to physical facilities, Anglo schools are on the average half the age of minority schools (App. 2070a). Although these schools were built at a time when there was much more land available in urban areas than at present, minority schools have considerably less land per child than Anglo schools (App. 2068a).

In the area of curriculum, the Voorhees Report (Plaintiff's Exhibit 20) implies that the existing uniform curriculum throughout the school system met the needs of the Anglo majority but not the needs of the disadvantaged minorities. The same treatment in this case was in fact "unequal" treatment.

The results of this disparity in treatment are predictable. Achievement levels at the minority schools fall far below those at the Anglo schools at every stage of the education process.

STANFORD ACHIEVEMENT TESTS, APRIL 1969
MEAN SCORES BY SCHOOL AND GRADE
(APP. 2102a, 2104a)

	GRADE LEVEL AT WHICH TESTS WERE ADMINISTERED				
	2.6	3.6	4.6	5.6	6.6
Average Grade Level Score for Minority Schools	2.27	2.85	3.58	4.42	4.91
Average Grade Level Score for Anglo Schools	3.12	4.26	5.44	6.53	7.01

One need only compare Plaintiff's Exhibit 375 (App. 2094a) with Plaintiff's Exhibit 372 (App. 2088a), which show that achievement levels at the minority schools in Northwest Denver are considerably lower than at Anglo schools in the Southwest, to understand fully the impact of unequal educational opportunity.

If more proof is necessary, let us check the ultimate test of a school system, the extent to which students complete high school. It is here that the human tragedy resulting from unequal treatment and low achievement are reflected. The Chicano drops out earlier and in greater numbers in Denver than either of the other two groups. By seventh grade some Chicano students are lost from the schools and by twelfth grade, the exodus is a torrent.

SCHOOL POPULATION STATISTICS BY RACE AND ETHNIC ORIGIN FOR 1968

	Chicano		Negro		Anglo		Other	
	No.	%	No.	%	No.	%	No.	%
Sr. High School (Grades 10-12)	2,996	12.8	2,447	10.4	17,821	76.1	160	.7
Jr. High School (Grades 7-9)	3,629	19.5	2,888	15.5	11,886	64.0	173	1
Elementary School (K-6)	11,986	22.0	8,304	15.2	33,678	61.7	608	11

(These figures are from App. 2038a).

Amicus has demonstrated that Chicanos in the Southwest are subject to the same kind of overt and subtle differences in treatment as Negroes in this country. The discrimination documented above proves that the Denver school system is but a microcosm of the educational system of the Southwest.

C. The Trial Court Correctly Found That Inequalities Existed In The Minority Schools, But It Also Should Have Ruled That Racial And Ethnic Isolation Was Caused By School District Policies and Practices

The trial court concluded that except for those schools dealt with in the 1969 school board resolutions, nonracial explanations for ostensibly segregating practices prevented a finding of de jure segregation. Amicus urges this Court to reverse this finding. Racial and ethnic motivations pervaded the decisions of the Denver school board. The evidence on inequalities in school services is self-explanatory. The trial court additionally found that the school board was aware of the effect of its policies but practiced "eye-closing" and "head-burying" (313 F.Supp. at 76) to avoid integration. Further, the Court found that the decisions of the school board were dictated by a consensus of the community (313 F.Supp. at 73). However, this controlling Anglo[28] consensus was in part responsible for the existing housing segregation.[29] Because the primary contributors to the consensus were those who helped establish segregated housing patterns, their intent to segregate should be imputed to the board.

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[28]Negroes and Chicanos never seemed to be a part of this consensus. (313 F. Supp. at 70, 71)

[29]"[I]f cause or fault has to be ascertained it is that of the community as a whole in imposing, in various ways, housing restraints." (313 F. Supp. at 75)

In regard to unequal educational opportunities the trial court concluded:

> "The evidence in the case at bar establishes, and we do find and conclude, that an equal educational opportunity is not being provided at the subject segregated schools within the District. . . . The evidence establishes this beyond any doubt."

Amicus agrees with this determination. However, the court erred in leaving out of its list of schools those where the combined total of Negro and Chicano students was over 70% but neither of the groups was individually over 70%. The same factors of teacher turnover, inferior physical facilities, and lower achievement are present in these over 70% black and Chicano schools (App. 2122a, 2124a), and therefore the same relief should be afforded.

The Court of Appeals reversed the trial court with regard to both the desegregation and equalization remedies. It did not deny the existence of the inequalities but by using the wrong constitutional standard and disregarding these inequalities the appellate court found no state action. The error in the appellate court's reasoning is manifest and Amicus defers to Petitioners' argument on this issue (Brief of Petitioners, p. 114).

D. Comprehensive Desegregation Is An Appropriate Remedy To Correct The Existing Constitutional Wrong

After hearing extensive evidence on the issues of relief the trial court concluded:

> ". . . The only feasible and constitutionally acceptable program—the only program which fur-

nishes anything approaching substantial equality —is a system of desegregation and integration which provides compensatory education in an integrated environment" (313 F.Supp. at 96).

This decision was clearly correct and within its equitable powers.

Those reasons normally supporting desegregation as a remedy exist in full force in Denver. Students will have heterogeneous, cross-cultural experiences, physical facilities at the inferior school will improve, teacher turnover will be reduced and the psychological stigma attached to attending an inferior school will be eliminated. For the Chicano, an important additional reason exists for desegregation. He often comes to school speaking Spanish as his mother tongue. To isolate him with other Spanish speaking students as the school district has done in the Elmwood, Fairmont and Fairview Elementary Schools deprives him of the opportunity to use his adopted language, English. That is not to say that his retention and development of Spanish should not be encouraged; however, he will never receive a balanced language learning experience in his most crucial years unless he is placed in a position to use Spanish on a regular basis. Oftentimes the only chance he has to speak English is at school because at home, the language in common use is Spanish.

The evidence in the record supports desegregation as a remedy for Chicanos. The testimony of Dr. James Coleman, author of *Equality of Educational Opportunity*, found that both Chicanos and blacks did better

in a school with students of diverse socio-economic backgrounds. (App. 1534a).

Amicus strongly supports the position of Petitioners that the trial court should have ordered system-wide desegregation. Excluding two race inferior schools from relief is simply not a decision grounded on the reality of Denver. Chicanos and blacks need cross-cultural interaction with Anglos, the dominant community in Denver. Maintaining minority schools continues the stigma attached to the schools. Teachers will continue to want to escape, physical facilities will remain inferior and peer group high-achievers will remain absent from these schools. Placing two economically and educationally disadvantaged groups together does not satisfy the policy underlying desegregated education. Professor Coleman found that a school population comprised of two disadvantaged minority groups is ordinarily as inferior as a school with one segregated minority, (App. 1538a).

In view of the facts set forth in Section II B of this brief, Chicanos in the district are themselves directly entitled to affirmative desegregation relief. However, even if this Court finds that the school board has practiced de jure discrimination against blacks only, with the result that blacks but not Chicanos are entitled to affirmative relief, neither sound policy nor the Fourteenth Amendment would permit treating Chicanos as Anglos nor leaving Chicanos completely out of the desegregation process.

Treating Anglos as Chicanos will result in continued segregation of minorities. Because of the proximity

of Chicano and Negro neighborhoods in Northeast Denver it will be poor Negros and Chicanos who are integrated together. Of course, none of the benefits of desegregation will accrue. The effect of such a decision will be to maintain all Anglo schools.[20]

The consequences of considering Chicanos as Anglo can be seen in the Houston desegregation litigation, *Ross v. Eckels,* 434 F.2d 1140, 1148 (5th Cir. 1970). That Court ordered 14 elementary schools paired on a black-white basis. Chicanos were considered white. The result of these pairings was that 13 of the 14 schools were over 80% minority (see Appellant's brief, *Ross, Rodriguez, U.S. v. Eckels,* U.S. Court of Appeals, No. 71-2357, appeal pending from denial of intervention to Chicano plaintiffs).

Recognizing that Chicanos are an identifiable group for equal protection purposes, but leaving them out of a black-Anglo desegregation plan results in different problems. There is the continuing stigma attached to Chicanos of going to isolated second class schools. In addition, the benefits accruing to the black, Anglo and Chicano children from the mutual understanding engendered by cross-cultural interaction would be lost.

Isolating Chicanos from blacks and Anglos also raises serious equal protection questions. No one could dispute that if a school board moving on its own initiative to end a supposedly de facto segregation situation were to desegregate blacks and Anglos to the

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[20] *Green v. County School Board of New Kent County,* 391 U.S. 470 (1968) prescribed a realistic approach to desegregation, an approach that actually works.

exclusion of the Chicanos, it would violate the mandate of equality required by the Fourteenth Amendment. The school board would be treating a discreet, identifiable group differently without any compelling reasons for doing so.[21] It would be ironic if the courts, under the guise of remedying discrimination against one minority could permissibly discriminate against another. And the courts are not of course immune from the requirements of the equal protection clause. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Cantwell v. Conn.*, 310 U.S. 296 (1940); cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

This Court's resolution of desegregation issues in a multicultural school district is crucial. Situations similar to Denver exist throughout the Southwest. Attorneys for Amicus are counsel in cases from Austin, Houston and Dallas, Texas.[22] Other pending litigation involves California cities such as Los Angeles and San Francisco.[23] Equal educational opportunity in America's cities requires desegregation

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[21]Distinctions based on race and ethnicity are the archtypical classifications subject to the strict equal protection standard. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1963). *Loving v. Virginia*, 388 U.S. 1, 9 (1967). See *McDonald v. Board of Election Comm'rs.* 394 U.S. 802, 807 (1969).

> "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."

[22]Austin, *U.S. v. Texas Education Agency*, supra, Houston, *Ross, Rodrigues U.S. v. Eckels*, supra, *Dallas, Tasby v. Estes*, supra.

[23]*Crawford v. Los Angeles Unified School District*, Superior Court of Los Angeles, California, No. 822854; and *Johnson v. San Francisco Unified School District*, U.S. District Court for the Northern District of California, No. C-70 1331 SAW (1971).

plans which realistically take account of their ethnically diverse character.

E. The Trial Court Correctly Ordered a Program For Equalization of Educational Opportunities

Both apart from and ancillary to the issue of desegregation, this Court should reinstate the District Court's order requiring the equalization of school facilities in which racial and ethnic minorities are concentrated. The record is clear that these schools are inferior to the Anglo schools, and this inequality is attributable only to action by the defendant district. As the Fifth Circuit noted in *U.S. v. Jefferson Co.*, 380 F.2d 385, 393-4 (5th Cir. 1967), the equalization of school facilities is an essential precondition to effective desegregation. But if this Court should hold that Chicano schools need not be desegregated, equalization of schools becomes all the more crucial—indeed, it then becomes the only hope for the district's Chicano children to receive a decent education.

The District Court approved a program which contains at least the following:

"1. Integration of teachers and administrative staff;

2. Encouragement and incentive to place skilled and experienced teachers and administrators in the core of city schools;

3. Use of teacher aides and para-professionals;

4. Human relations training for all School District employees;

5. In-service training on both district-wide and individual school bases;

6. Extended school years;
7. Programs under Senate Bill 174;
8. Early childhood programs such as Head Start and Follow Through;
9. Classes in Negro and Hispano culture and history; and
10. Spanish language training." (313 F.Supp. at 99.)

Spanish language training is crucial to development of a Spanish speaking child. If the language and culture that he brings to the school are rejected, his self-esteem and subsequent ability to succeed in school are adversely affected.[24] The use of teacher aides and para-professionals is of great benefit in implementation of these Spanish language programs.

The Court of Appeals reversed the District Court's equalization order in reliance on a resolution of the defendant board (445 F.2d at 1010). This was error. The constitutional rights of minority students should not depend on the good faith of a school board proven to have discriminated. Furthermore, the order of the District Court is much more particular than the resolution and provides specifically for programs for Chicanos. Finally, the school board's plan is not really a plan at all because it is dependent on the vagaries of the finances of the school district.

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[24]Congress has recognized the need for these types of language programs. Bilingual Education Act, 20 U.S.C. Section 880.

CONCLUSION

Wherefore, Amicus Curiae prays that this Court grant the relief requested by the Petitioners and reverse the judgment of the Court of Appeals insofar as it reverses the judgment of the District Court and remand the case to the District Court with instructions that it institute a comprehensive desegregation plan for the Denver school system.

Dated, May 4, 1972.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION AND THE COLORADO EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Education Association (NEA) and the Colorado Education Association (CEA) hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amicus curiae on the merits in the above entitled cause.[1] Petitioners have consented to the filing of this brief,[2] but respondents have withheld

[1] Rule 42 provides that briefs amicus shall be filed at the same time as the briefs of the party whose position they support. The brief of the petitioners was due for filing on May 1, 1972. On April 27, 1972, the Clerk of the Court, by telephone, granted the requests of movants herein, NEA and CEA, for an extension of time for the filing of this motion and the attached brief to and including May 5, 1972.

[2] The written consent of the petitioners has been filed with the Clerk.

their consent. Accordingly, NEA and CEA seek leave of the Court to file their brief.

The National Education Association is an independent, voluntary organization of educators open to all professional teachers, supervisors and administrators. It presently has over one million one hundred thousand regular members, and is the largest professional organization in the nation. NEA was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is (34 Stat. 805)—

> to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States.

The Colorado Education Association, which was founded in 1875 and incorporated in 1917, is an affiliate of NEA. A principal purpose of CEA is to promote quality education. Currently CEA has some 22,000 members, of whom approximately 3,000 are employed in the Denver School District.

The overall policies of NEA are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations, including CEA. Similarly, CEA's policies are determined by its Delegate Assembly, which is a body of approximately 500 representatives.

Both NEA and CEA have a deep interest in achieving and assuring equality of education for the children of all races. Reflecting this concern, NEA's Representative Assembly at its 1971 Convention adopted a specific resolution on desegregation in the public schools, which provided in part (NEA, *Handbook 1971-72*, p. 68):

> The National Education Association believes it is imperative that desegregation of the nation's schools be effected. Policies and guidelines for school desegregation in all parts of the nation must be strength-

ened and must comply with *Brown* v. *Board of Education; Alexander* v. *Holmes County Board of Education, Mississippi;* other judicial decisions and with civil rights legislation.

The Association recognizes that acceptable desegregation plans will include a variety of devices such as geographical realignment, pairing of schools, grade pairing and satellite schools. These arrangements may require that some students be bussed in order to implement desegregation plans which comply with established guidelines adhering to the letter and the spirit of the law. The Association urges that all laws of this nation apply equally to all persons without regard to race or geographic location.

Similarly at its 1970 session, CEA's Delegate Assembly resolved that:

CEA urge all Colorado school districts to move to eliminate de facto segregation through increased integration. Further, that CEA provide consultative services and publicly support local associations and school boards as they pursue this goal.

NEA and CEA desire to participate in the case at bar not only because of our interest in quality education, but also because we believe we can be of service in informing the Court as to the general character and effects of neighborhood school plans like that employed in this case. Such plans, when used in major urban areas, almost inevitably result in separation of children along racial and economic lines. This racial and economic isolation reduces the ability of school systems to provide equal educational opportunity and quality education. As the President's Commission on School Finance found:

Research results are not yet conclusive on the effect of the socio-economic backgrounds of other students on a child's educational achievement. However, it is becoming increasingly apparent that the student-mix within a school exerts a strong influence on

learning patterns of the total student body. A student body reflecting different social, economic, ethnic, and cultural family backgrounds tends to improve the learning of lower achieving students.

Accordingly, the Commission concludes that the effect of the student-mix appears to be such that equal educational opportunity is enhanced in a heterogeneous student body. Moreover, such a student body better prepares all its members for productive and creative participation in a free society.[3]

Wherefore, the National Education Association and the Colorado Education Association request that this Court grant leave to file the accompanying brief amicus curiae urging that insofar as the court of appeals sanctioned racial segregation in the "core" schools of Denver, the court's judgment should be reversed.

Respectfully submitted,

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[3] The President's Commission on School Finance, *Schools, People & Money; The Need for Educational Reform*, p. 15 (March 3, 1972). See also, Coleman, et al., *Equality of Educational Opportunity*, (U.S. Office of Education) 1966; Mosteller & Moynihan, *On Equality of Educational Opportunity*, 42-43 (1972).

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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION AND THE COLORADO EDUCATION ASSOCIATION

I

STATEMENT

This case is before the Court on certiorari to review the holding of the court of appeals that the maintenance by the Denver School Board of segregated schools in the "core" area of the city and the resulting unequal educational opportunities afforded to minority children do not constitute a violation of the Equal Protection Clause of

the Fourteenth Amendment. The court of appeals affirmed the decision of the district court requiring enforcement of three resolutions of the Denver School Board desegregating certain predominantly Negro schools in the Park Hill area of Northeast Denver. That part of the court of appeals' judgment is not challenged in this case. It is attacked in a cross-petition for certiorari (No. 71-572) filed by respondents herein on October 23, 1971. To date, the Court has not acted upon the cross-petition.

A. The Importance of the Issues Presented.

Viewed most narrowly, this is the first case coming to this Court raising squarely issues as to the standards of proof which are to govern the federal courts in passing on the constitutionality of segregated schools in urban communities of the North and West. Viewed most broadly, the case puts in issue the question whether segregated schooling resulting in unequal educational opportunities for minority children is actionable when effectuated by the affirmative conduct of state authorities, where that conduct is found to have been pursued without segregatory motive. Whether viewed narrowly or broadly, the Court's decision can be expected to have major significance in future litigation over segregated schooling in urban communities.

B. The Proceedings Below.

1. *The Factual Setting.* The Denver public school system, serving the city and county of Denver, included at the time of record a total of 117 schools, comprising 92 elementary schools, 16 junior high schools, and 9 high schools (A. 126a).[4] This action was brought by children

[4] Citation is to the Appendix To Petition For Certiorari. This appendix contains all of the related opinions below. The record below is contained in a five-volume appendix which will be cited as "J.A." plus the page reference.

attending the Denver public schools, charging that the school board had intentionally created and/or was intentionally maintaining racially segregated schools in the school district, and was providing unequal educational opportunities to students attending those segregated schools (J.A. 5a-10a).

Plaintiffs' proof in the district court focused on the historical and existing conditions in schools serving areas of the city substantially populated by Negroes and Mexican-Americans. That proof demonstrated a high degree of segregation throughout the school system, both in student population and faculties (A. 77a-78a; 9a). It established, in addition, gross inequalities in the educational opportunity available to children attending minority schools as contrasted with white schools in the district, measured by teacher experience, teacher turnover, physical facilities and achievement levels (A. 78a-84a).

The minority schools the subject of proof were located in two adjoining areas of the city. One of these was Park Hill in Northeast Denver where seven schools were located (A. 47a, 38a).[5] During the decade of the 1960's, the northern section of this area of the city, on the frontier of the expanding Negro area, had shifted from a predominantly white to a predominantly black neighborhood (A. 47a). It was singled out for separate and special attention in the proof at trial (and in the decisions of the courts below) because of publicly announced acts of segregation practiced immediately prior to the filing of suit. Specifically, the Denver School Board, for the purpose, as found by the district court (A. 35a), of preventing the integration of minority students in the Park Hill attendance zones into predominantly white schools there and elsewhere in the city, had in June 1969 re-

[5] The schools were Barrett, Stedman, Hallett, Smith, Phillips and Park Hill Elementary Schools; and Smiley Junior High School. East High School serves the area but is located outside of it (J.A. 2022a).

scinded a series of resolutions passed by a former school board earlier that year for the purpose of desegregating those schools. This led to a separate trial on motion for preliminary injunction and interlocutory relief (by way of enforcement of the original resolutions) pending trial of the full case. (A. 20a-43a.)

The other group of schools the subject of plaintiffs' proof at trial, 20 in number (A. 140a), were located in the older "core" area of the city.[6] This area, by and large, lies just west of the Park Hill area, and is occupied predominantly by minority residents, Negroes and Mexican-Americans. (See A. 140a; J.A. 58a) At the time of the trial on the merits, no school in the core area exceeded 30 per cent in white enrollment; the student bodies of 13 of the 20 schools were less than 10 per cent white. (A. 77a-78a).[7]

Plaintiffs' proof demonstrated a sustained history of affirmative conduct by the school board effectively isolating minority groups in minority schools throughout the district and retarding or precluding integration of minority children into white schools. Actions of the school board productive of this result included: the establishment, change and elimination of optional attendance zones; the selection of sites for construction of new schools; and the use of temporary facilities within minority attendance zones (A. 48a-50a; 59a-67a). By 1960 the core area had become almost wholly minority and segre-

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[6] We identify as core area schools those listed by the district court in its opinion of March 21, 1970 (A. 77a-78a), other than Barrett, Hallett, Smith and Stedman Elementary Schools and Smiley Junior High which are located in Park Hill and East and West High Schools which are located outside of the core and Park Hill areas (J.A. 58a).

[7] Four of the elementary schools were majority black, (Columbine (97.2%), Harrington (76.3%), Mitchell (70.9%), and Whittier (94.0%)); as were two junior high schools, (Cole 71.1%) and Morey (52.4%) and one senior high school (Manual 60.2%). Eleven elementary schools and one junior high school had majority Hispano enrollments (A. 77a-78a).

gation there could be maintained by strict adherence to a neighborhood school policy (A. 129). By this time, however, the racial composition of the adjoining Park Hill area was in transition from white to black. In that neighborhood the board during the 1960's acted affirmatively to maintain the racial make-up of the white schools by choice of locations for school construction, gerrymandering of attendance zone lines and the use of mobile units for expansion classrooms. (A. 21a-31a.) Based upon these historical facts, plaintiffs claimed that the school board had acted purposefully to segregate the schools in both the Park Hill and core areas and was adhering to a neighborhood school policy in the core area for the purpose of maintaining segregated schools. (J.A. 26a-27a; A. 73a). Defendants' answer to plaintiffs' case was that racial isolation in the Denver schools was solely the result of housing patterns. Defendants contended that the actions of the school board, which plaintiffs claimed produced or perpetuated segregated schooling, were racially neutral and taken solely for the purpose of effectuating the neighborhood school policy or other appropriate educational goals. (A. 134a; J.A. 473a.)

2. *The Decision of the District Court.* The district court, in approaching the case, compartmentalized its analysis of the evidence as if addressed to three separate, and largely independent issues: segregation in the Park Hill schools; segregation in the core area schools, and unequal educational opportunities in the minority schools generally. This is apparent from a reading of its decision (A. 47a *et seq.*) and was made explicit by the district court at the outset of that decision in announcing its approach to the case (A. 46a-47a):

> We will deal first with the schools which were the subject of preliminary hearing, considering the explanatory evidence offered at trial. Secondly, we will consider the evidence which has been offered relative to segregation and discriminatory educational oppor-

tunity in the core city schools and, finally, we will discuss possible remedies.

According to the district court's announced understanding of the prevailing law, segregated schooling constitutes an actionable violation of the Fourteenth Amendment only when it is causally connected to state action taken with the *intention* to segregate (A. 68a):[*]

> The important distinguishing factor between *de facto* and *de jure* segregation is purpose to segregate.

Starting from this asserted principle of law, the district court's analysis of each of three artificially separated issues followed this course:

a. *Segregation of the Park Hill Schools.* The Park Hill schools, as we have noted, came before the district court on motion for interlocutory relief to enforce a series of school board resolutions, later rescinded by the board, establishing a concrete program for the integration of those schools. That relief was ordered following an extensive evidentiary hearing on the motion for preliminary injunction (A. 37a), and was affirmed after full trial on the merits (A. 90a).

The district court's findings show a sustained and intentional policy of the board during the 1960's to segregate the schools in the Park Hill area. Viewing the actions taken by the board respecting each of the Park Hill

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[*] "From the cases, we gleaned the following principles as essentials of *de jure* segregation:

(1) The State, or more specifically, the school administration, must have taken some action with a purpose to segregate;

(2) this action must have in fact created or aggravated segregation at the school or schools in question;

(3) a current condition of segregation must exist; and

(4) there must be a causal connection between the acts of the school administration complained of and the current condition of segregation" (A. 67a-68a).

schools individually, the court made the following findings:

(1) *Barrett Elementary School* "was opened in 1960"; "[a]t that time its student body was 89.6 per cent Negro"; "[p]resently . . . [it] is virtually 100 per cent minority students (93% Negro 7% Hispano)" (A. 21a); it was "built and opened as a segregated school" (A. 22a); "positive acts of the Board in establishing Barrett and defining its boundaries were the proximate cause of the segregation which has existed"; "we find that the board acted purposefully to create and maintain segregation at Barrett" (A. 23a);

(2) *Stedman Elementary School* "was in 1960 a predominantly 'white' school, the student body being only 4 per cent Negro" (A. 24a); "[a]s of 1968, Stedman was 94.6 per cent Negro and 3.9 per cent Anglo" (A. 25a); "[t]he actions of the Board with respect to boundary changes, installation of mobile units and repeal of Resolution 1531 shows a continuous affirmative policy designed to isolate Negro children at Stedman and to thereby preserve the 'white' character of other Park Hill schools" (A. 26a);

(3) "The Negro enrollment at *Hallett Elementary School* has increased from approximately one per cent in 1960 to 90 per cent in 1968" (A. 28a, emphasis added); in a 1962 boundary change in the Hallett Elementary School optional zone "[a]ll that was accomplished was the moving of Anglo students from a school district which would gradually become predominantly Negro to one which has remained predominantly Anglo" (A. 29a); in 1965 classrooms were added to Hallett over objection "that they would increase segregation at Hallett" (A. 11a); "[t]he effect of the mobile units

and additional classrooms was to solidify segregation at Hallett" (A. 29a);

(4) "In 1960 both *Park Hill* and *Phillips Elementary Schools* were overwhelmingly Anglo in racial composition. Despite continued Negro population movement into these school districts, Park Hill and Phillips presently continue to have a majority of Anglos. . . . This characteristic of both schools is due at least in part to the efforts of the Board to prevent the use of Park Hill and especially Phillips to relieve overcrowding at Stedman" (A. 26a, emphasis added); and

(5) "In 1968 *Smiley Junior High School* was 23.6 per cent Anglo, 71.6 per cent Negro and 3.7 per cent Hispano" (A. 30a, emphasis added); the effect of repeal of Resolutions 1520 and 1524 "was to reestablish *Smiley* as a segregated school by affirmative Board action"; "[w]e therefore, find that the action . . . was willful as to its effect on Smiley" (A. 31a).

More broadly, the district court found "a high degree of interrelationship among" the schools in the northeast area "so that any action by the Board affecting the racial composition of one would almost certainly have an effect on the other," and that "[i]t is significant to note that Board action between 1960 and 1969, such as the 1962 and 1964 boundary changes, dealt with the entire Park Hill area and had some effect on each school in that section of the city" (A. 32a). This led the court to the ultimate finding that "Between 1960 and 1969 the Board policies with respect to these northeast Denver schools show an undeviating purpose to isolate negro students," (A. 33a) and the conclusion that "[t]he policies and actions of the Board . . . [in respect of the northeast schools] constitute de jure segregation" (A. 34a; see, too, 50a, 52a).

b. *Segregation of the Core Schools.* Plaintiffs' claim as to the core area schools was that various affirmative acts as to school sites and attendance zones plus a neighborhood school policy were consciously being employed by the board to create and maintain segregated schools (A. 46a). Plaintiffs' proof demonstrated that during the 1960's the board enforced within the core area a policy of attendance at a school in immediate proximity to a student's home (A. 66a-67a). In addition, a school-by-school analysis by the district court of the activities of the school board respecting schools within the core area showed actions of the board in the form of school attendance boundary changes, changes in optional attendance zones and selection of sites for new schools directly productive of racial segregation. Among such actions were the following:

(1) *New Manual Training High School,* which was a minority school when it opened in 1953, was built near the site of the old Manual High School—in a traditional Negro area, and with the original mandatory attendance boundaries coterminous with the eastern-most boundary of the Negro population, one-half block from the school. When in 1956 the Negro population had spread further eastward, the attendance zone was revised, over the protests of the Negro community, to include the expanded Negro residential area. (A. 59a-61a.)

(2) *Morey Junior High School,* which was predominantly white in 1961, was surrounded by four optional zones (A. 63a). In 1962 two of these, each with a very low minority concentration, were transferred out of Morey and attached to a predominantly white school. The other two, with a high Negro concentration, were included in the non-optional attendance zone for Morey. In addi-

tion, in response to a "particularly strong protest" by parents of white pupils in a mandatory Morey zone, that zone was transferred to an adjoining and predominantly white junior high school. "Thus, the 1962 Morey boundary changes were largely responsible for the transformation of Morey from a predominantly Anglo school in 1961 to a predominantly minority school in 1962." (A. 64a.)

(3) Optional zones created for *Columbine Elementary School* "increased the minority concentration" at that school (A. 72a) and "were apparently employed by Anglo students as a means of escaping" to almost totally white schools (A. 66a).

In treating the Park Hill schools, findings such as these, viewed in the aggregate, had led the district court to find an overall design on the part of the Board to segregate the schools in that area, and in turn to conclude that the Board was guilty of actionable, de jure segregation. The court appears to have been influenced in arriving at that conclusion by its determination—quoted above (*supra*, p. 12)—that there was a strong interrelationship among these schools so that "any action by the Board affecting the racial composition of one would almost certainly have an effect on the others." The court emphasized, as well, the inferences derived from the school board's rescission of its earlier resolutions to effectuate integration of the Park Hill schools.

The district court's approach, however, was markedly different in evaluating the evidence applicable to the minority schools in the core area. The district court itself remarked on this (A. 57a):

> The evidentiary as well as the legal approach to the remaining schools is quite different from that which had been outlined above.

While the reasons are obscure,[9] the district court appears to have felt compelled to examine the evidence as to the minority schools outside the Park Hill area more or less in a vacuum. In so doing, it placed upon the plaintiffs the burden of establishing individually as to each school, and without reference to their showing of the board's general segregatory and discriminatory intent—evidenced, *inter alia*, by the actions with respect to the Park Hill schools—that its racial make-up was the product of purposeful discrimination by the board. Thus, the district court opinion explicitly states—not once, but at several points—that its entire inquiry concerning schools outside the Park Hill area was limited to determining whether segregatory intent could be established from the evidence introduced into the record respecting the *specific* actions taken as to *those* schools.[10] This statement of approach is confirmed by the text of the court's decision. For not once in evaluating the actions taken by the school board as to the core schools does the district court even men-

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[9] The court recites as its reasons, that (A. 57a):

> For one thing, the concentrations of minorities occured at an earlier date and, in some instances, prior to the Brown decision by the Supreme Court. Community attitudes were different, including the attitudes of the School Board members. Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools.
>
> Still another distinguishing point is that we do not here have legislative action similar to the recission of Resolutions 1520, 1524 and 1581.

[10] *E.g.*, "Before discussing the acts which are relied on . . ." (A. 58a); "We now turn to a consideration of the evidence offered by plaintiffs regarding boundary changes and elimination of optional areas, which evidence is presented in support of their argument that *de jure* segregation exists in the affected schools" (A. 59a); "we must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above mentioned boundary changes and elimination of optional zones" (A. 75a); "what we have said about the boundary changes disposes of this contention [that the neighborhood school policy was maintained for the purpose of segregation]" (A. 74a).

tion, let alone consider, the actions of the school board in the neighboring Park Hill area during the 1960's found by the district court to evidence "an undeviating purpose to isolate Negro students. . ." (A. 33a).

Similarly, in passing upon plaintiffs' claim that the core area schools were purposefully segregated, the district court did not mention or consider the substantial body of evidence that the board had treated these schools unequally in other important respects. Thus, the district court had found that the board had assigned a higher percentage of black and less experienced faculty to core area schools than elsewhere (A. 9a, 81a) and that these schools had older physical facilities than the white schools (A. 83a).

Under the district court's reading of the governing law, as we have explained (*supra*, p. 10), state action resulting in racial isolation—including adherence to a neighborhood school policy—is actionable only when taken with the purpose to segregate or to maintain existing segregated conditions (A. 68a-74a). Following the narrow evidentiary analysis which we have identified above, the court found inadequate evidence to establish the requisite segregatory motive in the core area, and thus no de jure segregation. Representative are its findings that:

> [T]here is absolutely no evidence presented, other than the fact of the 1962 [boundary] change upon which to base a finding that the School District was motivated by an intent to segregate Hispano students at Boulevard . . . [A. 73a].
>
> [T]here is a dearth of evidence that [the boundary change at Columbine] was accompanied by a purpose to segregate . . . [A. 72a].
>
> What we have said above regarding boundary changes disposes of this contention [that the neighborhood school policy was maintained or employed for the purpose of segregation] [A. 74a].

As to specified (but not all) core area schools, the district court reinforced this determination that there was no actionable, de jure segregation on the alternative grounds of "causation": it found that the allegedly discriminatory individual actions taken by the board with respect to specific core area schools had little long term effect on the racial composition of those schools given the board's neighborhood school policy and the racial housing patterns prevailing in the core area (A. 67a).[11]

c. *Unequal Educational Opportunities.* A third, distinct aspect of the district court decision involves plaintiffs' claim of unequal educational opportunities in the segregated schools throughout the Denver system. The claim was that minority children in segregated schools in the Denver school system had been deprived of educational opportunities equal to those afforded white children. The district court found that "extensive and detailed evidence has been presented establishing the inferiority of plaintiffs' target schools" (A. 76a). This disparity was evidenced by "significantly lower" achievement levels in the segregated schools than in the other schools in the city (A. 78a). As one cause, the district court found that the faculty in the segregated schools was markedly less experienced than in white schools, and had a far greater rate of turnover as well (A. 80a-82a). The court concluded that "[f]aculty experience is an important factor in determining the educational opportunity offered at a particular school" (A. 80a). It also found disparity in the physical plant of minority versus predominantly white schools, which it deemed contributed to the unequal educational opportunities found to exist

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[11] Although the district court does in its findings addressed to the core area schools make generalized statements that residential patterns represent a "substantial" factor in the segregation existing in core area schools (A. 67a, 71a), only in the case of two of those schools—Manual (A. 61a, 72a) and Columbine (A. 72a)—is there a finding that the identified board action did not contribute to the long term segregation of the schools, at least in part (see A. 72a-73a).

in the segregated schools (A. 83a). Of even greater significance, the district court concluded from the extensive evidence submitted on the issue "that segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity" (A. 86a-87a; see also 84a, 107a-110a, 112a-113a, 115a). In all, the "evidence establishing the inferiority of the subject [segregated] schools is so convincing that it raises a serious equitable question about subjecting any pupils, minority or majority, to them" (A. 93a).

Based on these findings, the district court (after a further hearing on the issue of remedies) ordered desegregation of the Denver schools. In so doing, the court started from the predicate that the "present state of the law is that separate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal" (A. 88a). Here, the district court found that "an equal educational opportunity is not being provided at the subject segregated schools," and that "[m]any factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns" (A. 89a).

8. *The Decision of the Court of Appeals.* As did the district court, the court of appeals treated the case as involving three distinct and separable issues: segregated schooling in Park Hill; segregated schooling in the core area; and unequal educational opportunities in segregated schools throughout the school district.

With respect to the first issue, segregated schooling in the Park Hill area, the court of appeals affirmed the finding of de jure discrimination. That determination, in the court's view, could be reversed only if, under Rule 52 of the Federal Rules of Civil Procedure, the district court's findings were clearly erroneous. Following an in-

dependent review of the evidence on this issue, the court of appeals found no basis to reverse. To the contrary it was its view that (A. 139a):

> The facts as outlined above simply do not mirror the kind of impartiality imposed upon a board which adheres to a neighborhood school plan. . . . In sum, there is ample evidence in the record to sustain the trial court's findings that race was made the basis for school districting with the purpose and effect of producing substantially segregated schools in the Park Hill area.

With respect to the second issue, segregated schooling in the core area, it again affirmed the district court—this time on appeal by plaintiffs—on the basis of Rule 52's "not clearly erroneous" standard. The court of appeals addressed itself only to the district court's findings that there was no improperly motivated state action as to the core area schools.[12] On this issue, the court's articulation of the governing law corresponds to that adopted by the district court (A. 134a):

> The rule of the Circuit is that neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance. . . . However, when a board of education embarks on a course of conduct which is motivated by purposeful desire to perpetuate and maintain a racially segregated school, the constitutional rights of those students confined within that segregated establishment have been violated.

Applying this principle of law to the evidentiary record before the district court, the court of appeals, while recognizing that plaintiffs "have introduced some evidence

[12] See A. 148a. The court of appeals did not, at least in terms, consider the district court's alternative findings—relevant to several but not all core area schools—on "causation."

which tends to support their claim," held that "there is also evidence of record which supports the findings of the trial court, so under Rule 52 . . . , we must affirm" (A. 148a).

Examination of the court of appeals' analysis demonstrates that in reviewing the evidence as to de jure segregation in the core area it followed the same, fragmented approach of the district court, looking to the acts and policy of the school board with respect to the core area in isolation from, and without reference to, the acts concurrently being taken by the very same board to segregate the adjoining Park Hill schools. Thus, at the outset of its opinion, the court of appeals defines the case as involving "two *separate* causes of action," one involving the Park Hill schools and one the core area schools (A. 124a, emphasis added). And a review of the court of appeals decision demonstrates that its analysis followed this same approach to the evidence, not once considering in its review of the school board actions in the core area or in its determination of whether the neighborhood school policy was being maintained in that area for a racial purpose, the patent segregatory action being practiced by the board in the Park Hill area.

Similarly, the court of appeals placed on plaintiffs the burden of establishing a discriminatory motive on the part of the school board independently with respect to each area and, it appears, for the core area, for each school within that area independently. This issue of burden of proof was explicitly raised with the court of appeals on review, the court noting in its decision plaintiffs' claim "that they were required to labor under an erroneous burden of proof" (A. 147a). The court of appeals' response was that "it would be incongruous to require the Denver School Board to prove the non-existence of a secret, illicit, segregatory intent" (*Id.*):

> Where, as here, the system is not a dual one, and where no type of state imposed segregation has previously been established, the burden is on the plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action [A. 148a].

With respect to the third issue, unequal educational opportunity in the segregated schools in the core area, the court of appeals appears to have accepted the findings which furnished the predicate for the relief afforded by the district court. Thus, most narrowly, it accepted the view that "the evidence of the case supports the finding that the teacher experience in the designated core area schools is less than that which exists in other Denver schools" (A. 143a-144a); and, most broadly, "we cannot dispute the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation may in fact create an inferior educational atmosphere" (A. 145a). It rejected, however, the district court's conclusion that the resulting unequal educational opportunity was remediable by court order.[12] It did so on the explicit ground that "a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided the plan is not used as a veil to further perpetuate racial discrimination" (A. 144a); that there was no racially motivated segregation established, and, therefore, that there could be no court enforced desegregation whatever the inequality resulting from the segregated nature of the schools (A. 145a-46a).

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[12] The court of appeals, in result, barred implementation of the district court order requiring desegregation of 17 core area schools.

II

ARGUMENT

A. Introduction and Summary of Argument.

This is the first school desegregation case involving a district outside the South to be heard by the Court. At issue is the constitutionality of segregated schools located in a portion of the Denver School District, the so-called core area, which provide inferior educational opportunities for the minority children who attend them. The segregation of these schools results from the adherence by the Denver School Board to a so-called "neighborhood school policy" whereby the children in this segregated residential area are assigned to schools located near their homes.

Two fundamental issues are presented: First, whether the courts below applied the proper rules of law in determining if the school board acted with a racial purpose in adhering to a student assignment policy for the core area schools which resulted in the segregation and inferior educational opportunities. If the board's action was motivated by race, the existing segregation is de jure and constitutes a violation of the Equal Protection Clause. Second, assuming that the board did not act with such a racial purpose, whether its student assignment policy for the core area schools was nonetheless barred by the Constitution because the segregation it produced resulted in inferior educational opportunities for minority children and because that policy served no compelling state need.

Before urging upon the Court the principles that we contend are controlling, we believe two preliminary observations are in order.

First, school boards have real options in selecting an assignment plan. Many boards—including the predeces-

sor of the defendant board—have determined that the convenience involved in assigning children to schools relatively closer to their homes is outweighed by the educational advantages of eliminating segregated conditions which breed inequality of educational opportunity. Thus, where a school board adheres to a so-called "neighborhood school" plan which has the effect of preserving segregation, it is incorrect to assume that the board would have maintained such a policy irrespective of any purpose to segregate. Faced with the cancerous conditions of segregation, an objective board, free of racial bias and racial pressures, could well opt, indeed might be *likely* to elect, to correct those conditions.

Second, a "neighborhood school policy" [19a] lends itself to purposeful school segregation in urban areas. In large black ghettos where students traditionally have been assigned to schools on the basis of attendance zones which reflect the residential segregation, a board can effectively maintain nearly perfect segregation in the heart of the ghetto merely by renewing the attendance zones and refurbishing existing facilities. On the other hand, at the fringes of the ghetto it may be necessary to manipulate attendance zones and building programs because the racial composition of these areas is in flux. Thus, in detecting whether a school district is utilizing a "neighborhood school" plan for purposes of racial segregation, the most probative evidence will involve acts taken with respect to the schools located on the fringes of the ghetto.

Because neither of the lower courts considered these factors, their analyses of whether de jure segregation existed in the core area schools were skewed. Both courts focused on the era of the 1950's when the core schools became segregated. Having found that the segregation

[19a] The term "neighborhood school policy" is an imprecise term susceptible to a variety of meanings. See, *infra*, pp. 49-50.

of the 1950's was not purposeful, the lower courts terminated their inquiry as to the core area. They did not question whether during the 1960's the school board, rather than employing some other student assignment plan, maintained the "neighborhood school plan" in the core area for the purpose, at least in part, of perpetuatting school segregation.

If the lower courts had considered the board's reasons for maintaining a "neighborhood school policy" during the 1960's, they would have found persuasive evidence of racially discriminatory motive. During this period the school board was systematically manipulating the "neighborhood school plan" to maximize segregation in the expansion area of the ghetto (Park Hill). This racially motivated manipulation, arguably, at the very least, lays bare the reason why the school board continued to reapply the "neighborhood school plan" in the core area where—to the knowledge of the Board—the plan was producing educational inequality.

In this brief, NEA submits two contentions concerning the proof of de jure segregation in the core area, and a third contention that the inferior education offered in the core schools constitutes a denial of equal protection even if it is not the product of de jure segregation.

We urge that the district court's approach to the evidence, which was affirmed on appeal, was erroneous. First, the district court compartmentalized the evidence of segregation. In determining whether the "neighborhood school plan" was being maintained and administered for discriminatory reasons the district court ignored other evidence of discrimination, including the deliberate discrimination in the Park Hill area. Such an approach is contrary to the longstanding principle that where motive is an issue, related acts showing a similar motive are probative.

Second, the lower courts erroneously allocated the burden of proof. Plaintiffs proved that during the 1960's the school board was purposely manipulating the "neighborhood school plan" to assure racial isolation in the fringe area of the black residential district. There the "neighborhood plan" would not, without adjustment, fully segregate the children. This proof of racial manipulation, we urge, made out at least a prima facie case that in the core area during the 1960's the "neighborhood school plan" was being maintained and administered for racially discriminatory reasons.

Assuming that the segregation of the core area was not purposeful, there remains the issue whether the inferior educational opportunities resulting from segregation of the core schools, when compared to other Denver schools, constitute a denial of equal protection. In resolving this issue the lower courts should have applied the compelling governmental interest standard. That standard applies because education is a fundamental interest and Denver's student assignment plan denies equal educational opportunities to minority group children. Both courts below, however, misapplied this test. The trial court failed to consider whether the Denver assignment plan served any compelling governmental interest that would justify the educational inequalities that it was producing. The court of appeals, on the other hand, erred in holding that maintenance of a "neighborhood school plan" is constitutional as a matter of law notwithstanding findings that the segregation it produces results in inferior educational opportunities for minority children.

B. The Courts Below Employed Erroneous Standards of Evidence and Proof in Determining Whether the Denver School Board Acted with a Purpose To Segregate the Core Area Schools.

1. Evidence of the School Board's Actions Throughout the School District Must Be Considered on the Issue of Motivation.

The district court, with the approval of the court of appeals on review, found as to the schools in the Park Hill area that "[b]etween 1960 and 1969 the Board's policies with respect to these northeast Denver schools show an undeviating purpose to isolate Negro students" (A. 33a). As to the segregated schools in the core area, however, the district court, again with the approval of the court of appeals, found no such discriminatory purpose either incident to the specific acts of selection of sites for new schools or changes in school boundaries or incident to the board's strict adherence to a neighborhood school policy. This finding, as we have shown, *supra*, pp. 13-17, was predicated exclusively on the evidence respecting the actions of the school board in the core area. The district court's attempt to identify the "purpose" underlying those actions was taken without visible regard to the often-concurrent actions taken by the board in the Park Hill area, which were found to have been racially motivated, or to the objectively measurable discrimination against the minority schools in the core area which the court found to exist in faculty placement and physical facilities (see, *supra*, n. 10 and pp. 17-18).

We do not know why the district court, and in turn the court of appeals, took so restrictive a view of the evidence before them as to the fundamental issue of the motive or purpose with which the actions of the school board were taken. Whatever the reason, we think their approach to the evidence plainly improper. For it is now firmly established in the federal courts that the determination of

such an issue can only be made by reference to the whole surrounding course of conduct of the party involved, not solely by reference to a single act of the party viewed in isolation.

This principle dates back to, and before, the leading federal decision, *Wood* v. *United States*, 41 U.S. (16 Pet.) 341 (1842). In that case the defendant was charged with filing false invoices in connection with four shipments of goods in 1839 with the purpose of evading or defrauding the United States. At trial the court admitted evidence of 25 other fraudulent importations by the defendant in 1839 and 1840, fifteen of which were made before, and ten after, the four in suit. Over defendant's objection, this Court held that evidence of these similar transactions was admissible to establish the defendant's motive or intent. In the Court's opinion Mr. Justice Story said (41 U.S. at 358-59, emphasis supplied):

> The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is a matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. *Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty.* . . .

Since that decision, the principle that a party's full course of conduct is to be considered on the issue of motive or purpose has been given effect in the widest possible range of contexts. Thus, under the criminal law evidence of like transactions is deemed relevant to the issue of intent:

> It was important in the actions on trial to discover the motive of the defendants, whether what they did at the time in question was the casual conduct of innocent parties intent upon their own lawful affairs, or whether it was inspired by the fraudulent purpose of assisting in the spoliation. It is the settled rule that in such a case evidence of similar acts at other times is admissible. The theory of the rule is that a succession of like instances tends to illustrate the character of the act under investigation and to negative innocence in the particular case. It is especially applicable where there is a charge of complicity in a scheme to defraud pursued as a vocation. Such a scheme is naturally conceived in secrecy, and the part of the defendant may be the performance of some act which furthers the accomplishment of the unlawful design, but which, when isolated from that which preceded and followed, may bear the aspect of innocence. Yet proof of a recurrence of similar acts in other cases where like frauds were perpetrated may be persuasive proof of a guilty purpose and so disclose the true character of the whole. [*Exchange Bank* v. *Moss*, 149 Fed. 340, 342 (8th Cir., 1906)]

See also *Lutwak* v. *United States*, 344 U.S. 604, 617 (1953). So too, under the anti-trust laws, it is the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 705 (1948). *Accord, Standard Oil Co.* v. *United States*, 221 U.S. 1, 46-47, 75-76 (1911); *United States* v. *Reading Co.*, 253 U.S. 26, 43-44 (1920); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962). Again, in the many contexts under the National Labor Relations Act where an employer's "good faith" or motive is an operative element of the determina-

tion to be made, it is the established rule that "the Board must inquire into the 'totality of the employer's conduct.'" *N.L.R.B.* v. *Cascade Employers Assn., Inc.*, 296 F.2d 42, 47 (9th Cir. 1961). *Accord*, *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 134, 139-40 (1st Cir. 1953); *N.L.R.B.* v. *Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965); *Joy Silk Mills* v. *N.L.R.B.*, 185 F.2d 732, 741-42 (D.C. Cir. 1950); *N.L.R.B.* v. *National Seal Corp.*, 127 F.2d 776, 778 (2d Cir. 1942).

This rule has been applied repeatedly in the very context now before the Court. The federal courts have recognized in many school segregation cases the necessity that a trial court consider all the actions of a school board throughout the district when passing on the subjective, and often elusive, question of "purpose" or "motivation." [14] Ironically, the Tenth Circuit's own decision in *Downs* v. *Board of Education of Kansas City*, 336

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[14] Compare *Brown* v. *Gaston County Dyeing Machine Co.*, No. 71-1268 (March 28, 1972) (Slip op. pp. 10-12), where the Fourth Circuit said:

> "Courts have often observed that proof of overt racial discrimination in employment is seldom direct. *E.g.*, United States v. Jacksonville Terminal Co., —— F.2d ——, ——, No. 30,448 at 51 (5th Cir., Aug. 31, 1971); Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157, 1162 (8th Cir. 1971); Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E. 2d 581, 584 (1954). Recognizing this, we have found 'error in limiting Title VII to present specific acts of racial discrimnation.' United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970), and it is now well established that courts must also examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists. United States v. Jacksonville Terminal Co., —— F.2d ——, ——, No. 30,448 at 42, 51 (5th Cir., Aug. 31, 1971); Graniteville Co. v. EEOC, 438 F.2d 32, 41 (4th Cir. 1971); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970); United States v. Hayes International Corp., 415 F.2d 1038, 1044 (5th Cir. 1969)."

F.2d 988 (1964), provides one of the clearest statements on this point. There the court of appeals reviewed the board's minority transfer policy, its neighborhood school policy, changes in the attendance lines, and the racial imbalance of the faculty at various schools. The court then held (*id.* at 997, emphasis added):

> It follows from what has been said that none of the factors relied upon by appellants, when considered alone, is sufficient to establish a denial of their constitutional right not to be discriminated against because of race or color. *The crucial question, however, is whether all of these factors considered together are sufficient.*

The Fifth Circuit is in accord:

> In this case the essence of the complaint is purposeful discrimination against Negroes as a class. The inquiry into purpose makes it especially appropriate for the Court:
>
> > (1) to study the case as a whole, weighing all of the evidence and rational inferences in order to reach a net result . . . . [*Meredith* v. *Fair*, 305 F.2d 343, 360 (5th Cir. 1962)]

Similarly, the district court in its decision in the *Pontiac* case[15] emphasized that:

> If this Court's attention were directed and limited solely to the location of the Bethune School without being confronted by or concerned with the total pattern which was, at the time, developing in the construction of new schools in the system, the School Board may have succeeded in providing a persuasive argument here, as it did earlier, that the location of the Bethune School could be justified on the grounds of the existing criteria, namely, nearness, capacity and safety of access routes. However, this

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[15] *Davis* v. *School District of City of Pontiac, Inc.*, 309 F. Supp. 734, (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir. 1971).

> Court's consideration is not limited or directed solely to the location of the Bethune School, but has been broadened to take into consideration the composition of the entire Pontiac School System. [309 F. Supp. at 741]

The Sixth Circuit, on review, concurred in this approach:

> Although, as the District Court stated, each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial discrimination has existed in the Pontiac school system for at least 15 years. [443 F.2d at 576]

Other lower federal courts similarly have affirmed the requirement that the school authorities' "course of conduct" is to be "viewed in its totality," [16] and have stated that board actions must be "read against a background" of relevant facts.[17]

In the cases now before the Court, each of the courts below failed in any discernible way to take into account, in evaluating the motivation underlying the school board's actions outside the Park Hill area, the sustained acts of segregation practiced with respect to the Park Hill schools. Nor did the courts look to the "pattern" of school board conduct in the school district as a whole. On the evidence, given the bald segregatory policies being pursued in the Park Hill schools, we think no objective analysis of the evidence as a whole could have failed to identify a policy of segregation which affected the board's conduct in the core area and colored its adherence there to a neighborhood school policy. It is sufficient for present purposes, however, that the courts below

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[16] *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181, 195 (S.D. N.Y. 1961), *aff'd in part*, 294 F.2d 37 (2d Cir. 1961).

[17] *Evans* v. *Buchanan*, 173 F. Supp. 891, 892 (D. Del. 1959), *rev'd on other grounds*, 281 F. 2d 385 (2d Cir. 1960).

made no attempt to analyze actions directed to the core area schools against the school board's total pattern of conduct. For this reason alone, the judgment of the court of appeals as to the core schools should be reversed.

2. *School Authorities Have the Burden To Justify Segregated Schooling in any Part of the School System Once De Jure Segregation Has Been Established in a Transitional Area.*

The courts below, as we have shown, adopted an excessively restrictive view of the evidence to be considered in determining whether the Denver School Board had practiced de jure segregation outside the Park Hill schools. This error was compounded in the allocation of the burden of proof on this issue between the parties.

In the court of appeals, petitioners urged that they had been "required to labor under an erroneous burden of proof," but the Tenth Circuit approved the district court's handling of the burden (A. 147a). The court of appeals held that "where . . . no type of state imposed segregation has previously been established, the burden is on plaintiff to prove by a preponderance of evidence that racial imbalance exists and that it was caused by intentional state action" (A. 148a). And the court imposed on plaintiffs the burden of proving such a discriminatory motive with respect to each school in the core area notwithstanding its finding that the board had purposefully segregated the Park Hill schools.

We consider the position of the court of appeals on the issue of burden of proof seriously in error. If allowed to stand, it would have grave consequences with respect to segregated schools in urban communities of the North and West since plaintiffs would be required to bear the virtually insurmountable burden of proving separately for each and every school that segregation was the result of willful discrimination by the school board. In our

view, where, as in the instant case, plaintiffs have met the burden of establishing that school authorities have intentionally acted to establish or maintain segregation in a transitional area of the school district, the burden should shift to the school authorities to prove that segregation in the remaining areas is not purposeful.

a. The Governing Principles.

The authorities make clear that there are no hard and fast standards governing allocation of the burden of proof in every legal setting. The issue, rather, "is merely a question of policy and fairness based on experience in the different situations." IX Wigmore, *Evidence* § 2486 (1940 ed.). In the context of racial segregation, the courts, including this Court, have recognized a range of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions when challenged in litigation. These have direct application to the facts now before the Court.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971), this Court observed that the existence of a one-race school was not conclusive evidence that the system "still practices segregation by law." But, "in a system with a history of segregation" a presumption against racially disproportionate schools is warranted. Again, in a school district with a history of segregation, the discharge of a disproportionately large number of black teachers incident to desegregation has been held to raise a presumption of discrimination which "thrusts upon the School Board the burden of justifying its conduct by clear and convincing evidence." *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 193 (4th Cir. 1966) (en banc). This follows because (Id.):

> Innumberable cases have clearly established the principle that under circumstances such as this where a

history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts.

See *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 887-88 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (1967), *cert. den.* 389 U.S. 840; *North Carolina Teachers Ass'n.* v. *Asheboro City Board of Education*, 393 F.2d 736, 743 (4th Cir. 1968) (en banc); *Williams* v. *Kimbrough* 295 F. Supp. 578, 585 (W.D. La., 1969); *Bonner* v. *Texas City Independent School District*, 305 F. Supp. 600, 621 (S.D. Tex., 1969); *Armstead* v. *Starkville Muncipal Separate School District*, 325 F. Supp. 560, 570 (N.D. Miss. 1971), *appeal pending*, No. 71-2124; *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706, 720 (N.D. Miss. 1971), *appeal pending*, No. 71-2581.[18]

In seems to us that when school authorities have evidenced a pattern of affirmative and purposeful segregatory action within one area of a school district, logic compels a presumption that these same authorities will be motivated by the same illegal considerations and impelled to parallel action elsewhere in the school district should the occasion or need arise. There is, to our knowledge, nothing in the history of school segregation suggesting that a single school authority can be expected

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[18] Similarly, in the jury selection cases, this Court repeatedly has held that a substantial disparity between blacks and whites selected for juries when coupled with a showing of procedures which would permit or facilitate racial discrimination constitutes a prima facie case of invidious discriminaton. *Alexander* v. *Louisiana*, No. 70-5026, 36 U.S.L.W. 4365 (decided April 3, 1972); *Turner* v. *Fouche*, 396 U.S. 346, 361 (1961); *Eubanks* v. *Louisiana*, 356 U.S. 584, 587 (1958); *Avery* v. *Georgia*, 345 U.S. 559 (1953). The Court has ruled in such cases that "once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander* v. *Louisiana*, *supra*, at 4367.

to pursue an active policy of segregation in one area of the district it administers, while concurrently pursuing a policy of neutrality elsewhere within the district. Thus, common sense as well as the authorities discussed above strongly support our claim that proof of de jure segregation in one group of schools justifies a rule imposing on school authorities the burden of establishing that segregation found to exist in other schools within the same district is not the result of their illegal actions.

b. The Tenth Circuit's Ruling on Burden.

According to the Tenth Circuit, "it would be incongruous to require the Denver School Board to prove the nonexistence of a secret, illicit, segregatory intent" (A. 147a). Colorado has never, by legislation, required segregated educational facilities (A. 126a). Thus, the court held that (A. 148a):

> Where, as here, the system is not a dual one, and where no type of state imposed segregation has previously been established, the burden is on the plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action.

As the court put it, "Such an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent" (A. 147a). On the other hand, if Denver were located in Oklahoma or some other state in the South where at some point in time segregated schooling had prevailed by virtue of legislative fiat, the Tenth Circuit would have decided this case differently. *United States* v. *Board of Education of Tulsa County*, 429 F.2d 1253 (10th Cir. 1970). See also A. 147a.

In our view, the analysis adopted by the Tenth Circuit is indefensible, both in principle and as applied to the facts of this case.

(1) When it came to the allocation of the burden of proof, the court of appeals attached importance to the fact that there has never been state imposed segregation in Colorado. But in an earlier section of its opinion, that court emphasized that the Fourteenth Amendment's prohibition against racial discrimination reaches not only actions of the legislature but also the actions of other state agencies, and that there is "no rational explanation why state imposed segregation of the sort condemned in *Brown* should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers" (A. 134a). In short, the court of appeals first demonstrated the irrelevance of a distinction between discrimination required by legislation and discrimination voluntarily but purposefully undertaken by a public school board, but then the court inexplicably refused to apply its own compelling logic on the issue of burden. We see no reason why the existence of the presumption of discrimination should turn on whether the history of discrimination is one compelled by state law or is the product of voluntary action of the very school board under scrutiny.

(2) The court of appeals' treatment of the facts reveals a related inconsistency. In placing on plaintiffs the burden of proving discriminatory motive, the court reasoned that "[s]uch an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent" (A. 147a). While advancing this reason for its ruling, however, the court ignored the findings of the district court, affirmed in part on appeal, to the effect that the board, for a decade at least, had deliberately discriminated against black children in the Park Hill area.

We submit that the allocation of the burden of proof as to the core schools was erroneous. Simply as a matter of common sense, public officials who deliberately discrim-

inate with their left hand should be called upon to show that other conditions of segregation within their school district have not been wrought with their right hand.

3. *The District Court Erred in Requiring a Showing that the Segregation of Each School in the Core Area Was Caused by Discriminatory Actions, Such as Boundary Changes, Aimed at the Individual School.*

A word is in order concerning the trial court's allusions to questions of causation. The court suggested with varying degrees of specificity that certain individual acts of the school district during the 1950's and early 1960's (see, *supra*, pp. 13-14), even if found to have been racially motivated, were not the proximate cause of the segregation of the core area schools existing at the time of the trial, given the board's neighborhood school policy and the racial housing patterns (*supra*, p. 17).

In our view whether the specific acts of the 1950's and early 1960's created or originated the segregation in some core schools is beside the point. The point is that throughout the 1960's the Denver School Board annually assigned children to their respective schools. Each year the board used a "neighborhood school plan." And each year the plan produced segregated schooling. The board did this despite its receipt of formal reports and studies advising of the segregation and inferior educational offering which the "neighborhood school plan" was producing for minority children (A. 127a-128a).

Clearly the decision to adhere to the "neighborhood plan" had the direct result of continuing the segregation in the core area schools. Thus, the key issue, in amici's view, with respect to plaintiffs' claims concerning de jure segregation was whether the board acted for a racial purpose in deciding to maintain a "neighborhood school policy" in the core area—despite its knowledge that the

resulting segregation afforded inferior educational opportunities to the minority students. The evidence of the segregatory motive behind other contemporaneous actions of the board is directly relevant to the evaluation of the board's purpose in determining to adhere to the "neighborhood school policy" which, without question, was a major cause of the continued segregation of the core area schools.[39]

C. The Court of Appeals Erred in Holding that the Constitution Prohibits Only Purposeful Denials of Equal Educational Opportunity and that in any Event Such Denials Are Justified as a Matter of Law When They Result from the Operation of a "Neighborhood School Plan."

1. *Introduction.*

In the first section of our brief we have discussed the lower courts' failure to apply proper standards of proof in evaluating plaintiffs' evidence establishing that the extensive segregation throughout the Denver public school system was deliberate. In the balance of this brief we assume arguendo that the segregation in the core schools was not deliberate. Viewed in that light the case takes on fundamental importance, for it presents the question whether the Fourteenth Amendment renders unconstitu-

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[39] Plaintiffs are urging, *inter alia:* that the record leads inescapably to the conclusion that the Denver School Board has engaged in actionable, de jure segregation throughout the school district and that this Court should itself find that the segregation in the core area was de jure. We believe that course is commended by *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969). In the event the Court should wish to follow some alternative path in remedying the procedural deficiencies of the courts below, we urge that the proceeding be remanded to the trial court with instructions that the district court (a) consider the pattern of school board actions throughout the district in passing on the issue of its motivation with respect to segregated schooling in the core area, and (b) place on the school board the burden of establishing that segregated schooling, where it exists within the district, is not the result of illegal state action.

tional school segregation, whether or not purposeful, which results in educational opportunities for black students unequal to those available for white students.[20]

The factual predicate framing this important question is not in dispute. For as we explained in our statement of this case, *supra*, pp. 17-18, 21, *both* lower courts were in agreement that the facts of record established that segregation in the Denver public schools results in inferior educational opportunities for minority children. Thus, the trial judge found that the children assigned to the

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[20] It may be suggested that the position advanced here is inconsistent with the so-called "de facto" cases in the lower courts. See, *e.g.*, *Bell* v. *School City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 337 U.S. 924 (1964); *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Downs* v. *Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965). But see *Evans* v. *Ennis*, 281 F.2d 385, 389 (3d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961); *Branche* v. *Board of Educ. of Hempstead*, 204 F. Supp. 150 (E.D. N.Y. 1962); *Blocker* v. *Board of Educ. of Manhasset*, 226 F. Supp. 208 (E.D. N.Y. 1964); *Barksdale* v. *Springfield School Comm.*, 237 F. Supp. 543 (D. Mass.), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965); *Booker* v. *Board of Educ. of Plainfield*, 45 N.J. 161, 212 A.2d 1 (1965); *Jackson* v. *Pasadena City Bd. of Educ.*, 59 Cal. 2d 876, 31 Cal. 606, 382 P.2d 878 (1963). However that may be, this is the first time that this Court has considered the issue on its merits, and we believe the de facto cases should not be regarded as persuasive. To the extent that the plaintiffs in the *Bell*, *Deal* and *Downs* line of cases rested their claims on the theory that the Constitution requires racial balance in the schools (see, *e.g.*, *Bell*, *supra*, 213 F. Supp. at 828; *Deal*, *supra*, 369 F.2d at 58), the decisions are irrelevant. Plaintiffs have not urged such a theory and we make no such claim. To the extent that the decisions are predicated on a finding that state action was absent, the decisions are erroneous. Ample state action is present when school boards draw the attendance zones, locate the schools, assign the students and compel the attendance of students at those schools. The leading de facto cases (*Bell*, *Deal*, and *Downs*), moreover, did not present to the courts a factual record and findings, present here, showing the educational harm suffered by black students in racially identifiable black schools. Finally, to the extent that the *Bell*, *Deal* and *Downs* cases relied on a requirement that a discriminatory purpose must be shown, they are inconsistent with decisions of this Court. See, *infra*, pp. 46-48.

segregated core schools showed significantly lower scholastic achievement and significantly higher dropout rates. The court observed that these adverse consequences were attributable in part to factors such as "home and community environment, socio-economic status of the family, and the educational background of the parents . . . ." But even so, "we cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity." (A. 84a.) "Many factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation in the name of neighborhood schools and housing patterns" (A. 89a).[21] So too, it was the view of the court of appeals that "[w]e cannot dispute the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation in fact may create an inferior educational atmosphere" (A. 145a).

The issue, rather, is as to the principles of law to be applied to these facts. On this question the courts below disagreed. The trial court ruled that the proven inequalities must be remedied. "Where state action, even if nondiscriminatory on its face, results in the unequal treatment of the poor or a minority group as a class, the action is unconstitutional unless the state provides a substantial justification in terms of legitimate state interest" (A. 87a). In other words, the "present state of the law is that separate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to inferior schools." (A. 88a.)

[21] See also, A. 86a-87a.

The court of appeals disagreed and reversed. It is difficult to tell precisely why. Evidently it did so for either of two reasons. First, it appears to have been the position of the court of appeals that the Fourteenth Amendment, at least as interpreted in *Brown*, prohibits school segregation only when it is purposeful, regardless of the effect of such segregation. Alternatively, the court of appeals appears to have been of the view that a school board's employment of a neighborhood school policy, if not shown to be motivated by a purpose to segregate, suffices in and of itself to excuse any resulting educational inequality inflicted on minority children within the school district. The court thus stated "that the law in this circuit is that a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools . . ." (A. 144a).[22]

NEA contends that the district court, rather than the court of appeals, used the proper standard for determining whether Denver's segregated schools are permissible under the Fourteenth Amendment.[23] In our view, where it is established that segregated schools afford minority children unequal educational opportunities, the school district must show that the policies responsible for the segregation serve a compelling governmental interest. Absent such a showing, the inequality constitutes a violation of the Equal Protection Clause. The court of ap-

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[22] Elsewhere the court said "the rule of the Circuit is that neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance" (A. 134a).

[23] As we explain below, *infra*, p. 52, we believe that the district court misapplied this standard. The court failed to make any findings concerning the advantages of the neighborhood school system and failed to determine whether such advantages, if any, amounted to a compelling justification for the deprivations that the neighborhood school policy was found to inflict upon the minority group children in the district.

peals thus erred in ruling that the Fourteenth Amendment prohibits segregation only when it is purposely aimed at a minority group, and/or in adopting the position that a neighborhood school policy is a per se justification for the educational inequalities that are caused by the adventitious maintenance of segregated schools.

We discuss below our claim that the "compelling governmental interest" test is the standard which must be applied in cases such as this, where the proof establishes that segregated schooling within a school district denies equal educational opportunities to minority children. We follow this with a discussion of the alternative arguments which the court of appeals appears to have advanced in reaching a contrary result.

2. *The Compelling Governmental Interest Test Is the Proper Standard for Judging Whether Denver's "Neighborhood School Policy" Satisfied the Equal Protection Clause.*

The Fourteenth Amendment, in terms, speaks of "equal protection of the laws." Federal courts have interpreted the clause to place on the state the burden of justifying any state action which impinges unequally and unfairly upon a group or an individual.[24] As the law has developed, two distinct standards have been applied to measure the validity of state action put in issue under the clause. One branch of the cases requires only that the state, in justification of a proven discrimination, demonstrate a reasonable basis therefor.[25] A second branch of the cases —applicable in circumstances where suspect classifications and fundamental interests are involved—requires

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[24] *McLaughlin* v. *Florida*, 379 U.S. 184, 190-191 (1964).

[25] See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), and cases discussed therein.

the state to demonstrate a compelling governmental interest justifying the discrimination.[26]

As we have demonstrated above, both courts below are in agreement on the facts: the Denver school authorities have maintained segregated schooling by adherence to a "neighborhood school policy," and, as a result, have afforded minority children unequal educational opportunities. In determining whether this proven condition of inequality violated the Equal Protection Clause, the district court in essence applied that branch of the case law requiring the state to justify its actions by demonstrating a "compelling state interest." Thus, the district court held that where minority groups are consigned to inferior schools the probability that the assignment policy is unconstitutional "becomes almost conclusive" (A. 88a).

In our view, the district court's approach to the case was correct. We urge the Court to hold that once the plaintiffs demonstrate that school assignment policies have created segregated schools, which in turn provide inferior educational opportunities for minority children, a prima facie violation of the Fourteenth Amendment is established, which places upon the school district an obligation to show a compelling justification for its assignment policies.

We would urge this standard on the Court merely as a matter of principle if in fact the slate were clean and this were an issue of first impression. At stake in this case is the education of children—"perhaps the most important function of state and local governments," "the very foundation of good citizenship" and "a principal instrument" in the development of the individual's ca-

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[26] See, *e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 670 (1966); *Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969), and cases discussed therein.

pacities. See *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

But the slate is not clean. Recently, state and federal courts have recognized the paramount importance of education and have sought to assure equal educational opportunities to all children. Thus, five courts have required the state to show a compelling justification for school financing arrangements that in effect diminish the educational opportunities of children residing in poorer areas of the state. *Serrano* v. *Priest*, 5 Cal. 2d 584, 487 P.2d 1241 (1971); *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (D. Minn. 1971); *Robinson* v. *Cahill*, No. L-18704-69 (Superior Court of New Jersey, Jan. 19, 1972), pp. 66-69 (slip op.); *Hollins* v. *Shoftstall*, No. C-253652 (Superior Court of Maricopa County, Arizona, January 13, 1971) p. 6 (slip op.); *Rodriquez* v. *San Antonio Independent School District*, C.A. No. 68-175-SA (W.D. Tex. Dec. 23, 1971) (3 Judge Ct.) *jurisdictional statement filed*, 40 U.S.L.W. 3513 (U.S. April 17, 1972) (No. 71-1332).

The case at bar presents an even more appropriate instance for employing the compelling interest standard. In this case the educational deprivation falls most heavily upon the children of minority groups. In the past when such groups have been burdened disproportionately by state action, this Court repeatedly has applied the compelling interest standard in determining whether the racial or ethnic group has been denied equal protection. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668 (1966); *McLaughlin* v. *State of Florida*, 379 U.S. 184, 196 (1965); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). Consistent with these rulings of this Court, lower courts called upon to judge state action neutral on its face but disproportionately burdening blacks have similarly required the state to establish a "compelling state interest"

in order to justify its action. *Hawkins* v. *Town of Shaw*, 437 F.2d 1286, 1288, 1292-93 (5th Cir. 1971), *aff'd en banc*, —— F.2d —— (No. 29013 March 27, 1972); *Armstead* v. *Starkville Municipal Separate School District*, 325 F. Supp. 560, 570 (N.D. Miss. 1971), *appeal pending*, No. 71-2124 (5th Cir.); *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706, 720 (N.D. Miss. 1971), *appeal pending*, No. 71-2531 (5th Cir.); *Western Addition Community Organization* v. *Alioto*, 330 F. Supp. 536, 539 (N.D. Cal. 1971); *Arrington* v. *Mass. Bay Transp. Auth.*, 306 F. Supp. 1355, 1358 (D. Mass. 1969); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967). *Cf. Dandridge* v. *Williams*, 397 U.S. 471, 485 n. 17 (1970).

We submit that the great purposes of the Fourteenth Amendment cannot be satisfied unless black children in school districts throughout the country are assured of educational opportunities equal to those provided to whites in the same districts. More than half of the nation's black children reside in the center cities.[27] For these children *Brown* v. *Board of Education* has no meaning so long as school boards are free to make student assignments which mirror in the schools, and compound the effects of, the residential segregation in the city.

NEA does not urge here, however, that a "neighborhood school policy" is per se unconstitutional. We leave open the possibility of circumstances which might justify it.[28] We urge only that, upon a showing that minority

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[27] The official census for 1970 reveals that 58 per cent of the black population lives in inner city areas. U.S. Bureau of the Census, Census of Population in Housing 1970, *General Demographic Trends for Metropolitan Areas*, 1960-1970 (Final Report, October 1971), p. 33, Table 9.

[28] A district court should consider, for example, whether the segregation produced by a "neighborhood school policy" is detrimental to the educational development of the black children in those schools, whether the school district has embarked upon compensatory

students are afforded inferior educational opportunities in segregated schools, the state be required to show a compelling governmental interest justifying the policies responsible for such inequality. As the court put it in *Hobson* v. *Hansen*, *supra*, 269 F. Supp. at 508:

> If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (*e.g.*, unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in public schools irresistibly calls for additional justification. What supports this call is our horror at inflicting any further injury on the Negro, the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition, and also our common need for the schools to serve as the public agency for neutralizing and normalizing race relations in this country. With these interests at stake, the court must ask whether the virtues stemming from the Board of Education's pupil assignment policy (here the neighborhood policy) are compelling or adequate justification for the considerable evils of *de facto* segregation which adherence to this policy breeds.

3. *The Court of Appeals Erred in Holding that Only Purposeful Discrimination Violates the Equal Protection Clause.*

The court of appeals in one of its alternative holdings rejected the standard we urge upon this Court because that standard does not make segregatory purpose

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education programs that actually remedy the effects of racial segregation, and whether there is a practical alternative to the segregated conditions resulting from the "neighborhood school policy."

or invidious motive an element of the constitutional violation. In this regard the Tenth Circuit's ruling conflicts with the decisions of this Court.

To be sure, a discriminatory purpose may be relevant or even conclusive in establishing a Fourteenth Amendment violation. *Griffin* v. *Prince Edwards County*, 377 U.S. 218 (1964). *Cf. Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960). But cf. *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971). Discriminatory motive is not a prerequisite, however. Last term this Court again eschewed the search for a discriminatory motive or intent, looking instead at the operative effect of the state action. *Palmer* v. *Thompson, supra*, 403 U.S. at 225. Traditionally this has been the manner in which the Court has tested state action against the requirements of the Equal Protection Clause. *Douglas* v. *California*, 372 U.S. 353 (1963); *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931); *Griffin* v. *Illinois*, 351 U.S. 12, 17 n. 11 (1956); *Guinn* v. *United States*, 238 U.S. 347 (1915); *Bailey* v. *Alabama*, 219 U.S. 219, 244 (1911); *Home Insurance Co.* v. *New York*, 134 U.S. 594, 598-599 (1890); *Henderson* v. *Mayor of New York*, 92 U.S. 259, 268 (1876).

Recently the Fifth Circuit sitting in banc was confronted with this issue. *Hawkins* v. *Town of Shaw*, No. 29013 (decided March 27, 1972). The court held that the unequal distribution of municipal services between the white and black residents of a town constituted a violation of the Fourteenth Amendment irrespective of motive or intent. Quoting from decisions of the Second Circuit, the court said in *Hawkins* (Slip op. p. 2):

> In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials. We feel that the law on this point is clear, for 'equal protection of the laws means more than merely the absence of governmental action designed to discriminate; . . .

we now firmly recognize that the *arbitrary quality of thoughtlessness* can be as disastrous and unfair to private rights and to public interest as the perversity of a willful scheme.' (emphasis supplied) *Norwalk Core* v. *Norwalk Redevelopment Agency*, 2 Cir. 1968, 395 F.2d 920, 931. See also *Kennedy Park Homes Association* v. *City of Lackawanna, New York* (2 Cir., 1970) 456 F.2d 108, 114, cert. den. 401 U.S. 1010 (1971) and *United States ex rel. Seals* v. *Wyman*, 5 Cir. 1962, 304 F.2d 53 at 65.

To conclude, the Tenth Circuit would hold plaintiffs to proof of discriminatory purpose. Such a requirement is not only at odds with the decisions of this Court and other federal courts but is inconsistent with the basic purposes of the Fourteenth Amendment. The gravamen of the Amendment is not the requirement that public officials act with a pure heart; rather the Amendment's basic purpose was to secure for blacks and other minority groups the same rights and privileges as are enjoyed by whites. *Palmer* v. *Thompson*, 403 U.S. at 220. See also, *e.g.*, *Slaughter House Cases*, 16 Wall. 36, 71-72 (1873).

4. The Court of Appeals Erred in Treating the Defendants' "Neighborhood School Policy" as a Per Se Justification for the Unequal Educational Opportunities Afforded to Minority Children.

As we read the Tenth Circuit's decision, the court held in the alternative that the inequalities arising from Denver's segregated schools—however serious and detrimental to the interest of minority groups in general or minority children individually—were justified by the school district's adherence to a "neighborhood school policy." The court reached this conclusion, not on the basis of evidence in the record, but on the basis of its holding and dicta relating to school assignment policies in Kansas City, Oklahoma City and Tulsa. *Downs* v. *Board of Education*

of Kansas City, 336 F.2d 988 (1964), *cert. denied*, 380 U.S. 914 (1965); *Board of Education of Oklahoma City* v. *Dowell*, 375 F.2d 158 (1967); *United States* v. *Board of Education of Tulsa County*, 429 F.2d 1253 (1970). Citing these cases, it declared: "The law in this Circuit is that a neighborhood school policy is constitutionally acceptable even though it results in racially concentrated schools . . ." (A. 144a). In effect the court held that educational inequality resulting from racially segregated schools is constitutional per se if it is produced by a "neighborhood school policy." We believe the court erred.

NEA and CEA urge that a strong evidentiary showing, at the very least, should be required to justify educational inequality stemming from segregated schools. The existence of a constitutional right, including the right to equal protection of the laws, should not turn on mere lar student assignment plan which has the effect of pre-

The phrase "neighborhood school" at best is amorphous. As this Court observed in another context, "The word 'neighborhood' is quite as susceptible of variation as the word locality. Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Connally* v. *General Const. Co.*, 269 U.S. 385, 395 (1925). Nor have school administrators poured definite content into those words.

Generally, the term "neighborhood school policy," when used to describe a school board's student assignment plan, may be understood to mean that the factor of distance from home to school is taken into account. Typically, distance is but one of a substantial number of factors,

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[10] E.g., *Taylor* v. *Board of Education*, 191 F. Supp. 181, 194 (S.D.N.Y. 1961). Cf. *Goldberg* v. *Kelly*, 397 U.S. 254, 262-63 (1970); *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969); *Sostre* v. *McGinnis*, 442 F.2d 178, 196 (2d Cir. 1971); *Knight* v. *State Board of Education*, 200 F. Supp. 174, 178 (M.D. Tenn. 1961).

including safety, natural obstacles, utilization of classroom space, economics, etc., given varying weights by the board in varying circumstances. In Boston, for example, schools once were built in isolated areas rather than the center of "neighborhoods" because land in those areas could be purchased at reduced cost. See Weinberg, *Race & Place* 7 (1967). According to the most recent available statistics, covering the school year 1967-68, 42 percent of the nation's pupils in average daily attendance were transported to schools at public expense. U.S. Dept. HEW, Office of Education, *Statistics of Public Schools* 7-8 (Fall 1970). This fact constitutes irrefutable proof that school boards across the United States give greater weight to considerations other than the convenience of the "walk-in school" in formulating student assignment plans.

Manifestly, in framing a student assignment plan, a school board should consider various educational objectives. The weight given to those factors will dilute that allocated purely to proximity. For example, the board may decide to eliminate two small, inefficient schools and substitute one large school, with a broader attendance area, which can offer a more substantial program. School boards typically will draw larger attendance zones for junior and senior high schools than for elementary schools so as to insure student bodies of a size sufficient to sustain special programs and expensive facilities such as gymnasiums, swimming pools and theaters. As the court of appeals noted, in Denver the board "attempts to draw junior high school and senior high school boundary lines so that all students transferring from a given school will continue their education together" (A. 127a). Nonetheless, the ultimate assignment plan is commonly called a "neighborhood school plan."

The most evident benefit of a plan which gives relatively greater weight to the factor of proximity than to

overcoming school segregation is that it is more convenient for a larger number of students and parents. Convenience, however, is not so important as to require that all other educational values—or constitutional rights—be subordinated to it. "The first and most important consideration in determining a satisfactory attendance unit is the kind of educational program that is to be provided." [20] Many school systems, including the predecessor to the Denver board, have concluded that segregation, regardless of how it is caused, is educationally unsound, and have assigned students to schools other than those nearest their homes to overcome racial imbalance.

At the very least, a reasonable application of the compelling interest test requires a court to weigh the convenience of an assignment plan against the educational inequality it produces. In making such a judgment a court might also consider, for example, the relative inconvenience or burden that might result from an alternative plan which would minimize the segregation. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*. Clearly a court cannot assess whether a particular student assignment plan which has the effect of preserving segregation and educational inequality serves values so compelling as to justify the plan without scrutinizing the elements of the plan, the actual objectives served and the alternatives available. The accordian-like nature of the term "neighborhood school policy" and its uncertain meaning preclude any per se rule sanctioning school segregation and educational inequality by mere incantation of the term. In adopting such a per se rule, the court of appeals erred.

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[20] S. Cooper "Characteristics of Satisfactory Attendance Units" in R.T. Gregg (ed.), *Characteristics of Good Schools* 9 (1948).

5. The Appropriate Remedy Is To Remand this Branch of the Case for Trial of the Issue Whether Denver's "Neighborhood School Policy" Can Be Justified by a Compelling Governmental Interest.

It seems to us that if this Court does not dispose of the case on the ground that the record demonstrated purposeful segregation in the core area schools, it should remand this issue to the district court with instructions to resolve the question whether there are compelling governmental interests which justify the segregation and inequality in those schools. The trial court has yet to make findings regarding the objectives served by the student assignment plan of the Denver board, the respective values to be accorded to each of those objectives and the relation of those values to the costs of the segregation and resulting unequal education.

III

CONCLUSION

For the foregoing reasons the judgment of the court of appeals, insofar as it denies relief with respect to the core schools, should be reversed and the case remanded to the district court with instructions to (1) frame a remedy for the de jure segregation in the core area, or (2) in the alternative, (a) reconsider its finding that the board did not purposefully segregate the core area schools in light of its own finding that the board purposefully segregated the adjoining Park Hill schools and in light of the presumption of discrimination flowing therefrom, and (b) conduct hearings on the question whether the values served by the board's student assignment plan constitute a compelling justification for the

resulting segregation of the core schools and inferior education afforded thereby.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

—v.—

SCHOOL DISTRICT No. 1, DENVER, COLORADO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO, *AMICUS CURIAE*, AND BRIEF OF ACLU AND ACLU OF COLORADO, *AMICUS CURIAE*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO, *AMICUS CURIAE*

The American Civil Liberties Union and the ACLU of Colorado have requested the parties in this case to consent to their filing the attached brief *amicus curiae* out of time. The Petitioners have granted their consent. The Respondents have declined consent because we could not give them assurance that we would "file a brief supporting the position of the School District." The letters of consent and non-consent have been filed with the clerk.

The American Civil Liberties Union is a nation-wide nonpartisan organization of over 170,000 members dedicated solely to preservation of the liberties safeguarded by the

Bill of Rights and the 13th, 14th and 15th Amendments to the United States Constitution. The American Civil Liberties Union of Colorado is a state affiliate of the ACLU.

The ACLU and the ACLU of Colorado have been particularly concerned with the pervasive effects of racial discrimination and segregation on American society. They participate in numerous law suits challenging racial discrimination and segregation. They take the position that effective racial integration of the public schools is a necessary prerequisite to the full and equal protection of the laws for Americans of all races and colors.

In the attached brief, the ACLU and the ACLU of Colorado provide additional focus on the issues in this case which go well beyond the facts of the particular case. To place these issues in the larger perspective, they therefore respectfully request leave to file the attached brief.

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In the

Supreme Court of the United States

October Term, 1971

No. 71-507

Wilfred Keyes, *et al.*,

Petitioners,

—v.—

School District No. 1, Denver, Colorado, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF COLORADO, *AMICUS CURIAE*

Interest of *Amicus*

The interest of the *amicus* appears from the attached motion.

I.

The Children of Denver Are Denied Equal Educational Opportunity Because Their Schools Are Racially Segregated.

"Separate educational facilities are inherently unequal." *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954).

"To separate [black students] . . . generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." *Id.* at 494.

The nation must not repudiate *Brown*. This nation must never again accept the argument that "separate but equal" is not a badge of inferiority unless "the colored race chooses to put that construction on it," *Plessy* v. *Ferguson*, 163 U.S. 537, 551 (1896). The task of bringing equality of educational opportunity to the minority children of this nation through elimination of racially-identifiable schools has not yet been accomplished. We can ill afford to lower this standard of equal opportunity in the North, for segregation is now a more serious problem in the North than in the South. Nationwide, 68% of all blacks attended schools with student bodies 80-100% black in 1966 and by 1970, the figure had dropped to 49%. In the thirty-two Northern and Western states, however, 58% of all black students still attended such minority-race schools despite the drop in the nationwide figures—accounted for, obviously, by the dramatic decrease in Southern school segregation. U. S. Dept. of Health, Educ. & Welfare, *News Release*, June 18, 1971 (Table 2-A). Obviously, then, school segregation is not a problem confined to the South and constitutional doctrine intended to deal with the problem must not be so limited as to apply only to the South.

If schools are identifiably "minority race" or "white," if they are more than "just schools," *Green* v. *County School*

Board of New Kent County, 391 U.S. 430, 442 (1968), the discriminatory injury so zealously to be guarded against under *Brown* occurs. And that injury occurs whether or not the school is a northern school or a southern school, and regardless of whether the segregation is imposed under a dual or a "neighborhood" school system. What matters is the school's identifiability as a "minority race" school in a system which contains "minority race" schools and "white" schools. The identifiability of schools, and the resultant injury to students, is largely a matter of society's, and more particularly, of a child's perception. If a child can say (or see or feel) "This is one of Denver's minority race schools—and this is one of Denver's white schools," the school and the system that creates it, are segregated within the meaning of *Brown* and its progeny—and the constitutional harm is accomplished.

This case brings before the Court, for the first time since *Brown*, a school system in which segregation is pervasive but in which segregation is not mandated by explicit statements of public policy embodied in legislative enactments. It presents the question whether one constitutional standard prohibiting school segregation is to govern all schools, nationwide, or whether the South is to be separately and distinctly treated because it has been placed under a "judicial Bill of Attainder." *Monroe* v. *Board of School Commissioners*, 380 F.2d 955, 958 (6th Cir. 1967), *rev'd* 391 U.S. 450 (1968).

Putting aside for the moment any questions of intent or causation, Denver's schools are racially segregated, so segregated in fact, that the District Court concluded that "the result [of the Respondents' actions] is about the same as it would have been had the administration pursued dis-

criminatory policies, since the Negroes and . . . Hispanos . . . always seem to end up in isolation." 313 F. Supp. 61, 73. Given this factual context, no matter where he lives in the Denver area, the child perceives that some people attend "minority race" schools, and other people living elsewhere attend "white" schools. This racial identification causes the harm condemned under *Brown*, as amply demonstrated by the record and findings below.

The school age population of the metropolitan Denver area is approximately 64% Anglo and 15% black and 21% Hispano. If a child were in a school with a similar proportion of students, he would not perceive it as a "minority race" school or a "white" school but simply as a school which reflects the metropolitan Denver society in which he lives. However, in Denver most students attend schools which are readily identifiable as either "minority race" schools or "white" schools.

When almost every school in an area can be seen to be a "minority race" school or a "white" school, when schools in an area are not "just schools," it is obvious that the schools are segregated. That this segregation is caused by a "neighborhood school policy" does not alter the child's perception, or the injury stemming from the segregation. Indeed, plaintiffs produced a number of witnesses to testify to the actual educational harm done by this separation of the races. They also produced tangible evidence of this harm. The District Court in this case expressly found, as a fact, that Denver's segregated school system denied minority students equal educational opportunity. Arguably such evidence and findings should not have been necessary. For almost two decades now, this Court has recognized

that "Separate educational facilities are inherently unequal." *Brown* v. *Board of Education, supra*, 347 U.S. at 495. This case teaches that the same inequality inheres in "neighborhood" schools as in "dual" schools.

II.

The Denver School System Must Be Desegregated on a System-Wide Basis.

A. *The State Has Created the Segregated School System.*

To the extent that the State of Colorado has delegated to Respondents the power to determine location, size, attendance boundaries, student assignments, and faculty staffing of the schools in Denver, the exercise of those powers is still the state's responsibility and they must be exercised in conformity with the state's constitutional obligations under the Fourteenth Amendment. The Respondents, acting under color of and pursuant to state law located, sited, constructed, set attendance zones for, assigned students and allocated teachers and resources to all the schools in Denver. Regardless of the mechanism used by the Respondents or their purported justifications, the result of their exercise of state power is obvious—segregated schools.

The question in this case, therefore, is not whether state action has resulted in a segregated school system—that clearly has occurred. Rather, the question is whether the state, which has exercised its power in a fashion which resulted in segregated schools, can be held to have acted for reasons which reflects a compelling state interest. In other words, having acted in such a manner as to segregate the races in fact, can the state demonstrate justifica-

tion of a sufficiently compelling nature so as to excuse the effects of its actions? If such justification does not exist, then the school system is, within the meaning of *Brown*, segregated and the equity powers of a federal court may properly be invoked to remedy the resultant segregation.

The lower courts did not discuss this question. Applying the wrong legal rules, they instead deemed the relevant question to be the existence or non-existence of "racial motivation" or "segregative intent" as an explanation for the Respondents' behavior. This was error.

B. *The Courts Below Applied a Constitutionally Defective Standard of Proof the Effect of Which Is to Create Two Rules of Constitutional Law: One for the South, One for the North.*

The District Court considered the evidence in this case and found that Respondents were motivated by "segregatory intent" with respect to the Park Hill schools in Denver. Despite the apparent and obvious inconsistency in so doing, the District Court also found, with respect to schools other than the Park Hill schools, that the Respondents' actions were constitutionally permissible because Respondents were not "motivated by either an intention or desire to discriminate" even though the effects of their actions were "about the same as it would have been had the administration pursued discriminatory policies." 313 F. Supp. 61, 73. The Court explained that the segregatory effects which occurred at schools other than the Park Hill schools flowed from the Respondents' decision to bow to community sentiment with respect to the desirability of racial concentration in schools rather than from any desire to discriminate. "They just found the consensus and followed it." 313 F. Supp. 61, 73.

Since the court failed to find the necessary intent to discriminate with respect to these schools, it felt constrained to hold that petitioners failed to prove the existence of unconstitutionally imposed segregation. The Court of Appeals apparently adopted the same view and based its decision on the proposition that in order for a constitutional deprivation to be shown, a plaintiff must prove that a "state segregates children in public schools solely on the basis of race" because "racially imbalanced schools [are not prohibited] provided they are established and maintained on racially neutral criteria." 445 F.2d 990, 1005.

It is difficult to understand the precise definition given to the term "racially neutral" by the lower courts. Obviously, a desire to follow community sentiment when that sentiment is in favor of "racial concentration," or segregation, is not, in any usual sense of the word, "racially neutral." In fact, action based on such desires clearly is racially motivated. To follow such a consensus necessarily requires acts that are segregatory in nature. Similarly, to suggest, as did the Court of Appeals, that use of "racially neutral criteria" which leads to racial segregation is permissible distorts the commonly understood meaning of "racially neutral criteria." Many criteria are "neutral" on their face, but if the effect of their application is segregatory or unduly disadvantages a minority race, then such criteria can hardly be considered "neutral." Obviously, both courts were using "racially neutral" in a very strained, artificial and legally erroneous manner. This ill use becomes more apparent in other portions of the opinion of the Court of Appeals. It is apparent, from later portions of the opinion focusing on the existence of proof of "discriminatory intent" or "segregatory desires," that both courts define "racially neu-

tral criteria" as nothing more than criteria which do not, on their face, bear proof of such intent or desires. Only on such a basis is it possible for a court to suggest that criteria may be racially neutral when their effect, in the face of other equally available and less discriminatory alternatives, is foreseeably certain to, and in fact does, segregate the races and when, in utilizing such criteria, defendants are admittedly following community consensus which prefers such segregation. The Court of Appeals further demonstrates this focus on intention by stating that "The burden is on the plaintiffs to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action," *Id.*, 1006. By "intentional state action," the Court of Appeals meant action pursuant to "segregatory intent" or a "racially discriminatory policy," *Id.*, 1006. In short, both lower courts found no state imposed segregation, despite the clear segregatory effect of the state's action, because petitioners had failed to prove bad faith motivation or bad faith intent to discriminate by direct evidence of actual, conscious purpose. Such a reading of the requirements of the equal protection clause is clearly erroneous.

When a government drawn or supported classification is based on race, and its burdens fall heavily on members of a minority race, that law is at least "suspect." To justify it, a state must show a compelling, not simply a rational (or "neutral") basis for the classification. Even if such a classification is enacted in order to further a valid state interest, it "bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964); *accord, Loving* v. *Virginia*, 388 U.S. 1, 9 (1967).

Similarly, and aside from the case of a classification scheme which contains racial criteria on its face, a "neutral" statutory scheme or a "neutral" course of governmental action the objective of which is to segregate the races or disadvantage members of a minority race is impermissible; it is not merely "suspect" but invalid. "Whatever non-racial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Griffin* v. *Prince Edward County School Board*, 377 U.S. 218, 231 (1964). See also *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). In cases where the classification scheme or governmental action challenged is not racial on its face or in which the objective is not clearly apparent, the most telling point is the *effect* of the governmental action. In such cases, "the focus . . . [is] on the actual effect" rather than on motivation, intent, purpose or rationalization. *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971). See also, *Evans* v. *Abney*, 394 U.S. 1012 (1969). In such cases, if the state has acted in the face of other available alternatives and the *effect* of such action is to discriminate between, or segregate, the races, a prima facie case of racial discrimination is made. Thus, courts have not permitted school attendance lines to be drawn around a residentially segregated neighborhood when other attendance zones are just as feasible. *Brewer* v. *School Board of City of Norfolk*, 397 F.2d 37 (4th Cir. 1968). Even attendance zones which follow natural or historical boundaries have been struck down when they operate to separate the races. See *Henry* v. *Clarksdale Municipal Separate School District*, 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); *United States* v. *Greenwood Municipal Separate*

School District, 406 F.2d 1086 (5th Cir.) *cert. denied*, 395 U.S. 908 (1969); *Clark* v. *Board of Education of Little Rock*, 426 F.2d 1035 (8th Cir. 1970); and *Monroe* v. *Bd. of Comm'rs of Jackson*, 427 F.2d 1005 (6th Cir. 1970). See also *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

If the effect of state action is racial segregation and the non-racial justification is weak, there is no need to probe the psychological motivation of a legislature and determine whether there was in fact a racial purpose. Anyone involved in such a classification will readily perceive that they are treated unequally, and courts will agree with the perception. See *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1968); *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

Statutes prohibiting racial discrimination in voting and employment have been construed from this perspective. See *Gaston County* v. *United States*, 395 U.S. 285 (1969). In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), an employer used a standardized test for hiring and promotion decisions. The District Court found there was no racial purpose or invidious intent in adopting the test although whites generally did better than blacks in taking it; and by a split decision, the Court of Appeals affirmed. Nevertheless, this Court found that the use of the test violated Title VII of the Civil Rights Act of 1964 which made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race." The Court ruled that an employment test could be used only if it was in fact related to performance of the job, and that the employers' motive in using the test was not the significant question.

Indeed, any attempt to establish motivation, rather than effect is normally impossible and, because they are so conjectural even where possible, such attempts normally viewed as neither a necessary nor an adequate basis for constitutional determination. *Palmer* v. *Thompson*, 403 U.S. 217 (1971); *United States* v. *O'Brien*, 391 U.S. 367 (1968).

Where the effect of a classification is to separate the races, persons subject to the classification are likely to be harmed severely regardless of whether the classification was overtly on racial grounds or not. They should not be put to the burden of demonstrating an actual racial motive, intent or purpose. Further, it may prove impossible to prevent deliberate racial discrimination if the discriminator need only cite some rational basis not directly and obviously connected with race to support his action. Individuals and states then need only search for an apparent non-racial basis to continue segregation as before. Unless the state is forced to demonstrate substantial reasons for action which has a racial effect adverse to minority group members, the state can continue a policy of segregation behind a facade of neutrality.

In any event, it should not matter whether the guarantee of equal protection was deliberately denied or not. In this case, children have been forced to attend segregated schools and the state which requires them to do so can offer no compelling justification for its acts. Despite the clarity of this point, the Court of Appeals ignored the effect of Respondents' actions and held proof of intent necessary. Failing this proof by Petitioners the court would not impose a burden of proving a compelling justification on Respondents. The Court of Appeals further held that segregatory effects that flow from a neighborhood school

plan render such a plan constitutionally suspect only when adopted by school systems which had previously operated under a state law requiring racial segregation. The existence of the same segregatory effects under the same type of school plan, it ruled, are not constitutionally suspect if no such statewide law previously existed. 445 F.2d 990, 1005-6.

Thus, the Court of Appeals in effect laid down two rules of constitutional adjudication—one which is correct in that it focuses on effects, not intent, but which the Circuit Court felt was applicable only to schools located in the South, and one which is incorrect in that it focuses on intent rather than effect and which the Circuit Court felt was applicable only to Northern schools. This anomalous result necessarily follows from the lower courts' holding that proof of present constitutional deprivation in Northern schools (but not Southern schools) requires proof that the state has "taken some action with a purpose to segregate" 313 F. Supp. 61. But such proof may be negated by defendants' assertion of some colorably neutral basis for their decisions and actions, *e.g.*, a "neighborhood school policy," even though such decisions and actions resulted, and were known beforehand necessarily to result, in segregation, and even though, such "neutral criteria" cannot, in any sense, be deemed to involve a "compelling state interest." This result is invidious on both a personal and societal level.

On a personal level, adoption of the two disparate rules permits dissimilar treatment of similarly situated school pupils, which turns not on proof of the effects of objective acts but on the provable intent with which they were performed. To the southern student, therefore, relief from the harmful effects of segregation is granted notwithstanding the present "good faith" of the School Board. To the

northern student, relief from the harmful effects of segregation is not granted, despite the performance of identical acts with identical results—because no provable lack of "good faith" exists, even though "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

On a societal level, two constitutional rules of conduct are mandated. They turn not on the differing effects of the objective conduct but on the existence or non-existence, in the ever more remote past, of political and social views strongly enough held to be both codified and followed as, in the South, rather than simply followed, as in the North. A southern school's decisions even if rationalizable on "neutral grounds" are presumed invalid if segregation results, cf., *Swann* v. *Brd. of Comm. of Charlotte-Mecklenburg*, 403 U.S. 1, 26 (1970). But according to the lower courts, a northern school's decision, reached on the same grounds and with the same effect, are not presumed invalid and, indeed, are not provable as constitutionally invalid unless proof of the "intent" and "bad faith" with which they were taken is also proffered and believed.

The test of "intent" required by the lower courts is not even defensible assuming arguendo acceptance of the requirement that proof of an intent to segregate is necessary. Action taken with the knowledge of the consequences, where such consequences are both foreseeably certain and other alternatives are available, is "intentional" action even if some of the specific harmful consequences which flow therefrom were not provably desired by the actor. Rest. Torts §500. Obviously, Respondents here knew that the conse-

quences of their decision would be segregated schools when they selected, from all the available alternatives, the particular criteria they utilized in determining student assignments. When the criterion selected is geographical proximity and schools are built and located within "neighborhoods" in a system with residential segregation, the resulting segregation is foreseeable. So easily foreseeable were the consequences of utilization of the "neighborhood school criteria" in this case that Respondents had no difficulty in assigning minority race teachers to schools in which minority students were concentrated. The Court of Appeals stated that such assignments were "not proof of segregative desires," 445 F.2d 990, 1007, but this misses the point of the proof. The Respondents were well enough aware of the segregative results of application of their selected criteria that they could without difficulty assign teachers to schools, on a racial basis. Therefore, it is obvious that selection of such criteria was made in the light of the foreseeability of segregation.

The lower courts' insistence on proof of "intent" and disregard of proof of "effect" in the face of non-segregatory alternatives and the absence of compelling justification for the alternatives chosen were, therefore, clearly erroneous. Despite the lack of proof of "segregative desires," unless the criteria selected were selected because of the existence of some over-riding and compelling interest, Respondents must be chargeable with responsibility for the segregation that resulted.

C. *The School Boundary Lines Are Unconstitutional Because They Operate to Discriminate on the Basis of Race and Are Not Justified by a Compelling State Interest.*

The Court of Appeals held, in this case, that there is no remedy for segregation or the denial of equal educational opportunity if execution of that remedy would conflict with a school board's policy of pupil assignment to "neighborhood schools." 445 F.2d 990, 1004. However, the court did not suggest, analyze or weigh any argument that a state's interest in "neighborhood schools" is sufficiently compelling to justify segregation which knowingly and foreseeably flows from its utilization in a given school district. And, indeed, there seems to be no justifications, non-racial in character, which can be given in the circumstances of this case. There may be situations where deviation from an attendance system based on proximity is so expensive, or so destructive of other legitimate values that such zoning is permissible despite segregatory results. This clearly is not one such case—no justification was or can be given and none was weighed by the Court of Appeals which assumed the necessity for such zoning despite its effects.

The real danger of such an assumption, aside from its departure from relevant constitutional standards, is the mockery it makes of the equal protection clause as it applies to segregated schools. To deify "neighborhood schools" ignores the most obvious fact about such schools, —notably the "neighborhoods" which "neighborhood schools" serve, are defined by state action. It is the state which locates the school initially, which then determines its pupil capacity and which finally sets attendance zones for the school. In doing so, the state, and not local residents, is defining the "neighborhood" for the school. When

the effect of that state action is to segregate the schools racially and when the effect of the state's definition of "neighborhoods" is that the "neighborhoods" are racially segregated, there is simply no basis for the suggestion that the resulting segregation was not due to state action.

> "'Racially neutral' . . . plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial alteration of attendance zones is proper." *Swann, supra*, 28.

Aside from ignoring the obvious fact that the state is responsible for the "neighborhoods" which "neighborhood schools" serve, other justifications offered for such schools simply do not meet any rational, not to speak of compelling, standard of justification. To assume that such schools are an example of the "free choice" of the parents whose children attend them, which choice is manifested by selection of neighborhoods, ignores all reality. Housing choices for blacks and other minorities are not now and have never been "free". School boards must be charged with the knowledge of this fact, therefore rendering such segregation as results from utilization of these "neighborhood" criteria foreseeably certain. Similarly, even assuming that "neighborhood schools" are somewhat cheaper or administratively more simple, when the educational disparities created by such schools are considered, it is difficult to conceive that convenience or economy could justify such a pervasive deprivation. No such comparison was even made

in this case but it was clearly demonstrated that reasonable, feasible, non-segregative alternatives were available. Thus here there is no basis for Respondents to assert that the segregative choices it made were "compelled" at all.

In short, to assume, as did the Court of Appeals, that a school board's profession of adherence to the concept of "neighborhood schools" renders unnecessary all real proof of a compelling interest is a proposition wholly without merit. In a given case, utilization of "neighborhood schools" may, or may not, be justifiable. But if the effect of a present plan is segregatory, the state must establish its justification by proffer of alternatives and proof of their unacceptability. To require any less, given the nature of the harm and deprivation and the importance of the remedy, is irresponsible. ". . . [S]chool segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*." *Brunson* v. *Brd. of Trustees*, 429 F.2d 820, 826 (4th Cir. 1970) (concurring opinion of Judge Sobeloff). As demonstrated by the record and the trial court's finding in this case, segregation becomes no less a "living insult" and education is no less "tainted" because the state segregated schools are all located in state segregated "neighborhoods," or simply because the segregated schools are Northern schools rather than Southern schools. In all such schools, Northern or Southern, segregation causes the insult and taint. The harm and the cause being identical, the remedies available and the rules of proof applied in determining the appropriateness of such remedies must be identical.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed insofar as it reverses the judgment of the District Court and the case remanded with directions that a comprehensive desegregation plan for the Denver School System be implemented.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 71-507

WILFRED KEYES, ET AL., *Petitioners*

v.

SCHOOL DISTRICT No. 1,

DENVER, COLORADO, ET AL., *Respondents*

BRIEF ON THE MERITS IN SUPPORT OF RESPONDENTS SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL., SUBMITTED BY THE STATE OF INDIANA, AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of Indiana, by the Attorney General of Indiana, respectfully presents this brief amicus curiae in support of the School District No. 1, Denver, Colorado, et al., pursuant to paragraphs 4 and 5 of Rule 42 of the Rules of the Supreme Court of the United States.

The State of Indiana, pursuant to its Constitution, Article 8, Section 1 (1851), and statutes duly enacted, has provided for a system of common schools, wherein tuition shall be without charge, and "equally open to all."

An examination of the session laws of the General Assembly of Indiana, from 1850 forward, demonstrates the

State's commitment to the development of quality education in Indiana. Those laws speak to myriad items. Some of them are: teacher training; teacher qualification and certification; curriculum development and inspection; quality of curriculum; quality and safety of buildings; libraries; student-teacher ratios; student attendance; and student educational development. See generally, *Indiana Code, 1971*, Title 20 and Title 21.

The interest of the amicus is in seeking an interpretation of the Equal Protection Clause of the 14th Amendment, which will permit a continued development, a continued expansion, and a continued experimentation in educational programs in Indiana. It is a development and educational evolution which recognizes the vast complexities in educational programs in an open and pluralistic State, and also recognizes that within that development and evolution there shall be an equal educational opportunity for all students enrolled in public schools.

The amicus asks the Court not to restrain that development and evolution by a constitutional interpretation which would impose an interdicting rigidity, in the name of the Fourteenth Amendment, in educational theory and practice, as well as in established educational programs.

Accordingly, the amicus urges that the opinion and decision of the United States Court of Appeals for the Tenth Circuit, 445 F.2d 990 (1971) (App.Pet.Cert. 122a-160a), be affirmed but only to the extent that it reversed the opinions United States District Court, 313 F.Supp. 61 (1970) (App. Pet.Cert. 44a-98a), 313 F.Supp. 90 (1970) (App.Pet.Cert. 99a-121a).

This brief amicus curiae is limited in its discussion and presentation to that part of this case which is represented by the reversal in the Tenth Circuit of the District Court.

OPINIONS BELOW

The opinion of the Court below consists of the opinion and judgment of the United States Court of Appeals for the Tenth Circuit, filed June 11, 1971, 445 F.2d 990 (App. Pet.Cert. 122a-160a). The opinions in the District Court are found at (App.Pet.Cert. 44a-98a) 313 F.Supp. 61; (App. Pet.Cert. 99a-121a) 313 F.Supp. 90 (1970).

In its opinion and judgment, the Court of Appeals ordered that the judgment of the District Court be affirmed in all respects except that part pertaining to the "core area" or "court designated schools"; and it particularly reversed the District Court in its legal determination that those schools were maintained in violation of the Fourteenth Amendment because of "unequal educational opportunity afforded, this issue having been presented by * * * the Second Cause of Action contained in the complaint." (App. Pet.Cert. 160a), 445 F.2d 990, 1007.

JURISDICTION

The Supreme Court has jurisdiction to review this case by writ of certiorari under 28 U.S.C. 1254(1), and has accepted it for such purpose by granting said writ on January 17, 1972 (A. 1988a).

QUESTIONS PRESENTED FOR REVIEW

The schools in Denver, Colorado, which were affected by the District Court's decisions (App.Pet.Cert. 44a-98a), 313 F.Supp. 61, (App.Pet.Cert. 99a-121a), 313 F.Supp. 90, were divided into two categories, towards which the plaintiffs directed separate claims for relief in separate causes of action, supported by alleged separate and independent legal theories. The second category or group of schools, called hereafter (and in the case throughout), the "court-designated schools" or the "core area schools" was the subject

of the second claim for relief, in four counts, of which the third became primary.

The gist of the second claim for relief as developed by the complaint, evidence, and findings, was that because of comparatively low average achievement test scores of the pupils tested in the "court-designated schools", (and because of low morale and because of "segregation" [the word is used in quotation because the court found that there was *no state or officially imposed* segregation] in those schools) there was a denial of an equal educational opportunity and of equal protection of the law. The following questions are presented:

1. Shall *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, be reinterpreted to render unconstitutional the distinctive achievements among students in public schools which may be shown by standard achievement tests whenever they are administered?

2. Are there adequate data available, either in the record of this case or information in the public domain, upon which to develop a rule of constitutional law under the Fourteenth Amendment, Equal Protection Clause, concerning standard achievement scores and equal educational opportunity?

3. When there is *admittedly* no dual school system present, and when the District Court finds that there is no *de jure* segregation present in the specific schools about which plaintiffs complained in a separate count, does the District Court have judicial power to decree compulsory integration and compensatory educational programs?

4. After a District Court found that there was no *de jure* segregation in the court-designated schools, but

then concluded that there was a denial of an equal educational opportunity because of lower achievement levels in standard achievement tests administered in those schools, does the District Court have power to decree compulsory integration, and compensatory educational programs which must be subordinated thereunder?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first and fifth sections of the Fourteenth Amendment; and the Civil Rights Act of 1964, § 401, 42 U.S.C. 2000c; § 407, 42 U.S.C. 2000c-6; and § 410, 42 U.S.C. 2000c-9. These constitutional and statutory provisions are printed in the Appendix to this brief.

STATEMENT OF THE CASE

In this case the plaintiffs filed a complaint which contained two (2) causes of action, each with separate and distinct legal theories and claims for relief. (A. 2a-57a).

The complaint related to two groups of schools in Denver, Colorado. The first group of schools, called in the case and litigation the "Resolution schools" (because they were affected by Denver School Board resolutions), was the subject of the First cause of action. Concerning those schools, a hearing was held in July, 1969, which resulted in a preliminary injunction. Defendant was later to present its evidence, but the District Court found that the action of the School Board in rescinding and nullifying a school integration plan, had "the effect of perpetuating school segregation * * *" (App.Pet.Cert. 19a and 37a). 303 F.Supp. 279 at 288; 303 F.Supp. 289 at 296-97, in that the action was taken with knowledge of the consequences, and had a tort-like wilfullness about it, 303 F.Supp. at 286.

Court-Designated Schools, or Core Area Schools

"The evidentiary as well as the legal approach to the remaining schools [referred to hereafter as the "court designated schools" or the "core area schools"] is quite different from that which has been outlined above." (App. Pet.Cert. 57a), 313 F.Supp. 61 at 69 (1970).

Concerning these schools,[1] the plaintiffs first complained that there was *de jure* segregation (*Id*), because of boundary changes and other acts on the part of the School Board; but the District Court *found* that there was no *de jure* segregation (App.Pet.Cert. 75a), 313 F.Supp. 61 at 77. The court also said, concerning these schools, that it "is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." (App.Pet.Cert. 67a), 313 F.Supp. 61 at 73.

In the second count of the second cause of action, the plaintiffs asserted that the neighborhood school policy was itself maintained for the purpose of, and with the effect of, segregating minority pupils,[2] to a degree that it was un-

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[1] Eventually the Court said that there were 15 schools involved. The court said, "we are here primarily concerned with the following schools: Bryant-Webster, Columbine, Elmwood, Fairmont, Fairview, Greenlee, Hallett, Harrington, Michell, Smith, Stedman and Whittier Elementary Schools; Baker and ColeJunior High Schools; and Manual High School." (App.Pet.Cert. 78a), 313 F.Supp. 61 at 78.

[2] The plaintiffs themselves used a racial and minority class grouping which is of far more than casual interest. It should be noted because it is in contrast to the bases of much of their experts' testimony, namely the *Coleman Report*, see footnote 14 infra.

"In some schools there are concentrations of Hispanos as well as Negroes. Plaintiffs would place them all in one category and utilize the total number as establishing the segregated character of the school. This is often an oversimplification * * * [which] * * * plaintiffs have accomplished * * * by using the name 'Anglo' to describe the white community. However, the Hispanos have a wholly different origin, and the problems applicable to them are often different." (App.Pet.Cert. 58a), 313 F.Supp. 61 at 69.

constitutional. But the district court rejected that claim too, saying that there was no such policy apparent.

The third count of the second cause of action said, in part, that the neighborhood school system was unconstitutional if it produced segregation in fact in a school system. In short, regardless of the cause, regardless of the absence of state or official law or policy, if the result was a separation or segregation, it was unconstitutional. This too the District Court rejected under the authority of previous cases in the Tenth Circuit, which in turn was built on cases in this Court.

The District Court then approached the heart of plaintiffs claim in their second cause of action. It was that the defendants were maintaining the "court-designated schools" in such a way as to fail to provide an equal educational opportunity for students attending them.

All of those schools, plaintiffs said, produced low average scholastic achievement. They also maintained that there was a high teacher turnover; a higher student dropout rate; that there were older buildings and smaller building sites; and that there were less experienced teachers.

The District Court agreed that there was a low achievement level present and significantly lower than in other schools in the city, as shown by comparative scores on the 1968 Stanford Achievement Test results. The trial court made findings of fact with regard to teacher experience, teacher turnover, pupil dropout rates, and building facilities, but there was no finding, as there could not have been on the evidence presented, that there was a *causal* relationship between these factors and student achievement. (App.Pet.Cert. 78a-89a), 313 F.Supp. 61 at 78-83.

To then seek the judicial declaration of court-ordered equalized achievement, the plaintiffs presented the testimony of several witnesses, chief among them, and on

which testimony the district court relied, were Dr. James Coleman (A. 1516a-1561a); Dr. Neal Sullivan (A. 1562a-1598a); Dr. Robert O'Reilly (A. 1910a-1968a), and in a prior hearing, Dr. Dan Dodson (A. 1469a-1513a).

It is clear that some of the plaintiffs' witnesses sought society-wide, social reformation, which would simply use the school system as the instrument of change:

Dr. Dan Dodson:

"Q. Now, isn't it also true that in your study you found that race is not causally related to the achievement level in these minority schools?

A. That's right." (A. 1508a)

* * *

After discussing the socioeconomic structure of some areas, but not Denver, Colorado, and the effect of a parents' educational background, Dodson continued:

"Q. In other words, you think, then, that it's the schools' problem?

A. I certainly do.

Q. And so your opinion is that the school has an obligation for a social change?

A. That's right.

Q. For the entire community?

A. That's right.

Q. Not for just the—not for the achievement of academic aspect of the school?

A. That's right." (A. 1509a).

* * *

"Q. In other words then, you mean that the board must cure any racial imbalance created by housing patterns in their school system?

A. I think that's right." (A. 1510a).

Another witness, Dr. Neal Sullivan testified, in part:

> "Q. Now, also, even under your own theory that integration in the schools has to be—as you say in the article, a massive educational revolution? Right?
>
> A. I like that expression.
>
> Q. Well, that's yours, isn't it?
>
> A. You bet. I like that language.
>
> Q. You need something more than integration?
>
> A. You bet. Massive reform. (A. 1595a).

And the District Court itself caught the spirit of the thing:

> "The Court: I mean, psychologically, the school is taking over for the family in many instances. It has to. I know this is abhorrent to all of you. You just disregard it all at (sic) paternalism. But you can't. I mean, that is the fact of life. The church has fallen down somewhat. The family has collapsed, and there is not much left. And a kid has to relate to something, to an institution, and to people, doesn't he? Where is this substitute? So, you say there is no psychological foundation for this? [The Court was then, apparently, addressing Dr. O'Reilly]. There is no foundation in experience? That you can just substitute this competitive atmosphere? And this impersonal competitive atmosphere of the integrated school and let him sink or swim?" (A. 1934a).[2]

The District Court held that there was no *de jure* segregation with regard to the core-city schools, and that a neighborhood policy was not unconstitutional per se as *de facto* segregation.

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[2] "One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination." Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 22-23 (1971).

But against such an evidentiary background, the District Court found an alternative. It held that the "core-city schools in question were providing an unequal educational opportunity to minority groups *as evidenced by low achievement and morale.*" (Emphasis added). (App.Pet.Cert. 100a), 313 F.Supp. 90, 91.

From that position the District Court then moved to a consideration of a remedial plan or plans, consistent with the *Brown I*,[4] *Brown II*[5] dichotomy.

During that proceeding, in May 1970, the District Court said on opinion, and largely in response to the proposals which the defendants raised, that the,

> "crucial *factual* issue considered was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects * * *" (App.Pet.Cert. 106a), 313 F.Supp. 90 at 94.

In an effort to answer that question the District Court then turned principally to the testimony of Dr. James Coleman (A. 1516a-1561a); Dr. Neal Sullivan (A. 1562a-1599a); and Dr. Robert O'Reilly (A. 1910a-1968a); 313 F.Supp. 90 at 94.

A Second Look at The Expert Testimony

The petitioners ask on brief that the Court itself conduct an independent examination of the record.[6] If so, then

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[4] Brown v. Board of Education, 347 U.S. 483 (1954).

[5] Brown v. Board of Education, 349 U.S. 294 (1955).

[6] Petitioners' Brief page 79. The authority cited for this request is *Haynes v. Washington*, 373 U.S. 503, 515-517 (1963); *Spano v. New York*, 360 U.S. 315, 316 (1959); *Stein v. New York*, 346 U.S. 156, 181 (1953); and *Oyama v. California*, 332 U.S. 633, 636 (1948). But the petitioners seek here a new constitutional rule: that equal educational opportunity shall mean equal achievement results, however measured. They deny this result, of course, see footnote 123, page 103 of Petitioners' Brief. But the district court said: "The final portion of the

under the evidentiary standards freely used in this case,[7] this Court can consider the relevant surveys, data, and findings (the "Coleman Report" 737 pages, for example, is marked as PX 500) which were used and to which reference was made, as well as other data and information which this Court can acknowledge and consider. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).[8]

The testimony given by these witnesses, when measured against the data admitted, and subsequent interpretation and analyses thereof, simply does not support the conclusions reached or the holding which the petitioners seek from this Court, as a principle of Constitutional law.

In short, having concluded, primarily on the basis of the 1968 Stanford Achievement Scores, that there was an unequal educational opportunity, these experts were called to discuss a remedy.

That testimony and the impact of other data upon it is discussed in the Argument section of this brief, under Argument I-C, *"The Testimony of Dr. Coleman, Dr. Sullivan, and Dr. O'Reilly."*

In summary, the results against which the District Court directed a remedy in regard to the "court designated" schools were not the product of, or caused by state action, or official, or school board action, or positive law. To the extent that these results were established (and the expert witnesses often testified that they were not referring to Denver in their testimony), they occurred adventitiously.

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plaintiffs' plan suggest a system of compensatory education programs, carried out in an integrated environment, *designated to equalise achievement."* (App.Pet.Cert. 102a), 313 F.Supp. 90, 91-92. (Emphasis added).

[7] Coleman—A. 1526a; Sullivan—A. 1568a, 1583a-1586a; O'Reilly—A. 1915-1928a.

[8] *"Equality of Educational Opportunity"* (H.E.W., G.P.O. 1966) PX 500 (herein *"Coleman Report"*); *"On Equality of Educational Opportunity,"* Mosteller & Moynihan (Vintage Ed. 1972) (herein "Mosteller & Moynihan"); *"The Effectiveness of Compensatory Education"* (H.E.W., G.P.O. 1972) (herein, *"Effectiveness"*).

The District Court thus entered findings and guidelines, which, generally, provided for a program of "desegregation" [which word, again, is used in quotation simply to recall to the reader that there was no state or officially imposed segregation] and compensatory education as a solution to low average achievement in the "court-designated schools." (App.Pet.Cert. 112a-121a), 313 F.Supp. 90 at 97-100. The preliminary injunction arising from the first cause of action remained in effect, except as altered by the orders entered.

This determination was reversed in the United States Court of Appeals for the Tenth Circuit, which said that the final decree and judgment of the District Court was affirmed, "except that part pertaining to the core area or court designated schools, and particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of unequal educational opportunity afforded, * * * *" (App. Pet.Cert. 151a), 445 F.2d 990 at 1007 (1971). Other orders are well described by the Denver School Board, on brief. On January 17, 1972, this Court granted a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

The brief amicus curiae is limited in its discussion to that part of this case which is represented by the reversal in the Court of Appeals.

SUMMARY OF ARGUMENT

I

In so far as the "court-designated" schools are concerned, the measure of this case as it reaches the Supreme Court is found in what this Court is asked to affirm from the District Court and the consequences it would have on educational development throughout the United States. This Court is being asked to affirm the assertion, as a

matter of Constitutional law, that compensatory educational programs, as a means to develop and improve a child's educational performance and achievement, are unconstitutional unless they are developed in the setting of subordination to racial and economic integration, as effected by the remedies which were developed in, and are borrowed from, the cases decided from *Brown I* to *Swann*.

But the empirical data which have become available since this case was in the District Court show that the bases for that court's holdings with regard to both the wrong and the remedy are disestablished to such an extent that no constitutional interpretation should be indulged in.

II

The Fourteenth Amendment, as interpreted by this Court, and as addressed and interpreted by the Congress of the United States, does not mandate a specific educational performance among children attending a public school.

The Fourteenth Amendment should not be interpreted so to mean that equal rights under the law, when one is confronted by the State, shall mean equality in achievement when one attends a public school.

Racial segregation was never an educational program; it was a social-racial policy imposed in an educational system by the State.

In the name of racial (or economic) desegregation, the Fourteenth Amendment should not be interpreted to require an educational program which would attempt to develop but one result: equal achievement among students, as evidenced by achievement test scores.

ARGUMENT

I

The Fourteenth Amendment Does Not Mandate A Specific Intellectual Result Among Children In Public Schools, Measured By Achievement Tests. Compensatory Educational Programs, Designed To Attempt To Improve Performance Require Flexibility For Development. Empirical Data Do Not Support Their Subordination Pursuant To The District Court's Holdings, To Racial And Economic Integration. Those Holdings Are Disestablished To Such An Extent That A Constitutional Ruling Is Improper.

A. Introduction

In the District Court, this was a great case. Walter Lippmann remarked many years ago, in America there is a distinct prejudice in favor of those who make accusations. Never was such an observation more appropriate than in this judicial proceeding.

It was a great case because a great school board, in Denver, Colorado, was well defended. It was a school system which had known a tremendous population growth subsequent to World War II, and it dealt with the remarkably complex educational problems which evolved from it, very well indeed. It was a school system which in fact spent over 100 million dollars on new buildings and installations since World War II. Its effort to manage the urban sprawl's impact on education was well underway long before the Congress and Executive branches of the Federal Government created the Department of Housing and Urban Development, or the Department of Transportation, or the Environmental Protection Agency, which is some testimony to their recognition of the urban problems confronted by the Denver School Board. But it came long after that School Board was already making the effort.

It was a School Board which never resulted, as the State of Colorado did not, to the use of a dual school system. There was in fact, for the School Board in Denver, simply no factual analogy to the bases of the cases and schools found in *Brown I*,[9] or *Green*,[10] or *Swann*[11]. Nor, for that matter, was the case factually similar to the *Tulsa*[12] case in the 10th Circuit.

Those were cases which arose in a dual school system, or they were cases in which the School Board failed to deal with the "vestiges of dualism".

But as the growth of Denver was great, so also was its growth of minority groups. In 1940 the Negro population was 8,000 persons. In 1966, it was estimated by plaintiffs' witness Bardwell to be at 45,000. Faced with this growth, still no dual school system ever developed, or existed in Denver. No person was ever excluded from any school because of race, color, or ethnic origin.

At the beginning of the school year 1968-69, there were 116 schools: 92 elementary, 15 junior high schools and 9 senior high schools. In the elementary schools, Negro students were enrolled in 78, "Hispano" in 88, "Anglo" in 92. Among the 15 junior high schools, there were Negro students in 14 of the 15, and Hispano in all 15. Anglo were in all 15. Among the high schools, Anglo and Hispano students were enrolled in all 9 schools; and Negro students in 8 of the 9 high schools.

In short, the defendant Board did not refuse to admit any student at any time because of racial or ethnic origin.

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[9] Brown v. Board of Education, 347 U.S. 483 (1954).

[10] Green v. County School Board, 391 U.S. 430 (1968).

[11] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[12] United States v. Independent School District No. 1, Tulsa, Oklahoma, 429 F.2d 1253, 1259 (10th Cir. 1970).

It simply required a student, consistent with the Civil Rights Act of 1964, § 410, 42 U.S.C. 2000c-9, to attend his neighborhood school. (App.Pet.Cert. 67a), 313 F.Supp. 61 at 73.

But if, as Lippmann said, there is prejudice in favor of one who makes an accusation, then the prize will go to he who makes the greatest accusation.

For the accused, however, the Denver School Board, the dilemma was enormous. The attack took a bifurcated approach. First, there was the accusation relating to the usual kind of segregation charge: the location of school buildings; boundary changes; the formal actions of a school board, and the like. That attack, as the case left the District Court, was largely a failure.

Secondly, in the plaintiffs' second cause of action, there was an attack for the "failure" of the School Board to cause students to achieve at the same level according to the Stanford Achievement Tests. The District Court found, "and concluded that the achievement level in these schools is markedly lower and dropout rates are high; and that there has been a concentration of minority and inexperienced teachers." (App.Pet.Cert. 90a), 313 F.Supp. 61 at 84. This presented an opportunity, as the case concluded in the District Court, for petitioners to strike hard at an *entire* school system (as they now do in this Court, on brief, page 68-92, and their factual assertions, page 1-64, passim) and more. It was an opportunity to attempt to bury any further experimentation and development with compensatory education, a favorite *bête noire,* unless it is compelled to march in constitutional lockstep with the massive movement of children, and massive social reform, as plaintiffs' own witnesses described it, under the banner of *Green-Swann.*

Concerning the first leg of attack, the District Court gave primary attention to the rescinding of School Board Resolutions, 1520, 1524, and 1531, and the court concluded that such an act violated the case law of *Reitman v. Mulky*, 387 U.S. 369 (1967); 313 F.Supp. at 67-69. The Court of Appeals did not reach the point, 445 F.2d 990 at 1002, and the petitioners appear to have abandoned the idea in this Court, entirely. Then the District Court considered the charges of boundary changes 313 F.Supp. 61 at 69, but came to the finding that there was no *de jure* segregation, 313 F.Supp. 61 at 77.

Up to this point the primary finding concerned the construction of Barrett Elementary School, along with an incorporation of the preliminary injunction statements, 303 F.Supp. 289, 290-95, which when made did not then consider defendants' evidence. Concerning Barrett Elementary School, the trial court said that alternative sites were available; and both the trial court and the petitioners on brief made much of the testimony of Superintendent Oberholtzer, (313 F.Supp. at 73; Petitioners' Brief, e.g., pp. 18 and 20), because he was "of the opinion that it was not permissible for him to classify Negroes as such, even for the purpose of bringing about integration." (App. Pet.Cert. 66a), 313 F.Supp. 61 at 73.

The Superintendent, in supporting the neighborhood school policy of the Denver Schools, and in assuring that the conduct of the Denver School Board was "color blind", anticipated, insofar as their schools were concerned, the fact that their policy was to become the policy of the United States, and so it remains to this day, in the Civil Rights Act of 1964, § 410, 42 U.S.C. 2000c-9. That section provides:

> "Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion or national origin."

Speaking to that section, Senator Humphrey said:

> "Furthermore, a new section 410 would explicitly declare [it is then set out in full].
>
> Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide." 110 Cong. Rec. 12714 (June 4, 1964).

Again, Senator Humphrey spoke to one of the very central factual questions in this case, and one which, it appears, the petitioners' would attempt to obscure on brief in their presentation of a factual quagmire: that issue is the legitimacy of a neighborhood school which was not designed to cause or perpetuate racial discrimination or unlawful segregation, or, for that matter, a school district organized in the same way:

Senator Humphrey:

> "* * * The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. [The Senator was speaking of racial segregation]. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is racial imbalance per se is not something which is unconstitutional." 110 Cong. Rec. 12717 (June 4, 1964).

In short, § 410 of the Civil Rights Act of 1964 was specifically added to permit student classification into school districts, or neighborhood schools, on bases other than race, religion, color, or national origin.

It did hardly behoove the District Court, to remark the "failure on the part of the Board" to take some action

which would have an integrating effect, when to do so would violate the spirit and broad command of the Congress of the United States, in structuring a neighborhood school system; which the District Court itself found not to be in violation of *Brown I*.

Generally, the Court of Appeals affirmed those very limited findings, and felt restrained by Rule 52 in its review —although, now, of course, petitioners ask this Court to review the entire record.

Secondly, an attack came to the Board of a very different nature. It was that, as the District Court finally evolved the issue, there was no equal educational opportunity present with respect to the "court-designated" schools, even if there was no *de jure* discrimination. The District Court held that there was not. Then the District Court looked at essentially one item: the student achievement level as determined by the 1968 Stanford Achievement Tests. Other things found their way into this part of the decision: teacher turnover; pupil dropout rates (one premise for this consideration is conventional wisdom: "its better that he be in school than on the streets,", or, "if you are in school, then stay in school"); building facilities ("the fact that the physical plant is old may aggravate the aura of inferiority which surrounds the school", the court said, 313 F.Supp. 61 at 81), teacher experience, and the testimony of Dr. Dodson. The court did not find that these conditions caused inferior achievement, and the experts at the remedy stage did not so testify either.

The District Court did not find here a *Brown I* type of violation. Rather it turned to other cases and said: in an effort to safeguard the poor or minorities "state action, even if non-discriminatory on its face" which results in unequal treatment of "the poor or a minority group as a class" [presumably the District Court was referring to

racial minorities,although the word, coming after the word "poor" could have meant an economic minority] is unconstitutional uness the state provides substantial justification, citing *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. Califrnia*, 372 U.S. 353 (1963). 313 F.Supp. 61 at 82. Contra, *James v. Valtierra*, 402 U.S. 137 (1971).

B. The Court of Appeals and the Remedy in the District Court

As the case left the district court on the "violation" side, these thingshad occurred:

1. **On Plaintiff's First Cause of Action:**
   a) The district court found a *Reitman* violation; which was phased out of the case in the Court of Appeal.
   b) With regard to the Resolution Schools, and especially Barrett Elementary, the District Court found a kind of *Brown I-Reitman* violation, which received a Rule 52 affirmance in theCourt of Appeals.
   c) With respect to all other claims, all other schools, there was a finding that no *Brown I* vioation was present.
2. **On The Plaintiff's Second Cause Of Action:**
   a) The district court found no *Brown I* violation.
   b) The district court found a *Griffin v. California*, violation.

On appeal, theCourt of Appeals seemed at first to agree with the Distric Court in its assertion on equal achievement:

> "The trial court's opinion * * * leaves little doubt that the finding of unequal educational opportunity in the deignated schools pivots on the conclusion that segrgated schools, whatever the cause, per se produce lower achievement and an inferior educational opportunity." 445 F.2d 990, at 1004.

But then the Court of Appeals spoke one of the most important sentences in its entire proceeding;

> "Thus it is not the proffered objective indicia of inferiority which causes the sub-standard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs." Id. at 1004.

In short, the Court of Appeals did not accept the bases of the trial court's holdings, namely the items to which the trial court referred as showing a *Griffin* type of violation[18] (and allegedly justifying the remedy which plaintiffs sought and the trial court imposed) plus inferior achievement, in the sense that they provided a basis for a *Constitutional Mandate*

Implicit in the Court of Appeals holding is the fact that we really do not know what causes inferior achievement nor, especially, how to remedy it, sufficiently to form a rule of *Constitutional law,* binding on 200 million persons and all of their school districts and programs.

Even acknowledging the experts presented at the remedies hearing by the plaintiffs, educational achievement development is at the early ether stage of anesthetics. The most we can do is try, experiment, develop, test, determine, and try again. That is precisely what the Denver School Board recognized (as did the Court of Appeals) in its Resolution 1562, found at 445 F.2d 1009-10.

3. On The Remedy.

The opportunity which was presented to plaintiffs certainly was not lost. It was an opportunity to judicially subordinate compensatory educational programs to racial integration remedies, and more. It was an opportunity to

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[18] Again, those things were in addition to achievement scores, teaching experience, building facilities, pupil dropout rates, and teacher turnover, and the testimony of Dr. Dodson. 313 F.Supp. 61 at 78-82.

bury, once and for all, one of the most important observations made in the *Coleman Report:*

> "The overall results of this examination of school-to-school variations in achievement can be summed up in three statements:
>
> 1. For each group,[14] by far the largest part of *the variation in student achievement lies within the same school, and not between schools.*
> 2. Comparison of school-to-school variations in achievement at the beginning of grade 1 with later years indicates that only a small part of it is the result of school factors, in contrast to family background differences between communities.
> 3. There is indirect evidence that school factors are more important in affecting the achievement of minority group students; among Negroes, this appears especially so in the South. This leads to the notion of differential sensitivity to school variations, with the lowest achieving minority groups showing highest sensitivity."
>
> *"Coleman Report"* (1966) at page 297. (Emphasis added).

The plaintiffs did not pass the chance. They proposed a simple pairing plan, wherein the great distinctions in student achievement *within each school* in the Denver schools would be lost forever. That is, they would exist, but not be recognizable. The plan would take an *average achievement* among the students in a school, and pair the school with the *average achievement* among students in another school. (Pl.Ex.501-A).

To this the District Court gave its constitutional imprimatur.

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[14] The Report was referring to: Puerto Rican; Indian American; Mexican-American; Negro, South; Negro, North; Oriental American; White, South; White, North.

C. The Testimony of Dr. Coleman, Dr. Sullivan and Dr. O'Reilly

The plaintiffs called Dr. Coleman, Dr. Sullivan, and Dr. O'Reilly to speak about remedies, and there was one consistency among their remarks: they were not speaking about Denver, Colorado, and had no previous experience with the schools there.

The petitioners have summarized Dr. Coleman's testimony in this way: the studies of compensatory programs "have not been very encouraging with regard to their efforts." (A. 1537a) (Petitioners' Brief page 58), and that "I think" the major problem with compensatory educational programs has been the fact that the child's environment has not changed if he speaks with other children who are homogeneous with his past. *Id.*

The H.E.W. Report on *"Effectiveness of Compensatory Education"* of 1972 states:

> "In this connection, it is worth noting two additional features of the *Coleman* report:
>
> - As the author has recently pointed out, the Coleman report should not be used to claim that physical desegregation is the only educational treatment that can have any positive achievement effects.
>
> - There is no direct evidence in the *Coleman* report for the conclusion, sometimes drawn from it, that compensatory education does not work. The Coleman report analyzed the existing range of school conditions in 1965-1966 and had nothing to say about situations in which very substantial additional resources above normal school expenditures were provided for basic learning programs. *The Coleman report did not analyze any such intensive programs.* (Emphasis added). "The Effec-

tiveness of Compensatory Education," (H.E.W., G.P.O. 1972), page 10.

The petitioners also summarized the testimony of Dr. Sullivan. That is understandable. Dr. Sullivan appeared as the Secretary of the State Board of Education in the State of Massachusetts. As such, he spoke on several things: compensatory programs in Boston, Massachusetts, and Berkeley, California; inferiority complexes (A. 1579a); psychology (A. 1579a); sociology (Id.); and the moral duties of educators. (Id.) But the principal purpose of his testimony was to establish that a compensatory education program with which he was associated in Berkeley, California, was a failure, that it "had no effect." (A. 1578a).

He explained that Berkeley tried everything: "lower class size; "materials and equipment"; "[h]undreds of thousands of dollars for electronic equipment that most schools have now"; the "addition of paraprofessionals"; "lots and lots of black administrators"; "Black principals in white schools. We felt that was only fair. White principals in black schools. We felt that was good. You name it and we tried it." (A. 1577a). Still, he said, it was a failure.

The H.E.W. Report on *"Effectiveness of Compensatory Education"* (1972), said this:

> "The important difference between success and nonsuccess appears to depend on whether compensatory education funds have been channeled into traditional patterns of expenditure—salary increases, routine techniques, etc.—or whether they have been used to develop supplementary, focused, compensatory education programs. *The reason there is so much evidence of failure is that resources have more often been used in the former rather than the latter manner."* (Emphasis added). *"Effectiveness"*, Id at 11.

The Report spoke about the situation in California in this way:

> "The most complete data are those available from the State of California. * * * Achievement data was (sic) collected for about 80% of all participants in compensatory reading programs and analyses were conducted using data covering about 50% of the participating children. Only that achievement data which met specified quality control criteria was (sic) included. Over the four years covered by the data, 54% to 67% of children receiving compensatory services showed a rate of reading achievement gain larger than the usual maximum for disadvantaged children. Analysis and results for mathematics were similar and even slightly better. *We judge this to be clear evidence of success.* (Emphasis added). *"Effectiveness"*, Id at 7.

Dr. Sullivan testified that integration in Berkeley eased such problems as teacher turnover and low teacher experience; and Dr. O'Reilly questioned the value of compensatory programs in either an integrated or non-integrated setting. (A. 1929a-20a). It is small wonder that with this evidence, the District Court came to its conclusions.

But one of the most important observations in the *Coleman Report,* went, it seems, almost unnoticed. It is stated as follows:

> "This analysis has concentrated on the educational opportunities offered by the schools in terms of their student body composition, facilities, curriculums, and teachers. *This emphasis, while entirely appropriate as a response to the legislation calling for the survey,* [§ 402 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-1] *nevertheless neglects important factors in the variability between individual pupils within the same school; this variability is roughly four times as large as the variability between schools.* For example, *a pupil attitude factor,*

> *which appears to have a stronger relationship to achievement than do all the 'school' factors together, is the extent to which an individual feels that he has some control over his own destiny." "Coleman Report"* (1966) at page 22-23. (Emphasis added).

Dr. Sullivan spoke about the feelings of inferiority of the Negro student. He said, "it was very clear to me that in their isolation they [Negroes] were completely rejected and psychologically this came through." (A. 1579a).

Again, the *Coleman Report* disturbs a number of assumptions and eye-witness certainties, such as that:

> "When asked about whether they wanted to be good students, a higher proportion of Negroes than any other group—over half—reported that they wanted to be one of the best in the class (table 3.13.2)." *"Coleman Report"* (1966) at 278.

And in speaking about general attitudes toward themselves and their environment, held by students, the following is found:

> "Apart from the generally high levels for all groups, the most striking differences are the especially high level of motivation, interest, and aspirations reported by Negro students. * * * [And speaking about the child's concept of himself] In general, the responses to these questions do not indicate differences between Negroes and whites, but do indicate differences between them and the other minority groups." *"Coleman Report"* (1966) at pages 280 and 281.

But with the testimony before it, the District Court was moved from the comparative to the superlative sense of approach:

> "We have concluded after hearing the evidence that *only feasible and constitutionally acceptable* program—the only program which furnishes anything

> approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment." (Emphasis added). (App.Pet.Cert. 112a), 313 F. Supp. 90 at 96.

And the court continued with the same penultimate language in its findings: "Thus, the *only hope* for raising the level of these students * * * *"; "The *ideal approach*, and that which offers maximum promise * * * *" (Emphasis added), Id. at 96.

Such comments if spoken by an educator would be regarded as graduation-day puffing. But the court spoke as a matter of *constitutional law* and it subordinated compensatory education programs, educational experimentation and research, all, to a kind of warmed-over *Swann* remedy, as a solution to low average achievement in the court-designated schools.

The essence of what the petitioners ask in this part of the case is that this Court do the same thing.

II

This Court And The Congress Of The United States Have Not Interpreted The Fourteenth Amendment To Require A Specific Educational Performance Among Children Attending Public Schools. There Is No Data To Support Such An Interpretation; It Should Not Be Given Under The Name Of Racial Or Economic Desegregation.

A. Introduction

The Fourteenth Amendment was certified as a part of the Constitution on July 28, 1868, and its Equal Protection Clause forbids a state to "deny to any person within its jurisdiction the equal protection of the laws."

Thus, the Equal Protection Clause requires a state to treat in like manner all persons similarly situated. *State*

Board of Tax Commissioners of Indiana v. Jackson, 283 U.S. 527 (1931); *Maxwell v. Bugbee*, 250 U.S. 525 (1919). It is a clause which does not, in law or fact, require identity of treatment. *Walters v. St. Louis*, 347 U.S. 231 (1954). And it permits a state to make distinctions between persons subject to its jurisdiction if the distinctions are based on some reasonable classification, and all persons embraced within the classification are treated alike. It outlaws invidious discrimination. *Avery v. Midland County*, 390 U.S. 474 (1968).

From 1868 to 1954, the Equal Protection Clause was interpreted to permit a state to impose, as a matter of state law, racial segregation in its public schools, when it furnished equal facilities for the education of the children of each race or races. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

"Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings." *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 11 (1971). "This case [*Swann*] and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what Brown v. Board of Education was all about." *Swann v. Charlotte-Mecklenberg Board of Education*, supra at 5.

In short, this Court struck down a governmental policy of racial segregation, which was effected in the public school system. The Court did not then, and not since that time has it used the Fourteenth Amendment to develop edu-

cational policy. *Brown* was not a case on educational programs and policies, and racial segregation was not a part thereof either.

Brown, and its progeny, was a case which struck at a government developed racial-social policy of segregation and discrimination in the public schools; such governmental policies meant inherent inequality by governmental order, which was developed and effectuated, in part, by use of the public school system. Thus this Court said, "The target of the cases from *Brown I* go the present was the dual school system." *Id.* at 22.

But the use of the public school system to develop and promote a governmental policy of racial segregation was only a part of the systematic program. It occurred and was struck down in public parks, *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971 (1954), in and on public beaches and bathhouses, *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955), municipal golf courses, *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), and on municipal buses, *Gayle v. Browder*, 352 U.S. 903 (1956), all on the authority and the concept of the *Brown* decision.

Under these authorities, the cases which hold that for a *Brown* violation there must be a state act in creating racial segregation or separation, rather than adventitious development, are simply legion. Among them are: *Springfield School Committee v. Barksdale*, 348 F.2d 261, 264, (1st Cir. 1965); *Offerman v. Nitkowski*, 378 F.2d 22 (2nd Cir. 1967); *Sealy v. Dept. of Public Instruction*, 252 F.2d 898 (3rd Cir. 1957), certiorari denied, 356 U.S. 975 (1958); *Deal v. Board of Education*, 369 F.2d 55 (6th Cir. 1965); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), certiorari denied, 377 U.S. 924; *Downs v. Board of Education*, 366 F.2d 988 (10th Cir. 1964), certiorari denied, 380 U.S. 914.

B. The Congress Of The United States Has Interpreted The Equal Protection Clause As A Constitutional Right To Be Free From Racial Discrimination In Public Schools

Section 5 of the Fourteenth Amendment provides:

> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Acting under the Fourteenth Amendment, and in response to this Court's decision in *Brown I*, and subsequent decisions, the Congress enacted subchapter IV, of the Civil Rights Act of 1964. In it, it gave an interpretation to desegregation (and thus segregation) 42 U.S.C. 2000c; it defined the power of the Attorney General to initiate a law suit to seek the desegregation of a school system, when a person is unable to initiate such an action, 42 U.S.C. 2000c-6; and it spoke specifically to the classification legitimacy, on bases other than race, color, religion or national origin, 42 U.S.C. 2000c-9. These interpretations were binding on the Denver School Board, and they were followed by the School Board. There was no finding of racial discrimination in the court-designated schools.

Congress is authorized to enforce the prohibitions by appropriate legislation under § 5 of the Fourteenth Amendment, *Ex Parte Virginia*, 100 U.S. 339, 345 (1879), and it could do so without regard to whether this Court or any court would hold the act prohibited to be in violation of the Equal Protection Clause. In seeking to promote the objects of the Equal Protection Clause the Congress prohibited racial discrimination in the public schools, it defined desegregation, and it specifically allowed classification of students on bases other than race, color, religion or national origin.

It was said:

> "In implementing the decision of the Supreme Court, we urge the Congress to be guided by two fundamental premises: (1) The American system of public education—an essential bulwark of a democratic system of government—should be preserved unimpaired; (2) the *constitutional right* to be free from *racial* discrimination in public education must be realized (Emphasis added). 2 *U.S. Code Cong. & Adm. News* p. 2504 (1964).

Section 410, 42 U.S.C. 2000c-9 provides:

> "Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

In speaking about this provision Senator Humphrey said:

> "Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide." 110 Cong. Rec. 12714 (June 4, 1964).

Again, Senator Humphrey said:

> "* * * The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school system. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is racial imbalance per se is not unconstitutional. * * *" 110 Cong. Rec. 12717 (June 4, 1964).

The interpretation given to the Equal Protection Clause by the Congress in subchapter IV of the Civil Rights Act of 1964 is binding here. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

C. Griffin-Douglas; Equitable Remedies; And Challenged Propositions Of Education.

The petitioners support the trial court's assertion that nondiscrimination, if it results in unequal treatment of the poor or a minority group, is unconstitutional unless the state shows a substantial interest therein, citing *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353 (1963); compare *Hunter v. Erickson*, 393 U.S. 385 (1969). *Contra, James v. Valtierra*, 402 U.S. 137 (1971).

From this position, the petitioners as well as the district court would sweep on to the full use of a court's equitable power under *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944), and *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15, (1971).[18] The result, as in this case,

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[18] But other courts, and authorities, have recognized that there is much more in the use of equitable judicial power than simply the recognition of its existence, which the petitioners show in their Brief on the Merits.

For example, the precise point was made by Chief Justice Burger, then Circuit Judge, in dissenting in the case of *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), at page 196, where he said:

> "Several commentators have expressed views which undergird what Judge DANAHER has said as to the need for caution and restraint by judges when they are asked to enter areas so far beyond judicial competence as the subject of how to run a public school system. We have little difficulty taking judicial notice of the reality that most if not all of the problems dealt with in the District Court findings and opinion are, and have long been, much debated among school administrators and educators. *There is little agreement on these matters, and events often lead experts to conclude that views once held have lost their validity.*" (Emphasis added).

And the dissent cited impressive authority where the point is further discussed. Among them are: Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U.Chi.L.Rev. 583, 592, 594, 595 (1968); Hobson v. Hansen, *The DeFacto Limits on Judicial Power*, 20 Stan.L.Rev. 1249, 1267 (1968); Hobson v. Hansen: *Judicial Supervision of the Color-Blind School Board*, 81 Harv.L.Rev. 1511, 1527, 1525 (1968).

The point that policy commitments are present in asserting equitable power and decrees was made by Professor Alexander Bickel: "Willy-nilly, the Supreme Court imposes a choice of educational policy, for the time being at least * * * and I don't think we can be sure that the

is to subordinate, if not bury, innovative compensatory educational programs, unless they march in lockstep to the *Brown I—Swann remedies.*

The substantial interest of the State of Indiana is in preventing the constitutionalization of education propositions, which, in the context of constitutional law, may be called "myths".

A short time ago, Mr. Justice Harlan reminded us that "*[d]ecisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations.*" *Katzenbach v. Morgan,* 384 U.S. 641, 668 (1966) (Emphasis added).

With that thought in mind, the amicus presents to the Court several "Propositions of Education" which are implicit in this case, and in the District Court's action:

"Proposition of Education, No. 1":

> The amount of money spent determines the goods and services bought, which in turn determines the effectiveness of the school in developing and meeting the needs of a child.

This proposition appeared in rough form when it was asserted by Charles Sumner in 1849 before the Massachusetts Supreme Court. He argued that racially segregated schools in Boston, Massachusetts, provided unequal opportunities for Negroes and whites. The ground for the argument was that his "client, a Negro girl, had to walk 2100 feet to her school while a white school was only 800 feet away from her home. He lost the case, but the same

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choice is the right one * * * Professor Bickel cannot be read to oppose school integration; but rather, he opposes *Swann* because it *willy-nilly decided that the nation's legal order compels the racial mixing of students [where there was a dual school system] as a matter of educational policy.*" Comment, *Civil Rights v. Individual Liberty,* 5 Indiana Legal Forum 368, 376 (1972).

kind of reasoning has pervaded the thinking of educators, the courts, and the public ever since. Up to 1954, innumerable attempts were made to prove that the separate education of Negroes in the South was either equal or not equal to white education by comparing schools in respect to their location ["inferior status of these school (is) the enforced isolation imposed * * * (by) neighborhood schools and housing patterns, 313 F.Supp 61 at 83 (1970)], the quality of their buildings ["the fact that the physical plant is old may aggravate the aura of inferiority which surrounds the school," 313 F.Supp. 61 at 81], the adequacy of facilities, the number of courses in the curriculum, the length of the school term, the paper credentials of teachers, and most importantly, the amount of capital outlay and annual expenditure per pupil." Mosteller & Moynihan, *"On Equality of Educational Opportunity,"* Dyer, page 514, (Vintage Ed. 1972).

Since 1954, and *Brown I*, the Court has disposed of the proposition, it too an educational myth, that to separate a child by government policy from an available school because of his race is somehow to treat him equally under the law.

The Court is being pressed to create another myth in its place, and in turn, to reinterpret *Brown I*. It is, essentially, that a minority child cannot be educated and receive equal educational opportunity unless his separation, from a majority group regardless of cause, is judicially destroyed.

"Proposition of Education, No. 2":

> The measure of equal educational opportunity is found in counting the dollars and cents spent on one school, or in one school district and comparing that with another school district, or school.

Probably the most extreme form of this assertion is found in the California case of *Serrano v. Priest*, 96 Cal. 601, 487 P.2d 1241 (1971). However, Mr. Dyer says this:

> "There is no guarantee that a more expensive installation is inherently better, if only as a piece of machinery, than a less expensive one. There is also no guarantee that a more expensive laboratory is capable of producing more language learning than a less expensive one, or indeed no language laboratory at all . * * * (During the period of excitement over the possibilities for audio-lingual instruction, many schools bought language labs that are now gathering dust.)" "Mosteller & Moynihan, *"On Equality of Educatonal Opportunity,"* Dyer, page 514-515. (Vintage Ed. 1972).

"Proposition of Education, No. 3:"

> Achievement Test Scores Determine the Education Received; the Equality Thereof; and Whether There is an Equal Educational Opportunity.

But a major educational reading does gainsay the statement:

> "The tendency is to assume that if on a reading test the 6th-grade pupils in a slum school average X points lower than those in a school in white suburbia, then X is the measure of the difference between the two schools in the effectiveness of reading instruction. The case may be quite the opposite: the slum school may be *more* effective than the suburban school in upgrading reading competence, especially in light of the deficiencies it has had to overcome." "Mosteller & Moynihan, *"On Equality of Educational Opportunity,"* Dyer, page 515. (Vintage Ed. 1972).

D. On Experimentation In Education And The Fourteenth Amendment

Certainly the State of Indiana does not say that there is no relationship between money spent, excellence of teachers, quality of facilities, teacher credentials, and the myriad concepts relating to educational standards and educational goals, and the product of the school system: the student. Obviously, there is; but equally obvious, or it should be, is the fact that it is not yet determined to an extent that a rule of *Constitutional Law* can be declared based upon it. But if this Court were to approve the fashioning of an equity decree, based upon, essentially, achievement criteria and a disparity among them, then there would be a major obstruction by the Judiciary in the environment and development of education programs, throughout Indiana and the United States.[16]

> "One of the compelling reasons for educational experiments is the importance for society of every improvement in the learning process." Mosteller & Moynihan, *"On Equality of Educational Opportunity,"* ~~Dyer~~, page 377. (Vintage Ed. 1972).

But success is still not a certain thing. For example:

> Indeed, after half a century of tightly controlled studies of optimum class size, we have made practically no progress toward answering the question (perhaps nature is hinting that the question is a poor one as customarily phrased). It is not that we haven't done controlled investigations, but rather that the studies have been too small and specialized for their implications to have much chance of holding in new situations." Mosteller & Moynihan, *"On*

[16] Mr. Justice Powell, concurring, spoke exactly to the point in saying: "In an age in which empirical study is increasingly relied upon as a foundation for decision making, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a 'laboratory' and to experiment with a range of trial and procedural alternatives." *Johnson v. Louisiana*, — U.S. —, 92 S.Ct. 1635, 1641 (1972)

Equality of Educational Opportunity," ~~Dyer~~, page 375. (Vintage Ed. 1972).

"The controversies about the Coleman Report show that we still are ignorant of what makes education tick for children and of why what works for some doesn't seem to for others. For whom is laissez faire wise, and for whom a lockstep program? Naturally we do not expect that only one sort of program is workable, because children can adapt to or resist most things. *Our point is that when a big national effort is as little understood as education now is, we are obligated to experiment."* (Emphasis added). Mosteller & Moynihan, *"On Equality of Educational Opportunity"*, page 378 (Vintage Ed. 1972).

To say that equity, as a judicial matter, should recognize as a judicial wrong the achievement level distinctions among students in public schools, and then proceed to order that the levels be equalized, pursuant to a decree which a District Court might attempt to fashion, is judicial obstructionism in its worst form; indeed, the Court might as well order an Opera Soprano to sing well.

To try to succeed is the essence of the thing, and that, precisely, is what the Denver School District was, and is, attempting to do.

The conclusion is manifest: the Fourteenth Amendment should not be construed to effect the adoption, as a matter of Constitutional law, of one specific educational policy, and programmatical result: equal achievement levels.

CONCLUSION

Mr. Justice Holmes once observed that,

"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic

> theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.*" *Lochner v. New York,* 198 U.S. 45, 75-76 (1905).

If this be so, then must the Fourteenth Amendment embody the social-educational theory of a Dr. Neal Sullivan, among several others?

In reversing the District Court in Richmond, Virginia, the United States Court of Appeals for the Fourth Circuit said, in speaking about the expert testimony in that case, that,

> "We think it fair to say that the only 'educational' reason offered by the numerous school experts in support of consolidation was the egalitarian concept that it is good for children of diverse economic, racial and social background to associate together more than would be possible within the Richmond school district. *Bradley v. School Board of Richmond, Virginia,* (June 5, 1972, slip opinion at page 25).

One can look at this case in Denver, and the record which was produced, and see that a similar tide was running. It was, as is,[17] that a particular theory, a particular way of approach, a specific "educational" program, a specific theory of "education", namely social reform and massive

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[17] In the Richmond case, the principal expert testimony for the plaintiffs came from Dr. Thomas F. Pettigrew, whose central theme was that all good things shall come from a carefully calibrated racial mixture which would give white superiority by, ideally, about a 70-30 ratio. Here the expert testimony was only less candid.

"The invidious nature of the Pettigrew thesis, advanced by the dissent in the present case, thus emerges. Its central proposition is that the value of a school depends on the characteristics of a majority of its students and superiority is related to whiteness, inferiority to blackness. Although the theory is couched in terms of 'socio-economic class' and the necessity for the creation of a 'middle-class milieu,' nevertheless, at bottom it rests on the generalization that, educationally speaking, white pupils are somehow better or more desirable than black pupils." *Brunson v. Board of Trustees,* 429 F.2d 820, 826 (4th Cir. 1970) (Judge Sobeloff, concurring).

societal remolding, should receive not only approval, but the dignity and the compulsion of constitutional law.

In the core area of Denver, there was no racial discrimination; there was no dual school system; there has never been. But the District Court wanted a result. That result was the mixing of persons in the schools, so that the public schools in Denver could act, according to the District Court, as a substitute for the home and the church. To accomplish that result, the District Court attached itself to equal achievement levels and from this it evolved a principle and holding of constitutional law.

It is clear that the curse at which Holmes directed his pen remains. It is the curse of binding constitutional rigidity based upon the cry of the moment, and the passion of the hour: equal achievement levels in the public schools. The terrible flaw in the District Court's desire is that it read the Constitution to embrace exclusively the passion of the moment. But the record in this case does not support the District Court; and massive other data do not support the District Court. Further, this Court should resist fully the temptation to enter into the thicket of educational policy and educational philosophy.

Accordingly, the State of Indiana urges that this Court affirm the decision of the United States Court of Appeals in this case, to the extent that it reversed the District Court.

Respectfully submitted,

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FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

SECTION 1:

§ 1. Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5.

§ 5. Power to enforce amendment.—The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CIVIL RIGHTS ACT OF 1964

42 U.S.C. 2000c

§ 2000c. Definitions

As used in this subchapter—

(a) "Commissioner" means the Commissioner of Education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not means the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or govern-

mental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

Pub.L. 88-352, Title IV, § 401, July 2, 1964, 78 Stat. 246.

42 U.S.C. 2000c-6

§ 2000c-6. Civil actions by the Attorney General—Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of any action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college

authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

Persons unable to initiate and maintain legal proceedings

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"Parent" and "complaint" defined

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, Title 18. Pub.L. 88-352, Title IV, § 407, July 2, 1964, 78 Stat. 248.

42 U.S.C. 2000c-9

§ 2000c-9. Classification and assignment

Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

Pub.L. 88-352, Title IV, § 410, July 2, 1964, 78 Stat. 249.

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IN THE

Supreme Court of the United States

October Term 1971

No. 71-507

WILFRED KEYES, et al,

Petitioners,

vs

SCHOOL DISTRICT NO. 1, DENVER COLORADO, et al,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The principal opinions of the courts below are adequately set forth in the Brief for Petitioners.

JURISDICTION

The jurisdictional statement is adequately set forth in the Brief for Petitioners.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

The sole question presented by Petitioners is: Whether petitioners are entitled to obtain system-wide relief to desegregate the Denver Public Schools. Four legal theories are propounded thereunder by Petitioners.

STATEMENT

The Brief for Petitioners contains a complex and lengthy statement. Portions thereof consist of preliminary findings of fact by the district court made following a hearing on motion for preliminary injunction, which are not supported by the ultimate findings made after a full hearing on the merits; portions consist of reiteration of some findings of fact and additional new findings of fact by the trial court after the hearing on the merits; portions pertain to asserted inferences from facts in evidence but not adopted by the trial court in its findings of fact; portions consist of conclusions of counsel but not of the lower courts; and other portions contain argumentative matters. For these reasons, respondents present a detailed statement to put this case in proper chronology and perspective.

1. PROCEDURAL HISTORY.

This action was commenced in the United States District Court for the District of Colorado on June 19, 1969, by Anglo (white, excluding Hispano), Negro, and Hispano (Spanish surnamed) parents of children attending public schools in Denver, Colorado, suing individually, on behalf of their minor children, and, under Rule 23, Federal Rules of Civil Procedure, on behalf of classes of persons similarly situated. They alleged violations of their constitutional rights and sought reinstatement of certain rescinded resolutions of the Board of Education, desegregation of certain schools alleged to have been segregated by acts of the Board

of Education, desegregation of the entire district, and other relief.

The complaint contained two separate causes of action.[1] The first cause of action addressed itself only to a small number of schools in a portion of northeast Denver known as Park Hill, and alleged that the rescission of three resolutions of the Board of Education numbered 1520, 1524, and 1531, containing plans for stabilization of the racial and ethnic pupil composition of those schools ("resolution schools") in northeast Denver was unconstitutional and void and prayed that the resolutions be reinstated by order of the court.

The three resolutions contained plans for reassignment of pupils from eight northeast Denver neighborhood schools to other schools more distant. Only four of the eight were predominantly Negro and none was predominantly Hispano.

The second (main) cause of action alleged the existence of racially and ethnically segregated residential patterns in Denver, and with knowledge thereof, the superimposition by the Board of a "neighborhood school policy" resulting in state imposed segregation on the basis of race and ethnicity at schools in the central or core city area of Denver ("core city schools") and an unequal allocation of facilities, resources and faculty to predominantly minority schools of the school district.

Although various forms of relief were sought, the Question Presented herein by petitioners is limited to the refusal of the lower courts to order system-wide "desegregation" in the Denver schools.

[1]Joint Appendix, pp. 2a-70a, hereinafter cited A. For ease of reference, the citation conventions adopted by petitioners in footnote 3 of their brief will be used in this brief. The Appendix to Petition for Certiorari is hereinafter cited as "A.P.", the Brief for Petitioner is cited as "Pet. Br."

Only the first cause of action was considered on motion for preliminary injunction to reinstate and implement the three rescinded resolutions. After hearing in July of 1969, the district court granted the preliminary injunction, holding the rescission unconstitutional.[2]

On application for stay of the preliminary injunction, the Tenth Circuit Court of Appeals remanded the case to the district court to make its injunction more specific and for consideration of the applicability of section 407(a) of the 1964 Civil Rights Act, 42 U.S.C. §2000c(6)(a).[3]

On remand the district court held section 407(a) of the Civil Rights Act of 1964 inapplicable and made its injunction more specific by ordering implementation of the resolutions as to five elementary schools, only three of which were predominantly minority and the one junior high school they fed, a total of only four minority schools. It reserved ruling on the second minority junior high school involved in the resolutions until trial on the merits.[4] The court also held that East High School, one of the eight resolution schools, was not within the ambit of a preliminary injunction because of section 407(a) and because the evidence failed to disclose a condition at East which merited a preliminary injunction (East was and has remained predominantly Anglo.)[5]

On August 27, 1969, the court of appeals stayed the preliminary injunction until further order of court stating that the important and difficult questions presented in the case

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[2]Opinion of the District Court of July 31, 1969, 303 F.Supp. 279, A.P. 18a and 19a.

[3]Opinion of the Court of Appeals of August 5, 1969. A. 455a.

[4]Opinion of the District Court of August 14, 1969, 303 F.Supp. 289, 296, A.P. 37a.

[5]Opinion of the District Court of August 14, 1969, 303 F.Supp. 289, 299, A.P. 43a.

should not be decided on application for preliminary injunction and questioned the piece-meal consideration of the case.[6]

On August 29, 1969, the Friday before the opening of school on September 2, 1969, Mr. Justice Brennan, Acting Circuit Justice, reinstated the preliminary injunction on the grounds that the stay was improvidently granted, the court of appeals not having said that the grant of the preliminary injunction was an abuse of discretion.[7]

The court of appeals on September 15, 1969, denied a motion to amend its August 27, 1969, stay order to specifically hold that the district court abused its discretion in granting the preliminary injunction, the schools having opened in compliance therewith and any change at that time would have had a disruptive effect on them.[8]

After trial on the merits from February 2 to February 24, 1970, the district court, in an opinion dated March 21, 1970, "considered the explanatory evidence offered at trial" (313 F.Supp. 61, 64, A.P. 46a) as to the first cause of action and made specific findings of fact and conclusions of law concerning the resolution schools reiterating the finding of unconstitutional rescission of the three resolutions. The court made the injunction permanent and included therein the second minority junior high school and one high school (East High), although it was a predominantly Anglo school. The court further held that the racial imbalance in the schools which were the subject of the second cause of action (core city schools) was not caused by state action, but that the schools which were over 70% Negro or over 70%

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[6]Opinion of the Court of Appeals of August 26, 1969. A. 459a.

[7]*Keyes v. School District No. One*, 396 U.S. 1215 (August 29, 1969). A. 463a.

[8]Opinion of the Court of Appeals of September 15, 1969. A. 467a.

Hispano were not providing an equal educational opportunity in violation of the Fourteenth Amendment.[9]

The district court issued a "Decision re Plan or Remedy" on May 21, 1970, after a further hearing on remedies and ordered a plan of massive compensatory education and the desegregation of seventeen "court designated" schools—fourteen elementary, two junior high and one senior high, all located in the core city area of Denver—which it concluded were not providing an equal educational opportunity, although not segregated by state action.[10] These included two elementary and one junior high resolution schools.

A Final Decree and Judgment was entered on June 11, 1970,[11] which was appealed by both parties. After a stay by the court of appeals[12] pending decisions of this Court in *Swann v. Charlotte-Mecklenburg Board of Education* and other cases was vacated by this Court, per curiam,[13] following the announcement of its decision in *Swann*[14] and other cases, the court of appeals issued its opinion on June 11, 1971.[15]

The court of appeals affirmed the holding of the district court on the first cause of action, not on the grounds of unconstitutional rescission of the three resolutions, but instead on the basis of certain school districting in the Park Hill area involving only four predominantly minority schools; af-

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[9]Opinion of the District Court of March 21, 1970, 313 F.Supp. 61, A.P. 44a.

[10]Opinion of the District Court of May 21, 1970, 313 F.Supp. 90, A.P. 99a.

[11]A. 1970a.

[12]Opinion of the Court of Appeals of March 26, 1971, A. 1981a.

[13]*Keyes v. School District Number One, Denver, Colorado,* (April 26, 1971). A. 1984a.

[14]402 U.S. 1 (1971).

[15]Opinion of Court of Appeals of June 11, 1971, 445 F.2d 990, A.P. 122a.

firmed the findings of the district court that the core city schools which were the subject of the second cause of action were not segregated by state action; and reversed the judgment of the district court decreeing desegregation of the court designated schools on the ground that its decree was beyond the power of the court, there having been no state action causing the "de facto" segregation and therefore no constitutional violation.

Plans to implement the district court's Final Decree and Judgment regarding desegregation of the court designated schools were formulated and approved by the district court prior to the announcement of the opinion of the court of appeals on June 11, 1971, but were not implemented because of the reversal of the district court's decision in the interim.

As a result of an opinion of the court of appeals issued on August 30, 1971,[16] on motion for clarification, the district court ordered additional cross-busing to further reduce minority percentages at two elementary schools in northeast Denver[17] which were determined by the court of appeals in its June 11, 1971, opinion to be "de jure" segregated independently of the rescission of the three resolutions of the Board of Education. That order was implemented in January of 1972, after this Court granted certiorari on January 17, 1972.

2. THE CITY AND COUNTY OF DENVER AND SCHOOL DISTRICT NO. 1.

A. *Political System*

The City and County of Denver was created as a home rule city by amendment to the Constitution of Colorado in 1902 and has a mayor-council form of government. Article

[16]Opinion of Court of Appeals of August 30, 1971. A. 1987a.

[17]Stedman and Hallett, both of which were resolution schools.

XX of the Constitution of Colorado provides in pertinent part:

> "Section 7. City and county of Denver single school district—consolidations.—The city and county of Denver shall alone always constitute one school district, to be known as District No. 1, but its conduct, affairs and business shall be in the hands of a board of education consisting of such numbers, elected in such manner as the general school laws of the state shall provide. . . .
>
> * * *
>
> "Upon the annexation of any contiguous municipality which shall include a school district or districts or any part of a district, said school district or districts or part shall be merged in said 'District No. 1,' which shall then own all the property thereof, real and personal, located within the boundaries of such annexed municipality, and shall assume and pay all the bonds, obligations and indebtedness of each of the said included school districts, and a proper proportion of those partially included districts . . . ."

The respondent School District No. 1 was thus created by the Constitution of Colorado along with the City and County of Denver in 1902. The school district is governed by a seven-member board of education elected for staggered six-year terms and is both fiscally and politically independent from the city and county. The boundaries of these two political subdivisions are identical. Until 1967 the City and County of Denver had exclusive control over annexation of surrounding lands into the city and county and, by virtue of the Constitution, into School District No. 1. Since then, con-

templated annexations must be approved by School District No. 1.[18]

B. *Geography*

Geographically, Denver is roughly square, (See map, Appendix to respondents' Brief in Opposition to Petition for Certiorari) approximately 11 miles north to south and 9½ miles east to west, or approximately 100 square miles. The South Platte River flows from south to north curving to the west near the center of the city. The principal business and commercial area is located in the center of the city.

Denver's major growth has been to the east and south over the past 25 years, much of it by territorial annexation of undeveloped land, subsequently developed primarily for residential uses, neighborhood business and suburban shopping centers. The annexations to Denver since World War II have totaled approximately 40 of Denver's present 100 square miles. DIX L, A. 2148a; DX HK, A. 2158a; and PX 20, Map No. 2, A. 2018a.

C. *Demography*

The city of Denver is most densely populated near its center. In the early 1940's, the relatively small Negro population lived in a rather small area immediately north of the center of the city, commonly called "Five Points". A.P. 47a. Hispanos generally lived further to the north, as well as to the south and west of the city's center. After World War II, the Negro population increased in size substantially and, supplemented by immigration from other areas of the country, migrated to the east.

A large number of the Negroes who came to Denver after the war were from the rural South, unskilled, partially edu-

[18]Colorado Revised Statutes 1963, §139-21-4(5).

cated, burdened by traditions of legally imposed inequality, and unable to compete successfully. PX 20, A. 2001a.

A large number of the Hispanos came from New Mexico and southern Colorado, forced to the city by the closing of mines, the seasonal nature of agricultural work and mechanization of farms, bringing value patterns and cultural characteristics which interfered with adjustment to urban life. PX 20, A. 2002a.

The change in population is reflected by the following statistics:[19]

	Anglo		Negro		Hispano		Others		Total
Year	No.	%	No.	%	No.	%	No.	%	Population
1930	279,814	97.2	7,204	2.5	Incl. in Others		843	0.3	287,861
1940	313,810	97.3	7,386	2.4	Incl. in Anglo		766	0.3	322,412
1950	397,491	95.6	15,059	3.6	Incl. in Anglo		3,236	0.8	415,786
1960	398,332	80.7	30,251	6.1	60,294	12.2	5,010	1.0	493,887
1970	371,842	72.3	47,011	9.1	86,345	16.8	9,480	1.8	514,678

Following World War II, the Negro population began to migrate eastward and by 1950 had reached York Street, a main north-south thoroughfare. Between 1950 and 1960, the migration continued eastward from York Street to Colorado Boulevard, another principal north-south six-lane thoroughfare which the trial court recognized as a natural dividing line. 303 F.Supp. 282 and 290, A.P. 4a, 21a. In the early 1960's, the Negro migration continued to the east of Colorado Boulevard into a middle class residential area known as Park Hill and on to the easterly city limits. 313 F.Supp. 64, A.P. 47a.

The change in the Negro population between York Street and Colorado Boulevard is roughly reflected in the following figures:[20]

[19]Source. U.S. Bureau of Census.

[20]PX 38, Table 3, p. 6, A. 2116a; U.S. Bureau of Census for 1970 figures.

Year	Negro Population	Total Population	Percent Negro
1940	86	12,482	0.7
1950	898	16,028	5.6
1960	8,715	17,216	50.6
1970	10,506	15,047	69.8

The Park Hill population changes, Colorado Boulevard eastward to Quebec Street, are shown by the following figures:[21]

Year	Negro Population	Total Population	Percent Negro
1950	54	20,201	0.3
1960	566	32,679	1.7
1966	12,222	32,944	37.1
1970	18,516	36,893	50.2

The 1966 census of the Park Hill area was conducted by petitioners' witness Bardwell in a study for the City and County of Denver (not the School District), wherein he made the following concluding remarks:

> "If one adopts the position that a balance and stable mixture of Negro and white residents in Park Hill is a desirable public goal, the results of the 1966 census are not encouraging. There is ample evidence that the Negro movement into Park Hill is persistent and growing in momentum. The results suggest that a massive shift in racial composition in new residents moving into the area will be required to reverse this trend.
>
> "A number of factors suggest a continuing and mounting pressure for school facilities. The aver-

[21]PX 38, Table 4, p. 6, A. 2116; U.S. Bureau of Census for 1970 figures.

age size Negro family in the 1966 census is about one-fourth larger than the white family in the 1960 census. This disparity is even more pronounced if the average white family in the 1966 census is used. Moreover, there is a relatively high vacancy rate in 'transitional' areas in Park Hill. These factors, together with the prospect of higher proportion of Negroes in Park Hill, point to an impact on school populations which is likely to be more severe than that experienced to date." PX 38, p. 23, A. 2116a.

The Hispano population of the city of Denver also migrated but over a larger and less well-defined area, generally north and west of the city's center. The record does not reflect the Hispano movement as clearly as it does the Negro movement. An example which is typical, however, is illustrated by Boulevard Elementary School, in an older section of west Denver, which in 1946-1947 had an enrollment of 576 whites (93.4%), no Negroes and 31 Hispanos (6.6%). PX 336, A. 2084a. The 1969-1970 enrollment for Boulevard was 118 Anglo (30.3%), 2 Negro (0.5%) and 269 Hispano (69.1%). DX S-1, A. 2166a. The older part of the school was demolished and not replaced prior to 1969.

The Five Points area and the Hispano residential areas just north and west of the city's center had the lowest median family income and the lowest adult educational attainment level in 1960. The Park Hill area was near the median of family income for the same year, and the areas in the south and southeast parts of the city showed the highest median family income. PX 20, Map No. 5.

Population mobility was highest in the area of the core city schools. As examples, Emerson Elementary School and Morey Junior High School each experienced pupil popula-

tion mobility of over 100% during a single school year. Oberholtzer, A. 1361a.

In summary, Denver experienced normal growth prior to World War II, but shared in the dramatic postwar population movement to the cities, perhaps more than some cities because its territorial annexation policy in the 1940's, 1950's and 1960's enabled it to accommodate more of the population influx than some metropolitan areas where growth has been primarily in the suburbs.

3. DENVER'S SCHOOLS

A. *General Background*

At the time the action was commenced, School District No. 1 operated 118 schools consisting of 92 elementary schools, 15 junior high schools, 9 senior high schools including 2 junior-senior high schools, an opportunity school and a metropolitan youth education center.

At the beginning of the school year 1968-69, immediately prior to the commencement of this action, Anglo students were enrolled in all 92 elementary schools, Negro students in 78, and Hispano students in 88. Anglo students were enrolled in all 15 junior high schools, Negro students in 14 of the 15, and Hispano students in all 15. Anglo and Hispano students were enrolled in all 9 senior high schools and Negro students in 8 of the 9. PX 242, A. 2051a; PX 273, A. 2075a; and PX 302, A. 2079a.

Prior to 1947, a racial and ethnic survey had been taken annually by the school district. Oberholtzer, A. 1309a. When Kenneth E. Oberholtzer took office as Superintendent of Schools that year, there was brought to his attention the existence of published reports of racial data and the provisions of the Constitution of Colorado, Article IX, Section 8, which provides in pertinent part:

> "Section 8. Religious test and race discrimination forbidden—. . . No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color."

The superintendent sought and received advice of counsel (A. 1309a) and was advised that the survey conflicted with the constitutional provision. He thereupon directed that the practice be discontinued. A. 1309a. This continued as the policy of the administration and the Board until 1962, when racial and ethnic surveys of pupils and teachers were made in May of that year as a result of the need to have such data available for the Office of School-Community Relations and the Special Study Committee created that year. A. 1352a. These surveys were made annually thereafter by observations of pupils in the classroom in the fourth week of September in each year. No indication of race appeared on the individual records of the pupils.

The time frame covered by this lawsuit coincides approximately with the tenure of Dr. Oberholtzer as superintendent of the Denver schools from 1947 to his retirement in 1967.

During those twenty years the school population more than doubled from 45,000 to over 97,000 pupils and the number of classroom teachers increased from approximately 1600 to more than 4000.[22] Over 100 million dollars was spent during that time for construction and equipping school facilities in all areas of Denver to accommodate this school population explosion. Oberholtzer, A. 1304a, Map PX 20, A. 2018a. Yet funds were never adequate to provide schools in all locations where they were needed to accommodate Denver's growing and shift-

[22]Oberholtzer, A. 1306a. See also comparative data, 1940 to 1969, DX HK A. 2158a.

ing school population, particularly in newly annexed areas from which children had to be transported to the nearest available spaces in their grade levels.

Sizeable capital outlays were expended on renovation and maintenance of older buildings and facilities to keep them in good condition and provide up-to-date lighting, seating and other educational equipment. Oberholtzer, A. 1365a.

Schools were constructed over the years where they were needed to accommodate resident pupils without regard to the race or color of the pupils until 1964. Oberholtzer, A. 1316a, 1317a, and A. 1370a.

These schools reflect the racial and ethnic composition of the areas of the city that they serve. As that composition changed, so did that of the schools.

There is no evidence that the school district or any other governmental agency either caused or had any control over the changing racial characteristics of the neighborhood areas involved.

The public policy of the State of Colorado as shown by its laws and decisions was to prohibit discrimination based on race and protect the right of the individual to choose his place of residence regardless of race, creed, color, sex, national origin or ancestry.[23]

Section 4 of Colorado's Enabling Act provided in pertinent part:

> "... whereupon the said convention shall be and is hereby authorized to form a constitution and

[23]The Supreme Court of Colorado in *Capitol Federal Savings and Loan Association v. Smith*, 136 Colo. 265, 316 P.2d 252 (1957) went further than this Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948) and following cases, when it held that no rights, duties or obligations whatever could be based on a private racially restrictive covenant on real property and, in essence, declared such covenants absolutely void.

state government for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color. . . ." Colorado Revised Statutes 1963, Vol. 1, p. 52.

In 1895, Colorado enacted statutes prohibiting discrimination in public accommodations. Colorado Revised Statutes 1963, Section 25-1-1. Subsequent, statutes in 1917 broadened the anti-discrimination provisions. Colorado Revised Statutes 1963, Section 25-2-3. In 1957, The Colorado Antidiscrimination Commission was created, which has since been granted broader powers. Colorado Revised Statutes 1963, Chap. 25, Art. 3. The Colorado Fair Housing Act of 1959 (Colorado Revised Statutes 1963, Chap. 69, Art. 7) made it unlawful and prohibited a person having the right of ownership or possession to real property to refuse to transfer, rent or lease to any person because of race, creed, color, sex, national origin or ancestry; or to discriminate against such persons in connection with housing, including lending, making of restrictions, advertising or aiding or abetting such conduct. Jurisdiction was given to The Colorado Antidiscrimination Commission to enforce the provisions thereof with appropriate judicial review and enforcement. (Laws of 59, p. 489; Chap. 69, Art. 7.)

In the period shortly after *Brown v. Board of Education* 347 U.S. 483 (1954), Superintendent Oberholtzer requested opinion of counsel and was advised that *Brown* did not apply to Denver as it did not have separate schools for the races and *Brown* applied only to state-imposed dual systems and not to racial imbalance in schools resulting from residential concentrations. Oberholtzer, A. 1310a.

B. *Pupil Assignment Policies and Practices*

The Denver School District has never maintained a system of separate schools for children of different races or a

dual system. 445 F.2d 990, 996; A.P. 126a. The school district has always utilized a neighborhood school policy of assigning children to schools. Under this policy, the school district is divided into geographic subdistricts. A school is provided for each subdistrict generally within ready walking distance for all children in the attendance area (subdistrict). There is a subdistrict for each level of education, elementary, junior high and senior high. Elementary school attendance areas are smaller than the upper levels to accommodate the younger children and limit walking distances to school, generally no more than one mile. Junior high school attendance areas are generally limited to a two-mile walking distance. Senior high school subdistricts are much larger and rely on various forms of transportation to and from school such as public transit, private automobiles and bicycles. Oberholtzer, A. 1308a.

The school district has never assigned pupils to its schools on the basis of race or other individual characteristic except that children with extreme physical handicaps are transported to a special school at district expense, some children with learning disabilities are assigned to special education classes outside the subdistricts where such classes are not provided at their neighborhood schools, and in recent years, a Voluntary Open Enrollment or majority to minority transfer policy has permitted transfers from the neighborhood school to another school on the basis of race or ethnicity where such transfers improve integration at both the sending and receiving schools.

The district court found:

> "It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless

it is necessary to bus him to relieve overcrowding." 313 F.Supp. 73 A.P. 67a.

The school district never took into account race or ethnicity as a factor in establishing school subdistrict boundaries until 1964. Oberholtzer, A. 1370a.

Benefits of the neighborhood school concept include a rational distribution of school population, convenience to the child in getting to and from school, a close home and school relationship with parents and teachers and placement of pupils in relation to maximum use of school plants. PX 20, p. A-2, A. 2008a.

The neighborhood school policy has had some exceptions in its application based on necessity but non-discriminatory. These include transportation of children in newly annexed areas, where there are no schools, to the nearest schools with space available at the required grade levels. Other variations of the neighborhood school policy have included optional attendance areas, eliminated in 1964; individual transfers for a limited number of purely personal non-racial reasons; transportation out to relieve overcrowding; and Voluntary Open Enrollment.

In 1962, concern developed over a proposal to construct a new junior high school on the northern portion of a large site in northeast Denver at East 32nd Avenue and Colorado Boulevard, purchased for that purpose in 1949 when the neighborhood was predominantly Anglo. Many in the community were of the opinion that the rapidly changing racial composition of the area would cause the new school to be predominantly Negro if built. The School Board deferred action on the proposal and appointed A Special Study Committee (sometimes referred to as "Voorhees Committee") to study the question and report generally on the status of educational opportunity in the Denver Public Schools. The

committee was composed of representatives of the varied racial, ethnic, cultural and economic groups which form the total Denver community. PX 20, p. 10, A. 2006a. After an exhaustive study, the committee made a written report to the Board with recommendations on March 1, 1964. PX 20, A. 1997a.

In that report the committee generally endorsed the application of the neighborhood school concept in the organization of the Denver school system (PX 20, p. A-1, A. 2008a), recommended that the Board formalize into a written policy the criteria theretofore utilized in establishing school boundaries and locating new schools (PX 20, p. A-6), and recommended that the Board continue the neighborhood school principle except that it should establish a limited open enrollment plan. PX 20, p. A-10, A. 2011a. The committee also recommended that a matter to be considered with all other factors was that school boundaries and the location of new schools should be determined so that the school neighborhoods will represent, to the extent possible, a heterogeneous school community. PX 20, pp. A-6 and A-7. Such a policy was promptly adopted by the Board on May 6, 1964. PX 1, Policy No. 5100, A. 1989a.

As to optional attendance areas, the committee found that they often were continued after the reasons for their establishment ceased to exist and were no longer necessary to a rational boundary system, and therefore recommended that they be abolished. PX 20, p. A-13, A. 2013a. The remaining few were abolished by the Board shortly after receipt of the committee's report in 1964. The racial effects of optional areas were insignificant and there were no findings that optional areas or their abandonment in any way caused racially concentrated schools.

The committee also reviewed the school district's transportation policies and concluded that while transportation is

sometimes necessary, it is never desirable and that transportation of pupils for the sole purpose of integrating school populations was regarded by the committee as impractical. It was recommended that transportation should be regarded as an expedient rather than a solution to problems including the problem of racial imbalance in the schools. PX 20, p. 11 and 12, A. 2011a and 2012a.

The transportation of pupils from newly annexed areas, where there were no schools, to the nearest available space at the appropriate grade level involved approximately 1000 pupils in 1964. PX 20, p. A-11, A. 2011a. Petitioners complained that these children, who were predominantly Anglo, were not transported to available space in minority schools. The great majority of these children lived in the southwest and southeast areas of Denver where there was space available in schools near their homes. Basically, the petitioners' complaint was that these children were not bused additional miles to integrate minority schools and not that the school district used such transportation as a device to maintain "segregation."

> The Court: Are you maintaining here that the transportation is used to maintain segregation, that transportation is employed in order to avoid integration?
> Mr. Greiner: The latter, yes, Your Honor, that certain students are bused past schools with space in them to schools further distant. A. 769a.

The evidence was not as counsel stated. The evidence was that *minority* students from Smith School who were transported out to relieve overcrowding were bused past some Anglo schools to other Anglo schools. Bardwell, A. 770a.

This type of busing — to relieve overcrowding — was different from the type of busing employed to trans-

port children from areas which had no schools until such time as schools could be built. Petitioners do not complain about busing to relieve overcrowding. The example cited on page 26 of their brief — transporting a small number of pupils from Montbello to Lake Junior High instead of to Cole Junior High which was closer in terms of miles but not on the Interstate highway route utilized—was evaluated by the Court in considering the effect of Resolution 1524 on Cole Junior High School.

> "The purpose of this change [reduction of the pupil membership by 275 students] was to decrease the pupil-teacher ratio at Cole and to make room for a number of special programs to be instituted there. This was also a good faith effort by the Board to improve the quality of education at predominantly Negro Cole." 313 F.Supp. 67 A.P. 54a.

Having determined on educational grounds to reduce the membership at Cole, it would have been inconsistent for the school district to bus additional children into Cole at the same time. School capacity as explained numerous times in the testimony was related directly to the type of educational program conducted at the school and was not simply the product of number of classrooms times 30, the average pupil-teacher ratio for the district, as petitioners assumed.

The district court made no findings that the use of transportation as an adjunct to the neighborhood school policy in any way contributed to or caused "segregation" in any of the schools.

Regarding individual pupil transfers between schools, the Special Study Committee stated that there was every evidence that the rules governing such transfers have been followed carefully and without prejudice. These were extreme-

ly small in number (during 1963, 122 at the elementary level and 29 at the junior and senior high level. PX 20, A-9) and thus were insignificant in relation to the issues in this case.

The Limited Open Enrollment program (LOE) recommended by the Special Study Committee was instituted in 1964. LOE did not employ racial criteria. It simply permitted a student to transfer from his assigned school to any other school in the system where space was available in his grade level on a first come, first served basis. No transportation was provided by the School District. Petitioners state in their brief (p. 32) that LOE involved only 267 elementary students and had a negligible effect on integration.

LOE was instituted to enable minority children who desired an integrated school environment the opportunity to obtain it. To further improve integration, LOE was replaced in the fall of 1968 with a majority to minority transfer policy based on race, with transportation provided by the school district. This program was called Voluntary Open Enrollment (VOE). It was not expected that VOE would racially balance the entire school system although it had that potential. Koeppe, A. 432a. It was designed to give students an opportunity to attend another school where their race was in the minority and at the same time, to improve the racial balance of both the sending and receiving schools. Perrill, A. 1082a, Koeppe, A. 428a.

The VOE principle was incorporated into the Hallett Elementary School Voluntary Exchange Program and was intended to integrate Hallett. Koeppe, A. 425a. As petitioners note in their brief at page 33, the program reduced the Negro percentage at Hallett from 84% Negro to 58.4% Negro during the pendency of this litigation in the summer of 1969, despite the disruptive effects of this litigation. The Hallett plan was contained in Resolution 1531 and also in

its replacement, Resolution 1533. PX 6a, A. 2111a. In addition, the district-wide VOE policy was reaffirmed on June 9, 1969, and the Superintendent was ordered to initiate concentrated and effective plans and programs to accomplish, through voluntary transfers, the results intended by Resolutions 1520 and 1524. PX 6, A. 2110a and Koeppe, A. 433a.

C. Measures Utilized by the School District to Relieve Overcrowding

During the period in question, the school district was obliged not only to provide school facilities for children in newly annexed areas and newly developed areas within the city, but it was faced with increasing school population within some of the existing subdistricts and particularly, the Park Hill area. School buildings in these subdistricts had been adequate to house the children residing therein until the postwar population explosion.

The problem was particularly acute in northeast Denver which was experiencing an influx of young Negro families on the average about one-fourth larger than the white families they displaced. As pointed out by petitioners' witness Bardwell in his 1966 study of the area, the impact on school population was severe. PX 38, p. 23, A. 2116a.

Several means of handling this overcrowding were employed by the school district: permanent construction, temporary buildings or mobile units, boundary changes where adjacent subdistricts were less crowded, double sessions and busing out to nonadjacent subdistricts where space was available.

Permanent construction was preferred. Former Superintendent Oberholtzer testified: "Now, our ideal was to provide permanent construction wherever possible. We had the

usual problems of insufficient funds to do all the things that we wanted to, to meet the needs. A great many of the needs were met through the three bond issues and the other program that I referred to, but a lot of them were not met." A. 1333a.

(1) *Construction of New Schools.*

School District No. 1 spent more than 100 million dollars on school construction from 1947 to 1967, involving 100 or more building projects. Oberholtzer, A. 1304a.

Petitioners complain of only two new schools. The first was not the creation of a new school to relieve overcrowding, but was simply the replacement of the old Manual High School building which had been constructed sometime prior to 1900, and was the oldest high school in the city. Planning and the decision to build the replacement facility were made some years prior to 1951. The new building was constructed on lots immediately adjacent to the old building and opened in 1953. The old building was then razed and the site was used for athletic fields and playgrounds for the new school. PX 356, p. 19. Attendance boundaries for the new building were not changed and remained the same as for the old building and the district court so found. 313 F.Supp. 69-70, A. 59a. In 1950, Manual High School was 27.7% Negro. In 1953, when new Manual opened, the Negro enrollment was 35%. PX 401.

Petitioners' statements to the effect that new Manual was designed to serve the minority community imply that it was planned for a discriminatory purpose. This ignores the fact that the existing school building was simply replaced by the new structure and the area served was exactly the same as the area served by the old building. Former Superintendent Oberholtzer testified that race and color were simply not

considered in the school district's decision making. Oberholtzer, A. 1316a.

The district court commented on this testimony.

> "Former Superintendent Oberholtzer testified at great length to the fact that the administration, including the Board, followed a policy of strict neutrality as far as segregation or integration was concerned. Indeed, Superintendent Oberholtzer stated that even after the decision in *Brown v. Board of Education, supra,* he was of the opinion that it was not permissible for him to classify Negroes as such, even for the purpose of bringing about integration." 313 F.Supp. 73. A. P. 66a.

The court found:

> "Quite apart from the cause element which will be discussed further below, it cannot be said that the acts were clearly racially motivated. One would have to labor hard in order to come up with this conclusion.
>
> "It can, however, be concluded that the segregation (or racial concentration) which presently exists at Manual is not *de jure*." 313 F.Supp. 75, A.P. 71a.

As the court had earlier pointed out, "The impact of the housing patterns and neighborhood population movement stand out as the actual culprits." 311 F.Supp. 75, A.P.71a.

The other new school of which petitioners complain is Barrett Elementary School located at East 29th Avenue and Jackson Street and constructed in the late 1950's for the purpose of relieving extreme overcrowding at neighboring schools then serving the area.

The district court, after the preliminary injunction hearing, held that Barrett Elementary School was built in the late 1950's for the purpose of serving a residential area which was destined in a short time to become populated by Negro families. When the school was completed and opened, its population was predominantly Negro. 303 F.Supp. 282, A.P. 5a. This had come about, the court found, by reason of the Negro migration from the core city area to the east, first to Colorado Boulevard and later beyond, which "caused these areas to become substantially Negro and segregated." 303 F.Supp. 282, A.P. 4.

The court further found fault with the school district for failing to build Barrett larger and not extending its boundaries further east across Colorado Boulevard, a six-lane highway, to encompass the westerly portion of the Stedman Elementary School and relieve its overcrowding, and at the same time obtain some white students in order to integrate Barrett. 303 F.Supp. 290, A.P. 22a.

Yet the principal of Stedman from 1958 to 1963 testified at the trial on the merits that she resided in the 2900 block of Albion Street in 1960 (one block east of Colorado Boulevard and directly east of Barrett School), that there were more Negro families than white families living in the two block area immediately east of Colorado Boulevard; and that the children from that area were attending Stedman Elementary School, which was also receiving children bused from the Hallett area immediately to the east of Stedman. McLaughlin, A. 1135a.

Thus, extending the Barrett boundaries to the east of Colorado Boulevard would have exposed the children to the hazards of a busy six-lane highway without accomplishing any of the salutary purposes assumed by the district judge.

Further, as the district judge found, the school district did not segregate the children in the area served by

Barrett. The migration had done that. The school district simply provided a neighborhood school building for the children who were already there. The only alternatives were to build an addition to Harrington School to the north, as some in the community had suggested,[34] or increase busing out on a permanent basis to whatever schools had space available from time to time.[35] Busing out was not only against the wishes of most parents but also contrary to school policy at the time. The essence of the district court's findings as to Barrett is that the school district, although it had no responsibility whatever for the racial concentration in the Barrett area, violated the Constitution when it did exactly what it did in other areas of the city, built schools where the children were.[36]

The district court commented on the school district's evidence:

> "At trial (on the merits) Defendants attempted to justify Barrett on the ground that until 1964 the Board maintained a racially neutral policy. Racial and ethnic data were not maintained by the District, and race was not considered as a factor in any decision. Defendants further stated that (1) the Barrett site had been owned by the District since 1949 and a school was needed in that general vicinity; (2) Colorado Boulevard was established as the eastern boundary of the Barrett attendance zone because it was a six-lane highway and would have been a safety hazard were

[34]DX GC. Harrington would have had a racial composition similar to Barrett and by 1963, was 81.1% Negro. PX 243, A. 2054a.

[35]All the elementary schools to the east of Colorado Boulevard were overcrowded less than two years after Barrett had opened. McLaughlin, A. 1130a.

[36]Denison School, in southwest Denver was built at the same time from the same plans as Barrett for the same reason—to house children. Oberholtzer, A. 1343a.

children required to cross it; and (3) Barrett was built relatively small because its main function was to relieve overcrowding in existing schools rather than to accommodate any significant projected increase in area population." 313 F.Supp. 64, A. P. 48a.

The court then held that these factors failed to provide a basis for inferring that a justifiably rational purpose existed for Barrett. First, it held that the District owned other sites east of Colorado Boulevard. The court misunderstood the evidence on this point. The evidence was that the school district owned two sites east of Colorado Boulevard in 1952, eight years before Barrett was built. One had already been used for Smith School in 1955 and the other was five blocks north of Stedman and eight blocks east of Colorado Boulevard, completely away from the residential area to be served and too close to Stedman. Oberholtzer, A. 1346a and A. 1442a.

Second, the court stated there were other school sites on both sides of busy thoroughfares indicating that safety was not a primary factor. Of twelve elementary schools near Colorado Boulevard, two have boundaries crossing it. DX HL. One was built in 1920 and the other in 1930 before traffic was a substantial hazard. One now utilizes an elevated crossing, built after two pupils were killed while crossing Colorado Boulevard. Armstrong, A. 1281a.

Third, the court would have had Barrett relieve overcrowding east of Colorado Boulevard as well as west of Colorado Boulevard. Overcrowding east of Colorado Boulevard was indeed to become a major problem later because of the influx of new families with more school age children. PX 38, p. 23, A. 2116a. It would have required an elementary school of enormous size to solve this problem and if it had been built by the school district, petitioners un-

doubtedly would have complained that it was intended to capture Negro students east of Colorado Boulevard.

The decision to build Barrett was made in 1958 before the 1960 federal census which was used by petitioners to show that the school district should have known that Barrett would have opened with a predominantly Negro school population. PX 41, A. 2022a. That census did show that in 1960 the southern portion of the Barrett attendance area was 73% Negro and that the northern portion was 51% Negro. But the 1960 census was not available to the school district until some time *after* Barrett opened. Had the school district been basing its decisions on racial factors, which it was not, (Oberholtzer, A. 1346a) the 1950 census showed that the area was only 5.6% Negro at that time. PX 38, Table 3, p. 6, A. 2116a.

Speaking of the 1956 Manual boundary change, the district court found that extension of the mandatory Manual attendance area to Colorado Boulevard at that time would have resulted in the inclusion of a *predominantly Anglo* neighborhood. 313 F.Supp. 70, A.P. 61a. Yet it concluded that the school district should have known that the area was *predominantly Negro* just two years later when the decision to build Barrett was made.

(2) *Construction of Additions to Existing Schools.* Between 1940 and 1964, the school district constructed 39 new school buildings, 5 replacement buildings and 46 additions to existing buildings (some were additions to buildings also constructed during that time). PX 20, p. B5. These additions were evenly distributed throughout the city. Of the 36 additions constructed between 1940 and 1960, 18 were constructed east of Broadway, the main north-south thoroughfare near the center of the city and 18 were constructed west of Broadway. Sixteen were constructed north of Colfax Avenue, the main east-west thoroughfare slightly

to the north of the geographical center of the city, and 20 were constructed south of Colfax Avenue. PX 20, App. No. 2. Thus each of the four quadrants of the city contained 9 additions.

Petitioners made no complaint about the construction of additions to existing schools except the addition at Hallett. The district court found that this increased the school's capacity to absorb the influx of Negro population into the area. 303 F.Supp. 293, A. P. 29a. The court did not suggest what other measures to deal with overcrowding would have been acceptable and did not find that this measure caused the racial concentration in the Hallett subdistrict.

(3) *Mobile Units.* Mobile units, or more properly, self-contained classrooms, installed on concrete foundations with air-conditioning and toilet facilities, were erected as a temporary measure at some schools when permanent construction was not feasible and after other measures to relieve overcrowding had been considered. Oberholtzer, A. 1333a. Petitioners complained of the use of mobile units in northeast Denver to accommodate the large migration of students into that area in the 1960's. However, the Special Study Committee approved their use as a temporary measure to relieve overcrowding PX 20, B-10. The district court found that, as to Stedman and Hallett, this measure to relieve overcrowding did just that and that it provided more room for students moving into these school subdistricts. 303 F.Supp. 291, 293, A. P. 25a, 29a. There was no finding that the use of mobile units caused the Negro concentrations within the subdistricts or that other measures should have been used to relieve the overcrowding within such subdistricts. Four mobile units were placed at Stedman in 1965 and four mobile units were placed at Hallett between May of 1964 and May of 1965. Boundary changes to adjust for crowding had already been used. Busing out of Stedman

had to be employed in 1966 as an alternative to double sessions. Burch, A. 972a, Oberholtzer, A. 1350a. At Smith Elementary School, adjacent to and northeast of Stedman, also predominantly Negro, some 12 mobile units were used because the parents preferred them to busing out (A. 106a and A. 1337a), and the court made no findings whatever with regard to mobile units at Smith.

(4) *Subdistrict Boundary Changes.* During the years in question, a great number of minor subdistrict boundaries were changed by the school district throughout the city as a means of adjusting for pupil population changes. For example, in 1962, subdistrict boundary changes were made by the administration involving some 32 schools at the elementary level (DX BD, Hedley A. 855a), and the same year, some 18 boundary changes were being considered at the junior high level. PX 405, Johnson, A. 951a. Junior and senior high school boundary changes were made by the Board of Education. By Board by-law, the superintendent had power to change elementary school boundaries.

A number of the school district's witnesses, including former board members and its former superintendent, testified that racial and ethnic characteristics were never considered by them as a factor in their decision making for any purpose until 1964. Johnson, A. 899a, Burch, A. 968a, Oberholtzer, A. 1371a. This fact was noted by the district court in its opinion following trial on the merits which found that the boundary changes of the core city schools were neither "willful or malicious actions of the Board or the administration." 313 F.Supp. 73, A.P. 66a.

Of the numerous school subdistrict boundary changes made by the school district over the years since World War II, petitioners complained of the few treated by the district court in its opinions. In every case, the boundary changes in question were minor and were made in response to a need to

adjust numbers of children because of overcrowding in some schools. Unnecessary boundary changes were not made because of the educational disruption caused to the children involved. McLaughlin, A. 1138a.

a. *Columbine Elementary School.* In 1946, Columbine, located north of City Park and east of York Street, had an enrollment of 510 pupils, 39 of whom were Negro. PX 336, A. 2081a. In 1950, Columbine School was overcrowded and on double sessions (PX 406a, A. 991a) and in 1951, its Negro enrollment was 24%. A.P. 65a. In 1952, three optional zones were established around Columbine—Columbine-Harrington, Columbine-Mitchell, and Columbine-Stedman—for the purpose of relieving overcrowding at Columbine and they did have the effect of decreasing the overcrowding at Columbine so that double sessions could be eliminated. 313 F.Supp. 75, A.P. 72a. The district court found no actions based on racial considerations, no willful or malicious actions on the part of the board or the administration, and no segregative effect. 313 F.Supp. 73, 75; A.P. 66a, 67a, 72a.

b. *1956 Secondary School Boundary Changes.* In 1956, a new junior high school, Hill, opened in the eastern part of the city to house the large increase in the area's pupil population occasioned by new residential construction and annexations to the city. Establishment of boundaries for the new junior high school caused a domino effect in changing boundaries for all other junior high schools in the area, Smiley, Gove, Morey and Cole. As a result, high school boundaries between Manual and East high schools also required adjustment because of changes in their feeder junior high schools. Oberholtzer, A. 1314a. There was objection to the high school changes and Cole-Smiley changes by some in the minority community primarily because they felt that these changes should have been more extensive to obtain a

better racial mix at Cole and Manual. The district court held that the effect of these actions, on the minority concentrations at Cole and Manual is not known and that "the instant situation then cannot be placed at the administration doorstep." 313 F.Supp. 75, A.P. 72a.

c. *1962 Elementary School Boundary Changes.* In 1962, minor boundary changes were proposed involving more than 30 elementary schools. McLaughlin, A. 1138a. One of these was Boulevard Elementary School located west of the South Platte River in the northwest quadrant of Denver. The change there was made necessary by the decision to raze the older portion of Boulevard School and the resulting reduction of the capacity of the school. The district court held that there was absolutely no evidence presented, other than the fact of the boundary change, upon which to base a finding that the school district was motivated by an intent to segregate Hispano students at Boulevard but did find that the boundary change was necessitated by the legitimate need to reduce pupil enrollment. 313 F.Supp. 75, A.P. 73a.

There was no evidence whatever as to any boundary change involving any other predominantly Hispano school.

Stedman Elementary School located just east of Colorado Boulevard in Park Hill was another of the more than 30 schools involved in the proposed 1962 boundary changes. The administration proposed that some minor changes be made in the Stedman subdistrict, (PX 53, A. 2026a) but after a meeting and discussion with the principals involved the suggested changes were not made. The district court found after preliminary hearing that the refusal to change these boundaries confined Negro students in Stedman (50-65% Negro) and denied them the opportunity to attend an integrated school at Hallett (85-95% Anglo) immediately

to the east of Stedman. In the next finding, the court held that Hallett would gradually become predominantly Negro. 303 F.Supp. 293, A.P. 28a, 29a. The court of appeals held that "The Board's refusal to alter the Stedman attendance area in 1962 was not an affirmative act which equates with de jure segregation." 445 F.2d 1001, A.P. 136a.

The administration did make a proposed minor change from Hallett to Philips by making the optional area between the two schools a part of the Philips mandatory attendance area. The district court made two assumptions: (1) that the children who lived in the area were 100% Anglo and (2) that *all* the children in that optional area had opted to attend Hallett in the 1961-62 school year. Neither of these two assumptions was supported by the evidence. There is no evidence to indicate how many of the children in the former optional area had opted for Philips in previous years. The district court commented on the result: "All that was accomplished was the moving of Anglo students from a school district which would gradually become predominantly Negro [but was then predominantly Anglo] to one which has remained predominantly Anglo." 303 F.Supp. 293, A.P. 29a. There was no finding that this change caused Hallett to become predominantly Negro or that it was racially motivated. In fact, Hallett remained predominantly Anglo for two years after the change. PX 243, A. 2054a.

d. *1962 Junior High School Boundary Changes.* In 1962, 18 separate boundary changes were proposed at the junior high school level. PX 405, p. 22. It was alleged that the elimination of optional areas and changes involving Cole, Morey and Byers located from north to south in the geographic center of the city were racially motivated. The district court found:

"The removal of the Morey Junior High optional zones in 1962 did have the effect of increasing the concentration of minority students at that school. It also had the salutary effect of relieving the concentration of Negro students at Cole, a result consistent with defendants' claim that it was carrying out a racially neutral policy. Both the desirable and undesirable consequences of the 1962 changes appear to have been by-products of a general redistribution. In view of that, it would strain both the facts and the law to say that the administration acted with an unlawful purpose or design in this instance." 313 F.Supp. 76, A.P. 73a.

e. *1964 Boundary Changes.* Twenty-one minor boundary changes were made at the elementary level in 1964. Hedley, A. 857a. Petitioners contended that the boundary changes affecting four elementary schools in Park Hill resulted in "segregation" at two of the schools, Stedman and Hallett.

These boundary changes included one from Stedman to Hallett and another making the Stedman-Park Hill optional area mandatory to Park Hill which was proposed by the administration in 1962 but not made until 1964. PX 71, A. 2030a. They also included changes from Park Hill to Philips and Hallett to Philips. The size of the areas changed could not have made a significant difference in the enrollment in any school. If anything, the changes should have reduced the enrollment at Stedman. Yet whatever reductions were made were more than offset by the influx of pupils into the Stedman district. The total enrollment increased from 796 in 1963 to 838 in 1964. Anglos decreased by 52 and Negros increased by 99. The following table made from plaintiffs' Exhibit 242 (A. 2052a) shows the enrollment by race in all four schools in 1963 before the changes and in

1964 after the changes. Considering all four schools, Anglos decreased by 201, Negroes increased by 357, and Hispanos increased by 29. None of these changes could be attributed to boundary changes among these four schools.

	1963				1964			
	A	N	H	Total	A	N	H	Total
Stedman	127	611	58	796	75	710	53	838
Hallett	417	183	28	628	239	296	42	577
Park Hill	779	10	4	793	745	63	16	824
Phillips	486	4	9	499	539	96	17	652
	1809	808	99	2716	1598	1165	128	2891

The district court found that the change in the Stedman optional area removed the option open to "many" Anglos residing in the optional area to attend Stedman. 303 F.Supp. 291, A.P. 25a. In view of the undisputed fact that Park Hill not only failed to gain Anglos after the change but lost 34 and gained 53 Negroes, this finding is clearly erroneous. The court also found that the predominantly "white" portion of Stedman was detached to Hallett. 303F.Supp. 291, A.P. 24a. As shown in the table above, Stedman lost only 52 Anglos and 5 Hispanos from *all* causes. If there were any whites at all in the area transferred to Hallett, there were only a handful.

The change from Hallett to Philips involved some 70 pupils of whom approximately 50 were Negro. McLaughlin, A. 1141a. The table above shows that the Negro enrollment at Philips increased from 4 to 96 for a gain of 92 Negroes.

(5) *Double Sessions.* Extended days and double sessions were other measures used by the school district temporarily to relieve overcrowding resulting from increased pupil population. Double sessions were used in preference to constructing temporary buildings. At times, the school district had as high as 200 classrooms on double sessions. Oberholtzer, A. 1333a. There was no evidence of the use of double sessions for containment and no findings of such.

(6) *Transportation Out to Relieve Overcrowding.* Transportation of children out of overcrowded school subdistricts was utilized by the school district as a temporary solution to overcrowding when other means of relieving overcrowding were not available. At times parents were given a choice of measures to relieve overcrowding. In 1966, Stedman parents preferred busing out to predominantly Anglo schools over double sessions. At the same time, Smith parents chose mobile units instead of busing out. Oberholtzer, A. 1337a, Burch, A. 972a.

D. *School District Policies Regarding Racial Imbalance.*

Until 1962, the school district followed a policy of strict racial neutrality. Its administration and Board members were of the opinion that the provisions of the Colorado Constitution would not permit them to classify pupils by race for any purpose. 313 F.Supp. 73, A.P. 66a.

In 1962, the administration proposed to construct a new junior high school in northeast Denver. Protests from the community, both majority and minority, caused it to postpone the decision and refer the broad question of what to do about growing concentrations of racial and ethnic minorities in the Denver Public Schools to a special study committee (the Voorhees Committee). A. 2005a. This decision marked the beginning of a change in official policy from that of strict racial neutrality to that of a conscious racial awareness. Oberholtzer, A. 1319a.

Also, in 1962, the Board created the Office of School-Community Relations on the recommendation of the Superintendent. Oberholtzer, A. 1351a. That office then compiled the first comprehensive racial survey of students and teachers since 1946.

In March of 1964, the report of the Special Study Committee was received (PX 20) and in April of 1964 the Su-

perintendent made a summary of the 155 recommendations and distributed it to every member of the school administrative staff. Oberholtzer, A. 1323a.

Action was taken on a large number of the recommendations over the following two-year period. Optional attendance areas were discontinued; racial and ethnic characteristics of school population were added to the criteria for setting subdistrict boundaries; experimental low cost lunch programs were set up in low income areas; an industrial arts facility was added to Smiley Junior High School (a resolution school); social studies programs to promote cultural understanding were added; teachers were given special training in human relations concepts; books dealing with intergroup relations were added to school libraries; special federally-funded educational programs including Headstart, team teaching of language, reading and arithmetic were established in core city schools; a Metropolitan Youth Education Center was established to provide basic educational training to unemployed youths; counselling time was doubled in core city secondary scools; recruitment of well-qualified minority group teachers was intensified and they were assigned to nearly all schools of the district; a community study hall program was instituted in northeast Denver; and various other actions were taken to implement the recommendations of the Special Study Committee. DX H.O. and H.P., Oberholtzer, A. 1382a-1388a.

On May 6, 1964, the Board of Education adopted Denver Public Schools Policy 5100 (PX 1, A. 1989a) which provided in pertinent part:

> "The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentrations and the establishment of

more heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity. This does not mean the abandonment of the neighborhood school principle, but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees." PX 1, A. 1989a, A. 1990a.

At the same time, the Board eliminated the optional attendance area between Cole and Smiley Junior High Schools, a predominantly Negro area, and assigned that area on a mandatory basis to Gove Junior High School, a predominantly Anglo school further to the south. This was the first time that the Board endeavored to take into account racial and ethnic factors pursuant to Policy 5100, and the result was integrative. Oberholtzer, A. 1375a.[27]

At the same meeting, the Board, in eliminating optional attendance areas between high schools, assigned a predominantly Negro optional area between Manual High School and East High School to predominantly Anglo East High

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[27]As a result of the 1964 boundary changes, a suit was instituted on May 14, 1964, against the Superintendent, the Board of Education and the School District by a white parent alleging that his children, who attended Park Hill Elementary School and Smiley Junior High School, would be affected by the boundary changes and that the changes were made

> ". . . with distinctions and classifications of pupils made on account of race or color, all in contravention of Article IX, Section 8, of the Constitution of the State of Colorado, which prohibits any distinction or classification of pupils on account of race or color."
>
> "4. That said boundaries were established for the express purpose of 'racial balancing' and with racial distinctions in mind."
>
> * * *
>
> "6. That said defendants at the same meeting on May 6,

School. Oberholtzer, A. 1376a. An area on the easterly edge of the city in the path of the Negro migration was assigned from East to almost totally Anglo George Washington High School. Oberholtzer, A. 1377a. Both actions were taken with the intention of changing the racial-ethnic factors to the extent feasible in accordance with Policy 5100. Oberholtzer, A. 1378a.

Also, in May of 1964, the Board adopted the limited open enrollment policy (LOE) recommended by the Special Study Committee. Oberholtzer, A. 1369a, A. 1978a.

On March 17, 1966, the Board appointed the Advisory Council on Equality of Educational Opportunity which considered the question of whether the school district's neighborhood school policy (as defined in Board Policy 1222C dealing with criteria for establishing or changing school subdistrict boundaries) should be applied to the location of new schools and additions to schools in northeast Denver. Oberholtzer, A. 1380, 1381a.

The Council submitted its final report and recommendations dated February, 1967 (PX 21) in which it recommended that no new schools should be built in northeast

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1964, adopted a 'Statement of General Policy' relating to the establishment of school attendance boundaries and the factors to be considered in their establishment, which Statement contained the following factor for consideration:

'(f) The ethnic and racial characteristics of the school population—making, to the extent possible, a heterogeneous school community.'

which Statement, together with the school boundaries as enacted, are annexed hereto as Exhibits A and B and by this reference incorporated herein.

"7. That the Board and the Superintendent have exceeded their jurisdiction and abused their discretion in enacting and approving said boundaries."

The suit was eventually dismissed on motion of the School District on July 31, 1964. *Willis v. Burch, et al.*, Civil Action No. B-71888, in the District Court in and for the City and County of Denver and State of Colorado. No appeal was taken.

Denver until plans were developed to implement the previously adopted policies of the school district to consider racial and ethnic characteristics in order to obtain more heterogeneous school communities. The Council also recommended a school capacity study, a cultural arts center, a superior school program, educational centers and continuation of the advisory council. All of these recommendations were implemented except the educational centers and continuation of the council. DX H.Q. Oberholtzer, A. 1389a.

As a result of the decision not to build new schools in northeast Denver and the pressing need for additional capacity at the junior high school level dating back to the proposal to build a new junior high school at East 32nd Avenue and Colorado Boulevard in 1962, the Board authorized the construction of Hamilton Junior High School in southeast Denver to be utilized to relieve overcrowding at Smiley Junior High School in northeast Denver. This permitted the transfer of minority pupils out of the Smiley area to Hamilton. Later similar transfers were made to another new junior high school (Place) in southeast Denver. Noel, A. 98a, 103a and 104a.

In 1967, the Board proposed a bond issue to finance construction of needed capital improvements in all parts of the city. The proposal provided for the establishment of middle schools to accommodate pupils in grades 4, 5 and 6 which would serve areas larger than the traditional elementary schools. The middle schools proposed would have been located in or near northcentral and northeast Denver and would have contained more heterogeneous school populations than existing elementary schools. PX 24, pp. 1-15. The bond proposal was defeated at a special bond election that fall.

In May of 1968, the Board passed Resolution 1490 (PX 2, A. 1991a) which was designed to further implement Pol-

icy No. 5100. PX 1, 1989a. Resolution 1490 provides in pertinent part:

> "Therefore, in order to implement Policy 5100, the Board of Education hereby directs the Superintendent to submit to the Board of Education as soon as possible, but no later than September 30, 1968, a comprehensive plan for the integration of the Denver Public Schools. Such a plan then to be considered by the Board, the Staff and the community and, with such refinements as may be required, shall be considered for adoption no later than December 31, 1968."

Pursuant to Resolution 1490, the then Superintendent (Dr. Robert D. Gilberts, who had succeeded Dr. Oberholtzer upon his retirement in 1967) with the aid of educational consultants, prepared his report entitled "Planning Quality Education" (DX D, A. 2128a) which he submitted to the Board in October of 1968. Basic to the proposals contained in the plan was the consideration that integration alone did not assure quality education and there was a need for intensified educational programs for children of all races who come from deprived environments to overcome the limitations imposed by their backgrounds. DX D, p. 6, A. 2133a.

The Superintendent's plan embodied, as its key feature, a Model-School Complex which involved a grouping of several schools into one administrative unit, preserving the neighborhood school as the basic unit in accordance with Policy 5100, but providing maximum social and racial integration through special programs in the larger area comprising the cluster. Other features included continued transportation of minority students out of overcrowded schools to majority Anglo schools, the Voluntary Open Enrollment Plan (VOE) embodying the principle of majority to minor-

ity transfers with transportation provided, and innovative educational programs. DX D, pp. 6, 7, A. 2134, A. 2135a.

In November of 1968, the Board adopted the VOE program to become effective at the beginning of the second semester of that school year in January of 1969, at which time approximately 850 students were transferred under the plan. Koeppe, A. 428a.

Despite limited applicability of VOE due to the mandatory injunctive orders of the district court, 1,648 students obtained transfers under VOE during the first semester of the 1969-1970 school year. Of those, 408 were Anglo, 94 were Hispano and 1,146 were Negro, (DX VA, p. 51, A. 2161a) or approximately 8.2% of all Negro students enrolled in all of the Denver Public Schools in 1969. DX S-1, A. 2166a.

Also, in November of 1968, the Superintendent commenced planning one element of his program for quality education, the "stabilization" of schools in northeast Denver. Gilberts, A. 228a. This included improving the percentage composition of Philips and Park Hill Elementary Schools and East High School (all predominantly Anglo) as well as the reversal of the racial composition of Barrett Elementary School and Smiley Junior High School. Gilberts, A. 229a. As the plans eventually evolved, certain areas were carved out of the attendance areas of these schools and assigned to noncontiguous majority Anglo schools in other parts of the city and children from some predominantly Anglo schools in the city, who were being transported because they lived beyond walking distance from their schools, were diverted and reassigned to these northeast Denver schools. These plans included innovative educational planning and reduction in pupil membership in Cole Junior High School and Stedman Elementary School. They also included a voluntary exchange program to integrate Hallett

Elementary School. The purpose of the entire planning was to attempt to reverse the trend of growing minority concentrations in the schools of northeast Denver and, as a side benefit, to test the hypothesis of whether an integrated setting provides a better educational opportunity for minority children. Gilberts, A. 235a, 313 F.Supp. 95, A.P. 109a. Dr. Gilberts was not convinced that there was a direct relationship between school integration and improved academic achievement. Gilberts, A. 245a.

The plans for the racial stabilization of these northeast Denver schools were embodied in three resolutions passed by the Board between January and April, 1969. Resolution 1520 (PX 3 annexed to Complaint, A. 42a), approved on January 30, 1969, recited that because of housing patterns, East High School and Smiley Junior High School contained growing numbers of racial and ethnic minorities and that reduction of such numbers was desirable as one of the steps to improve educational opportunity in those schools. The Resolution then made a series of boundary changes to accomplish the reduction of minorities at those schools effective as of the opening of school in September, 1969, with transportation provided.

Resolution 1524 (PX 4 annexed to Complaint, A. 49a), approved on March 20, 1969, made additional boundary changes by detaching areas from the Smiley Junior High School area containing approximately 850 students and assigning them to other noncontiguous predominantly Anglo junior high schools with transportation provided. Additionally, portions of the Cole Junior High School attendance area were detached and assigned to other predominantly Anglo junior high schools.

Resolution 1531 (PX 5 annexed to Complaint, A. 60a), passed by the Board on April 25, 1969, contained many of the same recitals as Resolution 1520 and directed the super-

intendent to implement the model-school complex concepts contained in his plan in response to Resolution 1490, by activating elementary school complexes 1 and 2 in September of 1969; made boundary changes affecting Philips, Park Hill and Barrett Elementary Schools; directed the superintendent to implement pre-primary educational programs in northcentral Denver; directed the superintendent to make Hallett Elementary School a demonstration integrated school as of September, 1969, by use of voluntary transfers; continued the transportation of pupils from Stedman Elementary School to permit removal of mobile units; and directed that cooperative plans be developed to group schools in complex 5 (northcentral Denver) with other schools outside the complex.

Some planning was begun during the month of May, 1969, in preparation for the implementation of the three resolutions in September of that year. A school board election was held in May of 1969, and two new members of the Board were elected. A majority of the reconstituted Board rescinded the three resolutions on June 9, 1969, nearly three months before they were to become effective.

At the same meeting, Resolution 1533 (PX 6a, A. 2111a) was passed by the Board. It was designed to replace rescinded Resolution 1531 and contained all of the elements of the rescinded resolution except the mandatory boundary changes. It recited that the Board had rescinded the three resolutions because they were inappropriate to accomplish their intended purposes and lacked community support. Other recitals included consideration of Resolution 1490 and the need to stabilize pupil memberships in certain schools of the district. The Board then found that many of the same steps contained in the previous Resolution 1531 were necessary and appropriate to the improvement of education in the Denver Public Schools and adopted them in Resolution 1533.

Consistent with its policy of voluntary rather than mandatory integrative efforts, the Board also passed a motion at its June 9, 1969, meeting designed to apply that principle vigorously to accomplish the same objectives contained in rescinded Resolutions 1520 and 1524—reversal of the minority racial concentrations at Smiley Junior High School and improvements in the percentage composition at East High School. PX 6, A. 2110a.

Both the mandatory plan and the voluntary plan were formulated on the premise that racial concentrations existed in Denver as a result of housing patterns and not as a result of any action on the part of the school district. Both plans were alternative evolutionary steps in Denver's developing educational policies to provide the best educational opportunities for all the children of Denver. Both were designed to reverse the trend of growing racial minority concentrations in northeast Denver schools as one of the steps to improve the quality of the educational programs in those schools. Only the means were different and the petitioners' major complaint regarding rescission and replacement of the three resolutions was the effectiveness of the replacement. Gilberts, A. 250a—A. 255a.

The Board has continued to pursue its policy of attempting always to improve the quality of education offered to the children of Denver. Following the trial on the merits and the opinion of the district court on March 21, 1970, the Board adopted Resolution 1562 (Appendix II to the Opinion of the Court of Appeals of June 11, 1971, 445 F.2d 1010, A.P. 156a) which reaffirms utilization of Voluntary Open Enrollment (VOE) while at the same time directing that intensified educational efforts be employed to improve the quality of education offered to children at the schools designated by the district court regardless of the final outcome of this litigation.

The court of appeals commented on this resolution in its opinion of June 11, 1971: "The salutary potential of such a program cannot be minimized, and the Board is to be commended for its initiative." 445 F.2d 1005, A.P. 146a.

E. *School District Resources*

(1) *School Facilities.*

In their second cause of action, petitioners alleged that the school facilities serving predominantly minority school populations were old and therefore inferior. The evidence indicates that some of the buildings located in the core city are older, but they are well maintained by an extensive maintenance and improvement program. Armstrong, A. 1284a. Of 39 elementary schools constructed prior to 1921, only four were court-designated schools to be desegregated (PX 24, p. 33), and of these, three had new additions constructed in the 1960's (PX 24, pp. 33-36), and the fourth, Elmwood, is currently being replaced by a new building. Of the three court designated secondary schools, Cole was constructed in 1925, Baker in 1957, and Manual in 1953. PX 24, pp. 52, 54. The district court held, in its opinion of March 21, 1970, that in general terms a disparity in age of buildings and size of sites exists between predominantly minority and predominantly Anglo schools. Based on the evidence of ages of buildings, the disparity favors the court designated schools. The court then found, "However, we do not think that the age of a building and site size are, in and of themselves, substantial factors affecting the educational opportunity offered at a given school." 313 F.Supp. 81, A.P. 83a.

(2) *Teachers.*

a. *Assignment Practices.* At no time, has any school faculty or staff been 100% minority in the Denver schools. With one exception, no school ever had more than 50% mi-

nority teaching staff. The exception was at Barrett School which, for a short period of time, had more Negro than white teachers, there being available several Negro teachers with special skills in the teaching of reading and other subjects, which expertise was needed at that school. Stetzler, A. 1167-9a.

In 1970, Negro teachers were assigned to 70 of the district's 92 elementary schools. Stetzler, A. 1166a. No school had more than 50% minority teachers, two schools had 41 to 50%, two schools had 31 to 40%, five schools had 21 to 30%, and all the rest had fewer than 20%. Of the three court designated secondary schools, Cole had 61% Anglo teachers, Baker had 83.6% Anglo teachers and Manual had 68.6% Anglo teachers. DX S-1, A. 2166a.

Dr. Stetzler testified that for some years it was considered discriminatory to identify teachers or applicants by race, through photographs or even requiring place of birth. Such was a policy of the Colorado Antidiscrimination Commission. A. 1168-9a.

Although the district court made no findings with regard to the racial composition of teachers in its opinion after trial on the merits, the petitioners argued in the court of appeals that the assignment of minority teachers was probative of segregatory intent. The court of appeals held that the Board's teacher assignment practices were not reflective of segregative desires.

> "It operated on the prevailing educational theory of the day, the Negro pupils related more thoroughly with Negro teachers. The rationale was that the image of a successful, well educated Negro at the head of the class provided the best kind of motivation for Negro children and that in turn the Negro teacher had a greater understand-

ing for the Negro pupil's educational and social problems. Although the validity of that theory is under severe attack today, we do not agree that the results of its past application infer segregatory intent. In response to new educational theories, the Denver public school system has today assigned Negro teachers to schools throughout the system and has reduced the percentages of Negro teachers in the predominantly minority schools." 445 F.2d 1007, A.P. 150a.

b. *Experience of Teachers.* There was no finding by the district court that any certain level of experience was superior to any other level or that teachers without prior experience were inferior to older and more experienced teachers. Nor was there any evidence to support such contentions.

All teachers must be licensed by the State of Colorado with a bachelor's degree from a standard institution of higher learning as one of the qualifications. Colorado Revised Statutes 1963, §127-17-14. Thus all Denver schools were assigned teachers with comparable educational backgrounds.

Petitioners' evidence on experience level of the faculty at the core city schools was severely distorted by their use of Denver public school experience only. The more significant evidence was that between 38 and 50% of the new teachers employed by respondents between 1962 and 1968 had prior teaching experience in other school districts. DX DA, A. 2143a. Of those, 18 to 24% had three or more years' prior experience. DX DB, A. 2144a. Further, about 9% of the new teachers hired by respondents had advanced degrees. Stetzler, A. 1156a.

Dr. James S. Coleman was of the opinion that teacher experience and graduate degrees were not important fac-

tors. A. 1557a. The Negro principal at Barrett Elementary School, Mr. William Smith, testified for the petitioners and his evidence included his opinion that new teachers were as capable and competent as those with more experience. A. 1701a. Dr. Stetzler testified that new teachers of the younger generation were better prepared and with greater social awareness than those of even five years earlier. A. 1170a.

The record contains no other significant evidence despite any claim by the petitioners pertaining to teacher inexperience as a cause of or relation to unequal educational opportunity in the core city schools.

c. *Transfers.* The school district's agreement with Denver Classroom Teachers Association, an affiliate of the National Educational Association (NEA), permitted transfers by teachers between schools, on the basis of seniority, within the district. The district court found that this created more vacancies in minority schools which were typically filled by new teachers with little or no Denver Public School experience. 313 F.Supp. 80, A.P. 82a. There was no finding that this resulted in an inferior educational offering at these schools.

(3) *Curricula.* Petitioners alleged in the second count of their second cause of action that the school district allocated inferior resources to predominantly minority schools. One of the items specified was curricula. They produced no evidence of disparate curricula and the court made no findings that curricula was inferior in any school. Dr. Oberholtzer testified that there were differences in curriculum offerings within specific subject areas, depending on the needs of the pupils and their interests, but the basic subjects were taught in all of the schools. A. 1366a.

(4) *Dollar Inputs.* There was abundant evidence that the predominantly minority schools received proportion-

ately *more* of the district's financial resources than predominantly Anglo schools. Petitioners point only to a possibility that the total salaries paid to teachers at minority schools was comparatively less because the district's salary schedule is based partly on experience. But the slight difference in salaries paid based on experience is far outweighed by a lower pupil-teacher ratio at minority schools, teacher aides, expensive compensatory educational programs, newer types of curriculum materials, more community trips, more teacher-developed educational materials, assignment of special reading teachers, and funds in substantial amounts allocated to low-income area schools under federal programs limited to such schools. Oberholtzer, A. 1367a, 1368a. The district court made no findings of unequal allocation of any resources to the core city schools.

F. *Educational Results—Achievement.*

The district court found lower academic achievement in the court designated schools by considering results of standardized achievement tests (1968 Stanford Achievement Tests). The school district had published a report in 1968 containing an alphabetical listing of all schools in the district and the results of the various standardized tests given in each school that year.

The *average* of the median for each test given at a particular school was used by the court as indicative of that school's overall achievement level.

The court then found from this data that children at minority schools achieved at a lower level than the city wide average for all schools (the city wide average was an average of the average median scores for all schools at the same level). 313 F.Supp. 79, A.P. 79a, 80a.

Individual pupil achievement in all schools ranged to highs between the ninty-fifth and the ninty-ninth percentile,

thus demonstrating conclusively that individual students in all minority schools achieve at the highest level shown by the standardized tests. Klite, A. 574, 576a, PX 379, PX 83.

Achievement expectancies at all schools were based on individual IQ tests previously administered. Expectancies were not based on racial or ethnic composition of the schools. School expectancies were then computed based on the individual expectancies of their pupils. PX 83, PX 379, Cavanaugh, A. 650a. In almost all cases achievement test results exceeded expectancies thus established. PX 379.

The finding of comparatively low average achievement was the single most important factor in the court's conclusion that the court-designated schools were inferior.

G. *Remedy*

The district court concluded, following trial on the merits, that "segregation, regardless of its cause, is a major factor in producing inferior scools and unequal educational opportunity." 313 F.Supp. 82, A.P. 86a, 87a. The court then proceeded to a discussion of remedies which included a "program of improvement" for the court-designated schools and a suggestion that the Board guarantee space for minority students who wished to transfer out of the court-designated schools under VOE. 313 F.Supp. 84, 85, A.P. 90a, 93a. The court observed as to the latter:

> "Arguably, at least, this method satisfies the Constitution in that it recognizes the right of every student and makes that right available to him without forcing it on him. Comments of the litigants on this will be considered at a further hearing." 313 F.Supp. 85, A.P. 94a.

At the later hearing on remedies, the Board presented a plan (DX VA, A. 2160a) responsive to the suggestions of

the district court. It contained a specific program for improvement in the quality of education and included VOE with space guaranteed. Through Resolution 1562 (A. 2160a) the Board committed itself to continue improvement in the quality of education offered in its schools regardless of the final outcome of this litigation. In its discussion of remedies, however, the district court discarded the question of whether VOE would satisfy the Constitution and stated that the crucial factual issue was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects or whether desegregation and integration are essential. 313 F.Supp. 94, A.P. 107a.

Petitioners' position was that both desegregation *and* massive compensatory education were essential to satisfy the Constitution. Respondents' position was that there was no competent evidence that desegregation or traditional compensatory education had any significant effect on improvement of educational achievement and that solution of the problem required continued experimentation with varied innovative approaches to educational policies until an effective solution was found.

The district court summarized the testimony of the expert witnesses produced by both sides, substantially all of which was designated and appears in Volume 4 of the Joint Appendix.

None of the experts could suggest an unqualified solution to the problem of low achievement of children with low socio-economic family background and attendant cultural disadvantages. The solutions suggested were studied but unproven theories. None of petitioners' experts had studied the Denver school system. They expressed general opinions not addressed to Denver specifically but to every school system

in the country. None of them prescribed a specific solution to Denver's problems.

The testimony of Dr. James Coleman, who supervised the survey reported in the publication entitled "Equality of Educational Opportunity" (PX 500), makes it abundantly clear that the causes of low achievement are socio-economic and are not a matter of race. A. 1546a and A. 1558a.

This conclusion of the experts that the cause of low achievement was not a matter of race but rather a product of the socio-economic status of the students was made so clear that the court remarked in colloquy with Dr. Coleman:

> "The thing that worries me about all this is that what you say is that the schools are not inferior as counsel proved at the trial, but that the students are inferior. They proved it overwhelmingly that the schools were inferior. Now, in coming up with a new tack—it's not the schools at all, it's the students and their economic and cultural deprivation that makes the educational experience one that is non-competitive. It's dull; not exciting. I mean, I get that from what you're saying. Sort of a self-defeating proposition. They proved the Constitution was violated and now they are unproving it." A. 1546a.

Dr. Coleman admitted his survey did not show the effects of racial integration one way or the other because the survey was limited to one point in time and did not purport to be a controlled study of a before and after situation. A. 1542a. The report did not examine innovative educational programs designed to improve the quality of education and Dr. Coleman could not comment on the programs proposed by the school district or on those underway at Manual and

Cole. A. 1537a, 1553, 1554a. When asked for the primary factor present in a predominantly Anglo school which would improve the education of a minority child, he stated that his answer was based on a mere statistical inference:

> "What that means in effect is that, if the inference is correct, is that a child from a linguistically-impoverished background will be most affected by a school situation which has a—which is more linguistic, particularly the rich or different educated environment." A. 1543a.

Dr. Neal Sullivan, former superintendent of schools in Berkeley, California, and, at the time of trial, Secretary to the Massachusetts State Board of Education, also testified for petitioners. His duties included administration of a Massachusetts statute requiring local school committees to eliminate racial imbalance. He had implemented a voluntary program of integration in Berkeley, California, prior to leaving his position there.

He testified that Boston, Massachusetts, had in the planning stage a proposal to construct educational parks costing $200 million as a means of racially balancing that school system, and that some 2000 minority students were being bused to suburban schools under a voluntary transfer plan. A. 1565a. He testified that research indicated that the black child's achievement improved under the voluntary plan (A. 1566a), but gave no specifics. Dr. Sullivan left the Berkeley school system at about the same time the integration plan went into effect and could not testify that integration alone would be sufficient to improve education in any event.

> "Q. You need something more than integration?"
> "A. You bet. Massive reform." A. 1595a.

Petitioners' rebuttal witness, Dr. Robert O'Reilly, a research psychologist employed by the New York State Board

of Education, described a research study of compensatory education programs carried on in various parts of the United States. This study, he admitted was really a study of the reports of other studies and not an independent study. A. 1925a. In his opinion, all the various types of intensive educational programs categorized as compensatory education were entirely valueless, even in an integrated setting, from all indications. A. 1929a, 1930a.

His general opinion was that, with regard to integration, knowledge of the process is not yet so complete nor is what is known so systematically applied that any startling changes in educational development should become evident in desegregated minority students. A. 1957a, 1958a.

Dr. O'Reilly's primary objection to compensatory education programs was that they were generally just more of what the schools already have. A. 1933a. He would recommend new approaches:

> "So, what I'm trying to communicate to you, I guess, is that this is a very unsettled field. There are no hard and fast rules to go on. It's very unlikely that anybody is ever going to come up with a treatment that is going to be generally effective with minority students at all. What has to be done is basically many, many years of experimentation in which we slowly and carefully identify and develop specific programs designed for specific groups, specific minority groups. Because they differ so greatly." A. 1932a.

Dr. O'Reilly testified that the effectiveness of the educational program should not be based on a single indicator and that "there are many, many indicators of the effectiveness of the school that are not necessarily achievement test data." A. 1957a. He would look at such items as students' opinions and how many of the students go on to college.

The court of appeals also recognized that achievement scores were not the sole indicator of the effectiveness of the educational opportunities in the schools and commented that:

> "Pupil dropout rates and low scholastic achievement are indicative of a flaw in the system, but as indicated by appellee's experts, even a completely integrated setting does not resolve these problems if the schooling is not directed to the specialized needs of children coming from low socio-economic and minority racial and ethnic backgrounds. Thus it is not the proffered objective indicia of inferiority which causes the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs." 445 F.2d 1004, A.P. 144a.

Mr. James Ward, principal of Manual High School, has instituted innovative educational programs designed to meet the needs of high school students from low socio-economic areas because the basic traditional program was not meeting the needs of those students. A. 1845a. These included pre-professional studies and work-study vocational training.

The district court summarized some of these programs at Manual, Cole and Bryant-Webster at 313 F.Supp. 95, A.P. 110a, and ultimately ordered the school district to continue these programs.

The effectiveness of these new approaches is dramatically illustrated by use of the "indicators" established by petitioners' expert witness Dr. O'Reilly. The dropout rate at Manual has been reduced and the students are staying in school (Ward, A. 1859a) and more Manual graduates applied to college (58%) than did the graduates of three predomi-

nantly Anglo schools (Thomas, A. 1233, 1234a) and 51% of the graduates actually entered college. Ward, A. 1859a.

None of the petitioners' experts had ever made any studies of or visited any of Denver's schools. In fact, the national survey directed by Dr. Coleman did not include Denver. A. 1562a.

Respondents' main witness at the hearing on remedy was Dr. Robert Gilberts, who had resigned as Superintendent of Schools for the respondent school district effective September 1, 1970, to take a new position as Dean of the College of Education at the University of Oregon. A. 1707a.

Dr. Gilberts had supervised preparation of the respondents' plan to comply with the district court's opinions following trial on the merits (DX VA, A. 2160a) which included a detailed plan for improvement and continuation of the VOE program with space guaranteed, both of which were discussed as remedies in the district court's opinion and which had been included in the Superintendent's original proposal for quality education (DX D). The district court characterized the respondents' plan as "designed to reconstruct the educational climate" and summarized many of its elements in the Decision Re Plan or Remedy. A.P. 109a.

In Dr. Gilberts' opinion, desegregation was not an absolute and necessary first step to the solution of the complex problem of comparatively low achievement among children from low socio-economic environments. A. 1712a. He said: "I agree with Dr. Sullivan's comments . . . that some massive changes are necessary . . . in the entire form of education." A. 1713a. Respondents' plan emphasized new and different approaches to the problem and not just more of the same.

Dr. Gilberts testified that integration is a voluntary process of changing attitudes so that individuals are accepted re-

gardless of their race or ethnicity (A. 1762a) and that, as such, it is necessary in the larger society to prevent the ill effects of racial polarization. A. 1751a. Yet he was not convinced that desegregation in terms of simple racial mixing had any educational advantage *per se* and that one of the reasons for proposing the resolutions in northeast Denver was to test the hypothesis in that regard. A. 1752a. In his opinion, the plan proposed by the respondents had a better probability of success in improving education than that proposed by petitioners. A. 1762a.

SUMMARY OF ARGUMENT

Respondents oppose the demand of petitioners that this Court decree racial and ethnic desegregation, on a system-wide basis, of the Denver school district. Respondents' position is that judicial intervention in the conduct of the Denver school system was never warranted, there having been no constitutional violation properly found by the courts below.

The detailed Statement in this brief is intended not only to show the entire relevant history of the school district's conduct of its affairs, but also to demonstrate that the Denver school district is quite different from the school district described by petitioners. The Denver school district has never excluded a child from any school by reason of race or ethnic origin; it has not continuously, obsessively, and covertly pursued a policy of discrimination toward its pupils; and it has not devoted inferior or different resources to any of its schools. The full facts in this case show that Denver has never practiced discrimination toward any racial or ethnic group and that, until 1964 when Denver adopted an affirmative policy of seeking racial and ethnic heterogeneity to the extent feasible within the neighborhood school policy, the Denver schools had followed a completely color-blind policy as far as pupil assignment was concerned. In short, the

Denver school district is and always has been a unitary system conducted in accordance with the Colorado constitutional mandate prohibiting "any distinction or classification of pupils . . . on account of race or color."

1. *The claims of state-imposed segregation.*

The claims of segregation in the Denver school system were made as to two groups of schools, each substantially separate from the other. The first group was referred to by the courts below as the core city schools, and the second as the resolution schools.

The district court expressly found that the existing racial imbalance in the core city schools was caused by housing patterns and neighborhood population movement and not as a result of any state action. In making these findings, the trial court placed upon the plaintiffs the burden of proving actionable segregation unaided by any presumption that racially imbalanced schools, in a unitary system with no history of discrimination, was caused by school district action. In such a case as Denver's, the allocation of burden of proof was in accordance with all authority and experience in such cases, and was correctly approved by the court of appeals.

As for the resolution schools, the district court failed to find in its earlier opinions that the claimed acts of segregation in the early 1960s caused the racial imbalance existing at the time of trial in any of the schools involved, and thus erred in its apparent conclusion that a constitutional violation existed as to three elementary schools and one junior high school. The evidence clearly showed such imbalance resulted from a massive movement of Negroes into the involved neighborhoods.

The district court erroneously found state-imposed segregation by reason of the rescission of three resolutions of the

Denver School Board in 1969. These resolutions would have required mandatory busing from the resolution school area. By rescission, the Board substituted a voluntary transfer plan which contained all of the elements of the rescinded resolutions except the mandatory boundary changes. The mandatory plan was preliminary, experimental and had not been implemented. No students had been transferred prior to the rescission nor were any transferred by reason of the rescission.

In its later opinion following trial on the merits, the district court noted that the findings of segregative acts in the early 1960s were discussed only as they were probative on the issue of the segregative purpose of the 1969 rescission, and held, in its ultimate finding on this part of the case, that the rescission, per se, was the operative act of segregation, and ordered the implementation of the rescinded resolutions.

The court of appeals affirmed the earlier findings regarding the claimed segregative acts at the four schools, and then erroneously concluded that those acts caused the present racial imbalance in the resolution schools, and thereafter erroneously declined to rule on the question of whether the rescission, in and of itself, was unconstitutional.

On the resolution school part of the case, therefore, the court of appeals should have found that the acts complained of in the early 1960s were not the cause of existing racial imbalance, and, further, that the school board's rescission of the racial balancing resolutions in 1969 was not, as a matter of law, an act of segregation causing the existing racial imbalance.

Nor should the remedy for acts found to have tended to intensify racial imbalance in four schools in the early 1960s extend beyond the reduction of racial imbalance as to those particular schools. Any remedy beyond correcting the ef-

fects, if any, of the earlier violations would be in excess of the power of the courts.

2. *The claims of unequal educational opportunity.*

The other branch of the case does not involve state-imposed segregation. It involves, rather, the question of whether any constitutional violation arises where it is shown that the median scores on standardized achievement tests differ substantially as among the several schools in the Denver school system, and where some, but by no means all, of the schools with relatively low scores also have relatively high percentages of Negro and Spanish surnamed pupils.

The district court found that certain court-designated schools showing low test scores were inferior schools compared with others, that concentrations of Negro and Spanish surnamed pupils were the cause of the inferiority, but that the racial and ethnic concentrations were not caused by actions of the school district. On the basis of these findings, the district court ordered racial balancing of the court-designated schools, together with implementation of the school district's existing program of compensatory education and voluntary majority-to-minority transfer.

The court of appeals, finding no state action causing the racial imbalance nor the educational outcomes in the schools, reversed. The holding of the court of appeals was correct and should be affirmed by this Court.

The neighborhood school policy, as applied in Denver, did not determine the racial or ethnic composition of the schools. This was determined, the trial court found, by housing patterns and population movement. Therefore, the school district did not cause the racial or ethnic concentrations which the trial court had held created an unequal educational environment.

In addition, the evidence in this case and available to the Court shows that median achievement test scores were not a valid basis for comparing educational opportunity among schools within a school system. Nor does the evidence support the conclusion that racial or ethnic concentrations were the cause of claimed inferior schools characterized by low test scores. Both of these conclusions of the district court were clearly erroneous and provide additional grounds for affirming the reversal of the district court by the court of appeals.

The Denver school district has never excluded any pupil at any time because of racial or ethnic origin. It operates on a neighborhood school plan free from racial discrimination and, in addition, for educational reasons, seeks to encourage racial and ethnic heterogeneity through voluntary majority-to-minority transfers with transportation provided. The Denver school district is carrying out its responsibility in full compliance with all the requirements of the United States Constitution.

ARGUMENT

I.
SUMMARY OF APPLICABLE CONSTITUTIONAL PRINCIPLES

A. INTRODUCTION

This case is a class action by parents of children attending the public schools of Denver who complained that their rights to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States have been violated by alleged racial and ethnic segregation and resulting unequal educational opportunity.

Unlike *Brown v. Board of Education*, 347 U.S. 483 (1954), this case does not arise in a state "having a long history of maintaining two sets of schools in a single school

system deliberately operated to carry out a governmental policy to separate pupils solely on the basis of race" as the *Brown* situation was described by this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, at p. 6 (1971). The policy of the State of Colorado as contained in its Constitution adopted in 1876 is that:

> "No sectarian tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color." Article IX, Section 8, Constitution of Colorado.

No "dual system" has ever existed in Denver. Its school system has always been operated as a "unitary system," defined by this Court in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1970), as one "within which no person is to be effectively excluded from any school because of race or color." After trial on the merits the district court below found:

> "It is to be emphasized here that the Board has not refused to admit any student *at any time* because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." 313 F.Supp. 73, A.P. 67a. (emphasis added)

School assignment in Denver has always been on the basis of residence in a geographic attendance area, a principle of pupil assignment contemplated by this Court in *Brown II*, 349 U.S. 294 (1955): ". . . [R]evision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis. . . ." 349 U.S. 300, 301.

With the possible exception of *Spencer v. Kugler*, ——

U.S. ——, 30 L.Ed.2d 723 (1972), this is the first case to reach this Court in which it is claimed that racial segregation exists in a unitary school system. *Brown* and the several school segregation cases decided by this Court since *Brown* have dealt solely with the duty of school authorities to dismantle, disestablish and convert former dual systems into unitary systems. *Swann* anticipated the day when former dual systems will have complied with *Brown I* and become unitary systems. At that point:

> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. 31, 32.

Denver does contain a growing, mobile society and it has experienced swift and massive demographic changes in the years since World War II which have caused racial imbalance in its schools.[28]

During the years that Denver's minority population grew in size and moved about the city, Denver's school officials

[28] See statement *supra*, pp. 9-13.

made the numerous policy decisions and took the many actions necessary to govern and administer a fast growing large urban school system.

Of all these actions, petitioners focused in their first cause of action on the building of one new school, a few minor subdistrict boundary changes in the early 1960's, and a policy decision in 1969 to change some unimplemented racial balancing plans from a mandatory to a voluntary approach. After a four-day hearing on preliminary injunction, the district court held that these actions amounted to state-imposed segregation as to four schools in northeast Denver. The court of appeals applied Rule 52, FRCP, and affirmed.

The second cause of action, heard seven months later at the trial on the merits, concerned a larger number of schools located in the core city area of Denver and involved a time period of roughly the ten years preceeding the actions complained of in northeast Denver. The district court held that the evidence did not support the conclusion that state-imposed segregation existed at those schools and that the neighborhood school policy was not unconstitutional per se. Both of these holdings were affirmed by the court of appeals. The district court also held that the racial imbalance at these schools, even though not caused by the school district, resulted in unequal educational opportunity for the children attending them and ordered, as a remedy, reduction of racial and ethnic concentrations. The court of appeals reversed on the ground that no state action had caused the condition.

B. ELEMENTS OF A CONSTITUTIONAL VIOLATION

Swann reminds us that judicial powers may be exercised only on the basis of a constitutional violation (402 U.S. 16) and teaches that:

> "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. 32.

The Court was speaking of a former dual system which had complied with *Brown* and become "unitary."

Denver always has maintained a unitary system. Plaintiffs, in attacking the existence of schools which are substantially disproportionate in their racial composition, are not aided by the presumption of the continuance of a dual system which arises only in a system with a long history of state-imposed segregation. *Swann*, at 402 U.S. 26.

The court of appeals recognized this principle and applied it below:

> "Where, as here, the system is not a dual one, and where no type of state-imposed segregation has previously been established, the burden is on plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action." 445 F.2d 1006, A.P. 148a.

This formulation is firmly based on this Court's holding in *Brown I* and other decisions of lower federal courts applying that holding to school districts where the question of a constitutional *violation* is put in issue, as distinct from cases involving concededly dual systems where only the *remedy* is in issue.

In *Brown I*, this Court held that the creation and maintenance by the state of separate schools for Negroes, solely on the basis of their race, was inherently unequal treatment and, therefore, violated the equal protection clause. The

precise question and holding in *Brown I* was "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." 347 U.S. at p. 493.

Analytically, the Court's holding involved (1) separate schools for Negroes, (2) caused by state action, (3) purposefully taken solely on the basis of race, and (4) unequal treatment.

Since *Brown* it has been deemed unnecessary to prove the fourth element because the Court found that state-imposed segregation (the combination of the first three elements) results in unequal treatment *per se*.[29] This Court in *Swann* described the constitutional violation announced in *Brown I* in terms of these elements. If, by state action, pupils are deliberately segregated in the schools solely on the basis of race, the Constitution is violated. 402 U.S. 5, 6.

In cases involving dual systems, the objective is to correct the violation by the remedial measures of *Brown II* and subsequent cases. Disestablishment cases are therefore not concerned with the violation, but with the remedy and the school authorities are required to show that all vestiges of state-imposed segregation have been eliminated. *Swann*, 402 U.S. 15.

In unitary systems such as Denver's, one who alleges a

[29]Stated another way, the Court held race to be an arbitrary and impermissible criterion for governing the use of public facilities. The principle was promptly applied to public parks (*Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971, 98 L.Ed. 1112, 74 S.Ct. (1954)) public beaches and bathhouses (*Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877, 100 L.Ed. 774, 76 S.Ct. 133 (1955)), municipal golf courses (*Holmes v. City of Atlanta*, 350 U.S. 879, 100 L.Ed. 76 S.Ct. 141 (1955)) and municipal buses (*Gayle v. Browder*, 352 U.S. 903, 1 L.Ed.2d 114, 77 S.Ct. 145 (1956)), all on the authority of *Brown*.

constitutional violation must show the existence of all the elements of a violation.

First, it must be shown that there is racial separation in the public schools of the system. Something more than mere racial imbalance is necessary; how much more is a problem in itself.[30] Even separation to the extent that the system contains some schools which are all Negro and others that are all white is not sufficient, standing alone, to justify a conclusion that the Fourteenth Amendment has been violated.[31]

The second element necessary to the legal conclusion that the Fourteenth Amendment has been violated is a finding that such racial separation is *caused by state action.* Only actions of the state which deny persons the equal protection of the laws are proscribed by the terms of that Amendment. In *Deal v. Cincinnati Board of Education,* the Sixth Circuit observed:

> "[T]he crucial fact to be found is whether the racial imbalance was intentionally *caused* by gerrymandering or by other alleged discriminatory practices on the part of the Board." 369 F.2d 55, 64. (emphasis added)

The third element necessary to support a conclusion that the Fourteenth Amendment has been violated is that the state action causing the racial separation must have been

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[30]"We pass the unsettling problem which would face every school committee of anticipating what amount of imbalance the local federal court would consider equivalent to segregation. . . . Deciding what is excessive racial imbalance necessarily involves the resolution of expert appraisals of highly intangible factors." *Springfield School Committee v. Barksdale,* 348 F.2d 261 at 264. (1st Cir. 1965).

[31]*Deal v. Cincinnati Board of Education,* 369 F.2d 55, 60 (6th Cir. 1966) *cert. den* 389 U.S. 847 (1966); *Downs v. Board of Education,* 336 F.2d 988, 996 (10th Cir. 1964) *cert. den* 380 U.S. 910 (1964); *Bell v. School City of Gary,* 324 F.2d 209 (7th Cir. 1963) *cert. den* 377 U.S. 924 (1963); *Brown v. Board of Education,* 139 F.Supp. 468, 470 (D.C. Kan. 1955).

based solely on race. This requires proof of purposeful and deliberate action to classify persons on the basis of race. Mere coincidence of result is not enough. The court of appeals for the Second Circuit, in *Taylor v. Board of Education of City School District of New Rochelle*, 294 F.2d 36 (2nd Cir. 1961) *cert. den.* 368 U.S. 940 (1961), approved the crucial finding that race was made the basis for school districting with the purpose and effect of producing a substantially segregated school. In *Downs*, the Tenth Circuit recognized that the element of racial purpose was necessary to a constitutional violation:

> "Of course, we agree with the appellants that the school authorities cannot, under applicable constitutional standards heretofore discussed, use such a change in boundary lines or the neighborhood school system as a guise for the purpose of perpetuating racial segregation. The trouble is that there is no evidence to show that the boundary line was change *for that purpose*." 336 F.2d 996. (emphasis added)

But of the several elements making up the constitutional violation, the most important, as emphasized by the district court, is a "causal relationship between the discriminatory action complained of and the current condition of segregation in the school or schools involved." 313 F.Supp. 74, A.P. 70a.

It is the absence of this causal relationship, in addition to the absence of segregatory purpose, which required the courts below to conclude that there was no actionable segregation in the Denver school system, except arguendo as to four resolution schools.

C. THE BURDEN OF PROOF

The rules relating to the burden of proof of the elements of actionable segregation which have governed actions in-

volving school districts which do not maintain dual systems were well summarized by the court of appeals:

> "Once a prima facie case is made, the defendants have the burden of going forward with the evidence. Hobson v. Hansen, 269 F.Supp. at 429. They may attack the allegations of segregatory intent, causation and/or defend on the grounds of justification in terms of legitimate state interest. But the initial burden of proving unconstitutional segregation remains on plaintiffs." 445 F.2d 1006, A.P. 148a.

This accurately formulates the universal rule regarding burden of proof followed in the federal courts in cases involving no relevant history of segregation (See, e.g. *Deal* at p. 571, *Wright v. Rockefeller*, 376 U.S. 52 at 56 (1964). This rule is related to the presumption accorded to school authorities, bound by state constitutions or laws making state-imposed racial segregation in the schools unlawful, that their actions are taken in accordance with law. In *Deal v. Cincinnati Board of Education*, 244 F.Supp. 572 (1965), the district judge, commenting on the failure of plaintiffs to carry their burden of proof, said at pp. 581, 582:

> "In a case involving similar issues, a colleague in this Circuit has recently recognized the well established principle that '. . . *public officials are presumed to have properly discharged their duties.*' (Craggett v. Board of Education of Cleveland, 234 F.Supp. 381, 386 (N.D. Ohio 1964, Kalbfleisch, J.)). . . . This proposition has also been in part at least the basis of determinations sustaining school boards in Bell v. School, City of Gary, Indiana, 213 F.Supp. 819 (N.D.Ind.), aff'd, 324 F.2d 209 (7th Cir.), cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1963)

(Plaintiffs' contend this case to have been 'wrongly decided.'); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 895, 13 L.Ed.2d 800 (1965); Lynch v. Kenston School Dist., 229 F.Supp. 740 (N.D.Ohio E.D. 1964), (appeal to the 6th Circuit Court of Appeals dismissed by plaintiffs-appellants July 2nd, 1965); Northcross v. Board of Education, 333 F.2d 661 (6th Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1586, 8 L.Ed.2d 810 (1964); and Barksdale v. Springfield School Committee, 237 F.Supp. 543 (D.C.Mass.), rev'd, 348 F.2d 261, (1st Cir. 1965)." (emphasis added)

Petitioners seek the adoption of a new standard of proof which would, in effect, cast upon school authorities the burden of disproving allegations of actionable segregation in any racially imbalanced school system. There is no authority for such a reversal of the burden of proof in a unitary system such as Denver's. This contention is fully discussed later in this brief at pp. 82-87.

II.

RACIAL IMBALANCE IN DENVER PUBLIC SCHOOLS WAS NOT CAUSED BY STATE ACTION

In the two opinions following the preliminary hearing, it is clear that the District Court misapprehended the elements of a constitutional violation when it concluded, in essence, that the failure of the Board to take action to alleviate racial imbalance, although not state-created, amounted to a violation of the Constitution.

By the time of the trial on the merits, the district court

had a clearer view of the constitutional principles of law as enunciated by this Court and some lower courts and recognized that judicial powers were limited to state-created segregation in schools, in violation of the Constitution. This is evident by the court's remarks during the trial on the merits and the substance of its opinions following that trial. The court then recognized that to be actionable, the school authorities must have acted with the purpose and effect of creating segregation in the school or schools in question, and that such action must have been the cause of racial imbalance present and existing at the time of trial. 313 F.Supp. 73-75, A.P. 67-71a.

Accordingly, the findings of the district court in the opinions following the preliminary hearing must be evaluated in light of the opinions subsequent to the hearing on the merits.

It was the absence of the element of causal relationship, in addition to the absence of segregative purpose, which was the basis for the conclusion of the courts below that there was no actionable segregation in the Denver school system (except in four specific schools, which we shall show was the result of an erroneous conception of the law).

A. THE COURTS BELOW CORRECTLY FOUND NO STATE-IMPOSED SEGREGATION IN THE CORE CITY SCHOOLS.

1. The findings regarding the core city schools were fully supported by the evidence and were correctly sustained by the court of appeals.

With respect to these core city schools, the following portions of the district court's opinion following trial on the merits are pertinent:

"The evidentiary as well as the legal approach to the remaining schools is quite different from that which has been outlined above. For one thing, the concentrations of minorities occurred at an earlier date and, in some instances, prior to the *Brown* decision by the Supreme Court. Community attitudes were different, including the attitudes of the School Board members. Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools." 313 F.Supp. 69, A.P. 57a

* * *

"It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." 313 F.Supp. 73, A.P. 67a

* * *

"So also in our case, the complained of acts are remote in time and do not loom large when assessing fault or cause. The impact of the housing patterns and neighborhood population movement stand out as the actual culprits." 313 F.Supp. 75, A.P. 71a

* * *

"In summary, then, we must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above mentioned boundary changes and elimination of optional zones. We hold that the evidence is insufficient to establish *de jure* segregation." 313 F.Supp. 77, A.P. 75a.

The court of appeals as to these schools affirmed under Rule 52, as follows:

"The trial court held that cross-appellants [petitioners] failed in their burden of proving (1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools.

"The evidence in this case is voluminous, and we have attempted to carefully scrutinize it. Thorough review reflects that cross-appellants have introduced some evidence which tends to support their assertions. However, there is also evidence of record which supports the findings of the trial court, so under Rule 52 F.R.Civ.P. 28 U.S.C., we must affirm." 445 F.2d 1006, A.P. 148a.

While professing not to challenge the district court's fact findings regarding core city scools, petitioners contend that as to findings on two such schools, Manual and Cole, the court should have found discriminatory acts on the part of the school district and secondly, that such acts were the cause of the racial imbalance in those schools at the time of trial.

The trial court expressly found contrary to those claims of the petitioners as demonstrated by the above quoted portions of the court's opinion. As to intent, the district court also found:

"Quite apart from the cause element which will be discussed further below, it cannot be said that the acts were clearly racially motivated. One would have to labor hard in order to come up with this conclusion." 313 F.Supp. 75, A.P. 71a.

There was ample evidence to support this finding.

The district court thoroughly considered the construction

of a new Manual High School building at the same site as the old building and with the same attendance area.

As the court of appeals pointed out (445 F.2d 1006, A.P. 149a), the racial change at the school since 1927 had been gradual. PX 356, p. 5, A. 2086a. The racial makeup in 1950, when the planning for the new school was taking place, was majority white,[22] and the "community concern was with the nature and character of the new facility," rather than its racial makeup. 313 F.Supp. 70, A.P. 59a. As for the 1956 Manual-East boundary change, the trial court found that it was justified by the overcrowding at East and that the suggested alternative of a larger boundary change would not have had any significant or enduring integrative effect. 313 F.Supp. 70, A.P. 61a.

Similarly, the claim that the Manual and Cole boundary changes in 1956 "insured" that the schools would later become predominantly Negro cannot stand analysis. In essence, petitioners claim that the district court failed to find present segregative effect. The trial court, in discussing this claim, recalled that an essential requisite of a constitutional violation is state action which produces the presently existing segregation complained of. Upon a review of the evidence, the court found that the boundary changes did not have segregative effect either at the time in 1956 or at the time of trial. 313 F.Supp. 75, A.P. 71a, 72a. Again, the court made express findings on the acts complained of and there was ample evidence to support the finding.

The effect of the boundary change on minority concentrations in 1956, the court found, was simply not known or shown. 313 F.Supp. 75, A.P. 71a, 72a. Moreover, since much of the racial and ethnic concentration in the schools occurred after 1956, without any action on the part of the

[22] 27.7% Negro, 23.5% Spanish origin, 40.7% other white, and 8.1% Oriental PX 356, p. 5, A 2086a.

school district, there was ample evidence to support the court's finding that the present concentrations in those schools were not caused by the school district. 313 F.Supp. 75, A.P. 72a.

In criticizing these findings, petitioners analogize to an inapplicable principle from *Swann*. They rely on the principle that a school district, in dismantling a dual system, must avoid closing racially mixed schools and building new schools remote from Negro population centers, thereby promoting segregated residential patterns. *Swann*, 402 U.S. at 21. This never happened in Denver. The proper analogous principle, instead, is that in a unitary system such as Denver's, there is no constitutional duty to make year-by-year adjustments in racial balance, in the face of demographic change, where the school district is not shown to have deliberately acted to change demographic patterns to effect the racial composition in the schools. *Swann*, 402 U.S. at 32. In the case at bar, segregative purpose and effect as to boundary changes must have been shown before an actionable violation can be found. These elements were not shown and the trial court so held.

Finally, petitioners fault the court of appeals for not considering a factor the district court had also refused to consider with respect to these schools, namely, the continuing but declining (DX DG, A. 2146a) disproportion of Negro teachers teaching in several majority-Negro schools. Teacher assignments received great emphasis by plaintiffs in their evidentiary presentation and in their arguments here. With one exception, no Denver school ever had more than 50% minority teaching staff and that justifiable exception is discussed in the Statement at pp. 47-49, *supra*, along with the distribution of minority teachers throughout the system.

The district court made no mention of the racial propor-

tions of teachers in either the core city schools or the resolution schools in its opinion on the merits.

In Denver, teachers were never assigned with either the purpose or effect of identifying particular schools by race. Denver has vigorously pursued a policy of recruitment of minority teachers since 1964 and has assigned such teachers throughout the system. Stetzler, A. 1155a-1171a.

The teacher assignment policy prior to 1964 and the subsequent policy followed since then are best described in the opinion of the court of appeals:

> "[The Board] operated on the prevailing educational theory of the day, the Negro pupils related more thoroughly with Negro teachers. The rationale was that the image of a successful, well educated Negro at the head of the class provided the best kind of motivation for Negro children and that in turn the Negro teacher had a greater understanding for the Negro pupil's educational and social problems. Although the validity of that theory is under severe attack today, we do not agree that the results of its past application infer segregatory intent. In response to new educational theories, the Denver public school system has today assigned Negro teachers to schools throughout the system and has reduced the percentages of Negro teachers in the predominantly minority schools." 445 F.2d 1007, A.P. 150a, 151a.

The record abundantly supports the refusal of both lower courts to find evidence of segregatory intent from the assignment of teachers.

2. The policy of the Denver School District has been nondiscriminatory throughout.

Petitioners assert in their brief, that the school district followed a ten year policy of racial segregation during the 1960s. On this assertion, petitioners then build the argument that as to their claims of state-imposed segregation in the core city, the burden of proof as to the elements of intent and of causation and the burden of justification of racial imbalance should be shifted to the school district.

This argument quite obviously disregards the time of the alleged segregative acts with regard to the core city schools. The evidence at the trial on the merits relating to these schools consisted of the replacement of one school building and some school boundary changes during the 1950s. The claimed "policy of segregation" is not only non-existent as we show below, but the alleged discriminatory acts in northeast Denver occurred in the 1960s, after the core city actions were taken. Petitioners would thus apply such a policy retroactively and impute unlawful intent to the acts of the 1950s from acts of the 1960s.

Secondly, the alleged ten year policy applied only to 4 predominantly minority and 4 Anglo northeast Denver schools, as petitioners candidly admit in their brief, p. 71, and not to other areas of the system.

Thirdly, petitioners' assertions regarding the ten year policy are not supported by the ultimate findings of the district court. Here, it is necessary to take a careful look at what the trial court found and at what stage of the development of the case. It should be remembered that the district court entered four principal opinions over a period from August 14, 1969, to May 21, 1970. The first two opinions followed a hearing on a motion for preliminary injunction, were prepared under the pressure of the approach of the opening of school in September, 1969, on the basis of only

four days of evidentiary hearings and without having heard the case fully on the merits. Thus, where inconsistencies appear between the early opinions in 1969 and the later opinions in March and May of 1970, after full hearing on the merits, the opportunity for more careful and complete consideration of issues in the later opinions becomes significant.

In both of the opinions following the preliminary hearing, it is apparent that the court misapprehended the law. The court went beyond the constitutional concept that only state created segregation was violative of the 14th Amendment. Although having recognized the historical practice of pupil assignment in Denver under the neighborhood school policy, the court obviously concluded at that time that the state of the law proscribed not only state-imposed segregation, but also mere inaction or continuance of a neighborhood school policy without affirmative attempts to alleviate the resulting racial imbalance in an urban school district. As indicative of the erroneous concept of *Brown I* as applied to a dual system, the court stated:

> "Thus the clear import of the *Brown* decision is that neither a state or its agencies may establish, *maintain or lend support* to a system of segregated public education. Furthermore, if the state or any of its agencies prior to or after *Brown* take any action which creates *or furthers* segregation, a positive duty arises to remove the effects of such de jure segregation." 303 F.Supp. 286, A.P. 13a (emphasis supplied to demonstrate the disjunctive)

Although the court proceeded to discuss the 10th Circuit decision in *Downs v. Board of Education*, 336 F.2d 988, (1964), the district judge questioned that opinion particularly in view of the decisions in the 5th Circuit. 303 F.Supp. 286, 287, n 8, A.P. 15a.

Thus prior to the hearing on the merits, the district court proceeded on the premise that the mere maintenance *or* continuance of racial imbalance in some schools was a constitutional violation and hence it made a general finding of a ten year policy of segregation. After making its general finding of ten years of segregation, the court further stated:

> "To maintain, encourage and continue segregation in the public schools in the face of the clear mandate of Brown v. Board of Ed. cannot be considered innocent" 303 F.Supp. 287, A.P. 16a.

A later statement by the court that a duty existed to remove segregation which had developed as a result of prior affirmative acts does not lessen the impact of the foregoing statements.

Following trial on the merits lasting over a period of 4 weeks, the court made some new findings and incorporated some old ones. It did not incorporate the mentioned ten year segregation policy and made no similar new findings, after having heard the school district's evidence. The significant findings as to the boundary changes for the core area from 1952 to 1962 was as follows:

> "There is no comprehensive policy apparent other than the negative approach which has been described . . ." 313 F.Supp. 76, A.P. 74a.

In the opinion after the hearing on the merits, there is clearly apparent a change and tightening up in the court's thinking and understanding of the constitutional concepts. Thus the district court discussed in detail the various elements necessary to be proven to establish a constitutional violation and held that there must be not mere inaction but affirmative acts of segregation purposefully or intentionally done and with a causal relationship to the conditions of racial imbalance existing at the time of trial. See Opinion of March

21, 1970, 313 F.Supp. 61, particularly pages 73 to 75; A.P. 67a to 70a.

The court also found that in 1962 the school district "was carrying out a racially neutral policy" in connection with boundary changes that year. 313 F.Supp. 76, A.P. 73a. Finally, and most significantly, the court describes the Board's policies during the ten years of rapid racial change in Park Hill as a

> "[P]rior undeviating policy of refusing to take any positive action which would bring about integration in the Park Hill Schools." 313 F.Supp. 66, A.P. 51a, 52a.

Even this description of the school district's policy, stated in terms of racially neutral inaction rather than affirmative action, was, we submit, contrary to the facts. Significant steps were taken from 1962 onward, as a matter of educational policy, to promote racial and ethnic heterogenity in the schools. (see Statement pp. 37 to 47).

After trial on the merits the district judge described the policy of the 1960s in Park Hill as one of racially neutral inaction while racial changes in the Park Hill neighborhoods resulted in corresponding changes in the schools there. The district court thus significantly modified its earlier comments regarding a "policy of segregation in Park Hill," made seven months earlier after the hearing on the preliminary injunction but before hearing on the merits.

3. The courts below correctly allocated the burden of proof.

Under the rules relating to burden of proof discussed earlier (*supra* pp. 70-72), as applied by the trial court in this case, the plaintiffs failed to prove, as to the acts complained of in the core city area, both segregative purpose and any

causal relationship to the present racial imbalance. The trial court found, accordingly, that there was no state-imposed segregation as to those schools. The court of appeals affirmed, applying Rule 52 F.R.C.P.

Petitioners complain that the courts below misplaced the burden of proof of actionable segregation. They seek to have this Court enunciate a new rule, substantially as follows: "Where a court finds one or more instances of discriminatory practices or factors in a school system and there exists within that system some degree of racial imbalance (even though not state-imposed), then the burden, not of going forward, but of proof, shifts to the school district to prove that the racial imbalance is justified by some compelling state interest."

Such a rule finds no authority in decided cases. Petitioners cite as their only source a law review article.[33]

To support the application of such a rule in this case, petitioners resort to charges such as "blatant discrimination", racially "distorted management", "covert policy", and subterfuge", none of which are contained in the record or in the findings of the district court.

The facts, as found by the courts below, are in sharp contrast with these assertions. Discriminatory acts were found to have occurred only as to three elementary schools during the early 1960s four or more years *after* the acts complained of relating to the core city schools, and would not, therefore, be part of a "history of discrimination" at the time in question. Thus, the court of appeals correctly refused to impose on the school district the burden of proving the non-existence of segregative acts, since "no type of state

[33]Dimond, *School Segregation in the North: There is but One Constitution*, 7 Harvard Civil Rights—Civil Liberties Law Review 1 (1972), (hereinafter, Dimond.) which describes the rule as a "proposed standard" (p. 32)

imposed segregation has previously been established" 445 F.2d 1006, A.P. 148a.

The petitioners' urging of such a rule was considered by the court of appeals, which stated:

> ". . . . [I]t would be incongruous to require the Denver School Board to prove the non-existence of a secret, illicit, segregatory intent. . . . Such an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent." 445 F.2d 1005, 1006, A.P. 147a.

We submit that if three instances of problematical segregative acts affecting three elementary schools in a system of 119 schools over a twenty-year period of inquiry, meets the test of "one or more instances of discriminatory practices or factors", and if "some degree of racial imbalance" means simply racial imbalance without proof of cause, as it surely must, then the proposed rule is nothing more nor less than the application of rules governing dual school systems to all public school systems in the Nation wherever racial imbalance exists, regardless of cause.[34]

In short, the rule petitioners urge has no application to the Denver case. The rule urged actually is that racial imbalance within a school system creates a conclusive presumption of state imposed segregation. Such a rule has no basis in any authority, and its proponents can offer none.

Of the many cases dealing with school systems which were not concededly dual systems at the time of trial, *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C., 1967), speaks most directly to petitioners' contention that "some" discrimination,

[34]Indeed, this is exactly what Mr. Dimond proposes. "The standard for review set forth here holds all school segregation actionable . . . unless insubstantial or adequately justified." Dimond, p. 11 (n. 43).

coupled with racial imbalance, triggers a shift of burden of proof. In the District of Columbia, the school authorities had deliberately maintained a dual system with complete racial separation until only 12 years *prior* to trial. (In Denver, the alleged discriminatory acts in northeast Denver occurred *after* the alleged acts pertaining to the core city). When the District of Columbia desegregated in 1954, immediately after the decisions in *Bolling v. Sharpe*, 347 U.S. 497 (1954) and *Brown I*, by the adoption of a neighborhood school plan, 27% of its schools remained one-race. This racial imbalance intensified during the next 12 years, so that by the time of trial in 1966, 87% of the District's schools were more than 85% of one race. 259 F.Supp., at 411, 412. Yet Judge Wright refused to relieve the plaintiffs of the burden of proof or shift the burden of justification to the school authorities. 259 F.Supp. at 495.

The standards formulated by the court of appeals represent the consistent rule of the federal courts in these non-dual cases, as we have discussed above. pp. 70-72. When school districts operate under state laws making racial separation in the schools illegal or unconstitutional, the school authorities are entitled to the presumption that their actions are lawful, and the burden is on the party challenging such actions to establish unlawful discrimination.

While there is no universal working rule as to the allocation of burden of proof, the standards develop out of experience in different types of situations as "a question of policy and fairness based on experience in the different situations." IX Wigmore, *Evidence*, Sec. 2486 (1940 ed.). The rules applied in cases of this kind are the ones which have best satisfied the basic requirements of fairness.

The "fairness" of the rule must be evaluated by considering the complexities of a school system in a large urban city. The over-all racial composition of large urban school dis-

tricts, and the schools within them, is determined by a myriad of factors completely outside the control of the school authorities. These factors, many of which this case illustrate, may and often do include rapid and unpredictable population growth and movement, annexation by separate governmental entities, freeway and urban renewal construction, and construction or abandonement of neighborhood parochial schools. To require such a school district to overcome the virtually conclusive presumption that all racial imbalance in its schools is the result of allegedly discriminatory acts would impose a punitive burden wholly unrelated to fairness. Furthermore, in this case, as the record shows, the plaintiffs had access to and analyzed with computer assistance all of the records of the school district. There were no facts or expertise available to the school district not equally available to the plaintiffs and in fact used by the plaintiffs in a most thorough manner.

Where, as in this case, multiple classifications of racial and ethnic groups are involved, and where plaintiffs purport to sue on behalf of all of the several classes, a serious danger would be introduced if the school authorities were put in the position of being required to justify repeatedly all existing aggregations of minority and ethnic pupils merely at the instance of a suit by one or two of their members. Other members of the classes represented may not perceive their neighborhood residential and school attendance arrangements as being contrary to their own interests. At the beginning of the hearing on remedy following trial on the merits, the district judge took note of this problem:

> "The Court: Now, you undertake to represent the Hispano community too?
> Mr. Greiner: That's correct, Your Honor.
> * * * *
> The Court: . . . I'm merely saying that our basic

> legal problem is remedying the invasion of the constitutional rights. And if it's true that there is a segment that says their rights are not violated, why, I don't see that it is any of our business to say, 'Well, they are. And you're going to get them remedied whether you like it or not.' I just don't —Not a single Spanish-origin person has appeared here demanding relief or even suggesting that any should be granted to them.
>
> Mr. Greiner: Well, I think the only basis upon which we can proceed, Your Honor, is the status of the record and the record—in the record there is no dissenting Hispano intervenors." A. 1515a, 1516a.

Nor does the rationale for the presumption applied in *Swann* to substantially one-race schools in a dual system in the process of desegregating (*Swann*, 402 U.S. 26) warrant the carrying over of that presumption to racially imbalanced unitary systems. In a dual system, especially at this late date, the constitutional right and remedy are so clear-cut and the instances of evasion of duty by dual school systems (e.g. *Green v. County School Board*, 391 U.S. 430 (1968)) have been so frequent that a shift of burden is warranted. But the circumstances are vastly different in a school system like Denver's which has never been a dual one and which has no history of state-imposed segregation except, arguendo, as to the four resolution schools which was not substantial but *de minimus* under all of the circumstances of this case.

We submit that neither experience, fairness, authority, nor logic requires a departure from the principles of burden of proof followed by the courts below.

B. THE ONLY ACTIONABLE SEGREGATION FOUND AS TO THE RESOLUTION SCHOOLS WAS THE RESCISSION OF THREE RESOLUTIONS, A FINDING WHICH IS ERRONEOUS AS A MATTER OF LAW.

1. The findings regarding the three elementary schools and the junior high school did not include a finding of present segregative effect and do not support a finding of actionable segregation.

We are here concerned with whether there has been a violation of the Constitution.

> "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." *Swann*, 402 U.S. 16.

A constitutional violation requires a showing of intentional state action causing presently existing racial segregation. We refer again to the Constitutional principles discussed in Part I above. pp. 66-70.

When the district court's findings with regard to the resolution schools are viewed in the light of such principles, it must be concluded that such findings were insufficient to support the court's legal conclusion of state-imposed segregation as to any of those schools. The legal conclusion was therefore erroneous.

The findings related to only three elementary scools and one junior high school. The first of these schools was Barrett elementary, where substantial racial imbalance was found to exist at the time it was built and opened in 1960. The trial court found that the school district built Barrett

with the intent to create a predominantly Negro school (313 F.Supp. 64, A.P. 48a) stating, as the principal reason, that the school could have been built with greater capacity to serve an area on the other side of a major traffic artery where fewer Negroes lived. 313 F.Supp. 65, A.P. 49a. The court of appeals likewise found segregative intent on those facts. 445 F.2d 1000, 135a, 136a.

But neither court found that the construction of Barrett had any continuing effect, at the time of trial, on the racial characteristics of Barrett or any other school in Denver. The construction of Barrett had no racial effect on either residential patterns or school racial proportions. There was no significant change in the number of children living in the area served by Barrett and the four schools surrounding it between 1959 and 1960[35]. Thus, no new pupils were drawn into the area by the building of Barrett; the new school simply added needed school capacity in a neighborhood where the pupil population had previously increased causing an overcrowded condition in the existing schools. See Statement, pp. 26-29.[36]

As a preface to discussion of other boundary changes among the other three northeast Denver elementary schools in the decade between 1960 and the trial in 1970, it must be kept in mind that such actions were taken during substantial demographic changes. Between 1960 and 1970 the Negro population for the entire City of Denver increased from 30,251 (6.1%) to 47,011 (9.1%). During the same period the Park Hill (northeast Denver) Negro population increased from 566 (1.7%) to 18,516 (50.2%) with an in-

[35] See 445 F.2d 1000, A.P. 135a, n. 3.

[36] A Negro spokesman had suggested to the school board in 1959, as an alternative to a new school, the addition of capacity to Harrington, immediately to the north (PX GC), which illustrates that the purpose of the construction of Barrett was to meet the then existing need for increased school capacity, not to alter or influence demographic patterns.

crease of the total population of the area from 32,679 to 36,893 residents (Statement, pp. 10, 11, *supra*.)

As to the assignment of the Hallett-Philips optional area to Philips in 1962, the court assumed that the white pupils residing in the area were choosing to attend Hallett and then found that they were thereby reassigned to Philips. 303 F.Supp. 293, A.P. 29a. Actually, both schools were insignificantly different in racial composition in the spring of 1962 when the superintendent made the change (Hallett was 95.8% white, Philips was 99.6% white. PX 393). Therefore, both the assumption and the finding were erroneous. But more importantly, there was no finding that this action had or could have had any effect on the racial composition of either school in 1970 at the time of trial.

In 1964, in response to the Special Study Committee recommendations (A. 301a), the two-block optional area between Stedman and Park Hill was abolished and assigned to less crowded Park Hill, another two-block strip on the east side of Stedman's attendance area was assigned to Hallett, and an area in the southeast corner of the Hallett area was assigned to Philips equidistant to the south. As between Stedman and Hallett, *both* schools gained about 100 Negro pupils after the boundary change between them (PX 242, A. 2050a), a result which could not possibly have been caused by the boundary change. Hallett's Negro percentage increased from 28% to 42% (P. 243, A. 2053a), despite the fact that the pupils in the area changed from Hallett to Philips were 70% Negro (McLaughlin, A. 1143a), which is confirmed by the increase of Negro pupils at Philips from 4 to 96 after the boundary change. PX 243, A. 2053a. The evidence thus showed that the boundary changes among Stedman, Hallett, and Philips in 1964 had no segregatory effect at the time, despite the findings of the district court made prior to the trial on the merits. No boundary changes

were made among these schools between 1964 and the time of trial, and during that period the racial change within the schools continued unabated.[37]. On this record there is no possible basis for a finding that the 1964 boundary changes, whatever their effect at the time, had any effect on the racial balance in the resolution schools at the time of trial in 1970. Indeed, the district judge, in his opinion on the merits, suggested as much. 313 F.Supp. 74, A.P. 70a, n. 18. Earlier, he stated: "The migration *caused* these areas to become substantially Negro and segregated." 303 F.Supp. 282, A.P. 4a. (emphasis added)

Findings regarding the fourth school, Smiley Junior High, appear only in the district court's second opinion. 303 F.Supp. 293, 294, A.P. 30a, 31a. The sole connection between school district action and Smiley's racial composition, the trial court found, was the so-called feeder relationship. The court attached a map as an appendix to the opinion (303 F.Supp. 297, A.P. 38a) to explain its finding that

> "[A]ny factors affecting the racial composition of the elementary schools will also have a similar effect upon Smiley." 303 F.Supp. 294, A.P. 32a.

and that

> "[S]egregated situations at Barrett, Stedman, and Hallett . . . ultimately led to a substantially segregated situation at Smiley." 303 F.Supp. 295, A.P. 33a.

The fallacy of the court's latter finding on Smiley is demonstrated by the map itself, which shows that the Smiley attendance area encompassed all of the schools affected by the boundary changes in 1962 and 1964. The elementary

[37] At the time of the preliminary hearing, the Negro percentages were: Stedman, 92.4%; Hallett, 84.4%; Philips, 36.6%; and Park Hill, 23.2% (PX 243, A. 2053a).

school attendance areas are all within the Smiley Junior High School subdistrict, and boundary changes among them could have no effect whatsoever on the pupil population at Smiley. Whether or not the changes were made, the same children would go on to Smiley.

Similarly, whether or not crowding was relieved at Stedman or Hallett by added classrooms or mobile units, the pupils at those schools would continue to live in the Smiley subdistrict. Nor did the existence or non-existence of Barrett school change or affect the racial composition of Smiley. The children in the Barrett area, until 1964, were in an optional area with Smiley, and thereafter were assigned, in accordance with Policy 5100, to Gove Junior High to the south, in order to improve racial balance at both junior high schools.

The inherent difficulty in the trial court's findings of fact as to Smiley led the court of appeals to go beyond the findings and refer to testimony in the record that white students in the Smiley attendance area were permitted to transfer to another school. 445 F.2d 1001, A.P. 138a. But the court of appeals failed to notice that the testimony referred to only four families, one of whom was Negro, during the entire period from 1964 to 1969, and that the assignments were made for valid non-racial reasons. Morton, A. 657a. Neither court below expressly found that the school district had acted to confine Negro pupils in Smiley, and there was no finding of any school district action causing racial imbalance at Smiley at the time of trial.

With respect to the legal conclusion that the four resolution schools were segregated, the essential element that state action *caused* the present racial imbalance at those schools was wholly absent and therefore, no constitutional violation exists. "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." *Swann*, 402 U.S. 28.

2. The findings as to the four resolution schools were ultimately used by the trial court only as a basis for finding segregatory intent in the rescission of the unimplemented racial balancing resolutions.

The original findings regarding the resolution schools were made after the hearing on the preliminary injunction prayed for in plaintiffs' first cause of action, which the district court said "deals *solely* with the purpose and effect of the rescission of [the] Resolutions." 313 F.Supp. 63, A.P. 46a (emphasis added). These resolutions, the court added, "were designed to relieve [de facto] segregation[38] and the tendency toward [de facto] segregation in schools located in . . . northeast Denver." 313 F.Supp. 64, A.P. 47a. The plaintiffs claimed, the court said, that the rescission of the resolutions was "unconstitutional because its purpose and effect was to perpetuate racial segregation" in the affected schools. 313 F.Supp. 64, A.P. 47a. The rescission of the three earlier resolutions was accompanied by the adoption of a substitute resolution, No. 1533 (PX 6a, A. 2111a), which contained all the elements of the substituted resolutions except the mandatory pupil reassignment for racial balancing purposes.

The plaintiffs' efforts, then, in seeking an injunction under their first cause of action, was to show that the school board, knowingly and with segregatory motive, maintained previously existing racial and ethnic separation and thus resegregated children on the basis of race and ethnic origin.

[38]We add "de facto" where the district judge uses the word "segregation" or "segregated" without the "de jure" qualification. The judge consistently used the unqualified terms in the descriptive or neutral sense of racial imbalance or de facto segregation not resulting from school district action. He was careful always to use "de jure segregation" or "de jure segregated" when he meant racial concentrations caused by school district action. Nevertheless, because "segregation" is freighted with connotations of deliberate or purposefully imposed separation, we have used throughout this brief other terms such as "racial imbalance."

Third and fourth counts, A. 20a, A. 21a. To obtain a declaration that the change of plans violated the Constitution would require a showing that the act of rescission was taken (a) with segregatory purpose and (b) with the effect of bringing about racial separation.

We submit that the district court's findings of state-imposed segregation in the early 1960s at Barrett, Stedman, Hallett, and Smiley were not, in the final analysis, the basis for the court's order directing the implementation of the rescinded resolutions.

The injunction order rested, instead, squarely on the conclusion of law that the rescission "in and of itself was an act of de jure segregation" in 1969. 303 F.Supp. 295, A.P. 35a; 313 F.Supp. 66-67, A.P. 52a.

The court explained this in the opinion following trial on the merits:

> "*Although past discriminatory acts may not be a substantial factor contributing to present segregation*, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation. Thus, in Part I of this opinion, we discussed the building of Barrett, boundary changes and the use of mobile units as they relate to the purpose of the rescission of resolutions 1520, 1524, and 1531." 313 F.Supp. 74, A.P. 70a, n. 18 (emphasis added).

The purpose of the rescission, the court found, was to maintain existing de facto segregation in majority-Negro schools and permit the trend of increasing Negro percentages to continue in those schools, such as East, Park Hill, and Philips, which were still majority-white in 1969. 313

F.Supp. 67, A.P. 53a, 54a; 303 F.Supp. 292, A.P. 27a. The substitution of the mandatory measures for undoing the effects of racial shifts with a voluntary program (Resolution 1533) was found to be a constitutional violation. 313 F.Supp. 67, A.P. 53a.

The district judge's last retrospective summary of what he had done is the most telling. In his opinion of May 21, 1970, three months after his opinion on the merits, he recalled what had happened during an intensive year of hearings, trials, and multitudes of briefs and arguments. He had found, he wrote:

> "[T]hat certain schools, elementary, junior high and high schools within an area of Denver known as Park Hill, and also some 15 schools within the core city, were segregated." 313 F.Supp. 91, A.P. 100a.

Significantly, the district judge is including in the one category of "segregated", East High School, Cole Junior High, and Park Hill and Philips Elementary Schools, all of which were expressly found not to be de jure segregated, as well as all of the remaining core city schools, also expressly found not to be de jure segregated. He was using "segregated", standing alone, in his consistent sense of de facto segregated. In other words, all schools were found, in 1970, to be de facto and not de jure segregated (absent effects of rescission as to the resolution schools).

Then the district judge succinctly stated his finding regarding de jure segregation:

> "[The Order of March 21, 1970] also concluded that our temporary injunction entered in August 1969, finding a condition of de jure segregation in certain schools *resulting from* the Denver Board of Education's action rescinding Resolu-

tions 1520, 1524 and 1531, which had been designed to have an integrating effect on Park Hill schools, must be made permanent." 313 F.Supp. 91, A.P. 100a. (emphasis added)

We submit, accordingly, that the only act of actionable segregation found by the district court to have effect at the time of trial was the rescission of the resolutions.[39]. The only way the court could extend the injunction to non-segregated schools such as East and Cole was on the basis of a holding that the rescission was the operative de jure act. 313 F.Supp. 67-69, A.P. 54a-57a.

Thus, the court of appeals, in reviewing and sustaining, under Rule 52, the district court's findings of earlier acts regarding the three elementary schools (445 F.2d 1000-1003, A.P. 126a-139a), and deeming it unnecessary to decide further whether the rescission was an act of de jure segregation (445 F.2d 1003, A.P. 139a), misconceived the final true basis of the district court's order enjoining the rescission.

3. The trial court erred in concluding that the rescission of the resolutions was an act of state-imposed segregation in and of itself.

The full history of the three resolutions and the rescission thereof is summarized at pp. 44 to 46 of the Statement.

The rescinded resolutions reassigned pupils, effective in September, 1969, from 15 schools.[40] These plans were rescinded and the substitute plans embodied in Resolution 1533 (PX 6, A. 2111a) were adopted by the Board on June

[39]Logic, as well as the district judge's own holdings, leads also to the same conclusion.

[40]PX 10, A. 2112a and PX 11, A. 2114a. Pupils from three senior high schools, four junior high schools, and eight elementary schools were reassigned. Only four of the fifteen schools were predominantly minority.

9, 1969, three months before their effective date. The previous plans were never put into effect as far as the pupils were concerned.[41] With the adoption and later rescission of the resolutions, *nothing happened* insofar as there was any school district action to affect racial proportions in the schools. To hold, as the district court did, that the rescission was a legislative act which "in and of itself was an act of de jure segregation" (303 F.Supp. 295, A.P. 35a, 313 F.Supp. 66, A.P. 52a) was an attempt by pure metaphysics to convert the substitution of unimplemented planning into an affirmative unconstitutional act.

The district court relied on *Reitman v. Mulkey*, 387 U.S. 369 (1967), as authority for the holding. 313 F.Supp. 67-69, A.P. 55a-57a. That case, we submit, does not support the holding. The district judge understood *Reitman* to strike down an initiated constitutional amendment which had the effect of repealing legislation "which recognized rights guaranteed by the equal protection clause." 313 F.Supp. 67, A.P. 55a. The amendment actually had the effect of repealing *pro tanto* all statutes forbidding private discrimination in housing. Its infirmity was not the repeal, but the finality of the action, which disabled every level of government from treating the problem, thereby authorizing and constitutionalizing the private right to discriminate. 387 U.S. at 377.[42]

In the case at hand, the rescission in no way disabled the board from continuing to deal with the educational problems of racial or socio-economic concentrations. After the

[41]As the district court put it, "True, the resolutions had not been carried out, but extensive preparations were in progress." 313 F.Supp. 67, A.P. 53a.

[42]In *Hunter v. Erickson*, 393 U.S. 385, 390 (1969), this Court expressly stated that it was not holding that the mere repeal of legislation enacted for the benefit of racial minorities violates the Fourteenth Amendment. *James v. Valtierra*, 402 U.S. 137, (1970) applied the same principle to repeal of legislation concerning other classifications.

rescission, the Board could and did take further legislative action in this regard (e.g. Resolution 1533, PX 6a, A. 2111a, and Resolution 1562, 445 F.2d 1010, A.P. 156a).

Nor were the rescinded resolutions aimed at recognizing constitutional rights. Of the 15 schools from which pupils were to be reassigned, only 4 had been found to have been the object of prior discriminatory acts, and, in those cases, as we have shown, there was no finding by the court of present segregatory effect and, accordingly, no existing constitutional violation at the time of trial as to any of those schools. Thus, the effect of the rescission was to repeal a mandatory racial balancing plan originally adopted in response to an undertaking, for educational reasons, to increase efforts to find solutions to the "educational problems of de facto . . . segregation."[48] The resolutions were to implement, as an educational policy, a racial balancing plan. This was within the discretionary power of the school board. But where no constitutional violation existed, the district court exceeded its authority in ordering the rescinded plans carried out. *Swann*, 402 U.S. 16.

The evidence was that the three resolutions represented pilot plans educationally, and were part of the long-range planning of the school district for improving educational quality. This is a process of trial and error, which all experts agreed was an extremely complex matter in which no certain answers were known. Any rule of constitutional law which would impute segregatory purpose and effect to the repeal of plans, proposed as a matter of educational policy, which include, among other measures, the reduction of racial or ethnic concentrations, would have a chilling effect on future educational efforts to solve the complex problems of public education. As Mr. Justice Harlan observed, in his dissent in *Reitman*,

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[48]Resolution 1490, (PX 2, A. 1992a-1996a).

> "I think that this decision is not only constitutionally unsound, but in its practical potentialities short-sighted. Opponents of state anti-discrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable." 387 U.S. at 395

Educational policy-making by the local school districts of the Nation should not be thus inhibited by the threat of being permanently enjoined to carry out every proposed innovation and experimental educational plan which happens to include measures for the reduction of racial or socio-economic imbalance as a matter of educational policy.

C. THE SCOPE OF THE REMEDY IS LIMITED BY THE EXTENT OF A VIOLATION.

Petitioners seek system-wide desegregation of the Denver public schools.

The background against which petitioners urge this argument regarding remedy is that of a school district practicing "covert segregation" with "hidden motives" involving "shams . . . surreptitous practices" . . . and "underhanded subterfuges." In this case there were no findings or evidence of such as to the Denver school district.

The findings of deliberate discrimination in the Denver school system, if sustained, are limited to only four predominantly minority schools which are only a small percentage of the 119 schools in the District and are located in a relatively small geographical area. No issue of system-wide discriminatory violations is before this court.

One of the axioms stated in *Swann* which should apply to a unitary system as well as a dual system is that:

> "(T)he nature of the violation determines the scope of the remedy. *Swann*, 402 U.S. 16.

Accordingly, the scope of the remedy must be limited to the geographical area and the schools in that area.[44]

In the Denver case, the nature of the violation, as we have shown was either the construction of one elementary school in 1960 and several minor elementary school boundary changes in the early 1960s, all in northeast Denver, or it was the modification of unimplemented mandatory racial balancing plans in 1969 involving the same area. If the violation was the former, it had no continuing or present effect at the time of trial because of demographic changes in the meantime. If the latter, the violation has been fully and precisely remedied by the reinstatement of the rscinded plans by injunctive decree of the district court.

Petitioners urge that various practical considerations require a remedy going far beyond the few schools where segregatory acts were found. The considerations they have discussed find no basis in the evidence nor in the findings of the courts below. The practicality argument grows out of a series of dual system cases involving dilatory practices resulting in unacceptable lack of progress. One of these cases, *Green*, 391 U.S. 430, illustrates the proper application of practical considerations. There, this Court had before it a problem involving a dual system operating two schools. The most obvious way to have created a unitary system in that situation was simple neighborhood zoning, 391 U.S. at 442, n. 6. This simple and workable solution had clearly been by-passed in favor of a scheme, predictably ineffective in that rural community, of "freedom of choice."

[44]Accord: Taylor v. Board of Education, 191 F.Supp. 181, (S.D.N.Y. 1961) appeal dismissed. 288 F.2d 600 (2nd Cir. 1961), 195 F.Supp. 231 (S.D.N.Y. 1961) affd. 294 F.2d 36 (2nd Cir. 1961) cert. den. 368 U.S. 940 (1961) The district court found that one elementary school (Lincoln) had been segregated by state action. The remedy was limited by the nature of the violation and the decree was for the desegregation of that school and did not require system-wide desegregation.

This Court simply refused to accept a remedy based on theoretical and unrealistic assumptions where a far more feasible and specific remedy was at hand. The same pragmatic approach here would find no further remedial intervention necessary in Denver.

We submit that there is no evidence in this case and no findings by the courts below which would warrant or constitutionally require system-wide racial balancing of the Denver school system.

III.

THE NEIGHBORHOOD SCHOOL POLICY, AS APPLIED IN DENVER, DOES NOT OPERATE TO DEPRIVE ANY PUPIL OF AN EQUAL EDUCATIONAL OPPORTUNITY, AND THE HOLDING OF THE COURT OF APPEALS TO THAT EFFECT SHOULD BE AFFIRMED.

A. INTRODUCTION

1. Neighborhood school policy—generally.

The neighborhood school policy, when impartially maintained and administered, does not violate the Constitution even though the result of such policy is racial imbalance in certain schools of the system.

Various circuits have considered this question and all have upheld the constitutionality of the neighborhood school policy.[45]

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[45] *Downs v. Board of Education of Kansas City*, 336 F.2d 988 (10th Cir., 1964), cert. den., 380 U.S. 914 (1965); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir., 1966), cert. den., 389 U.S. 847 (1967); *Bell v. School City of Gary*, 324 F.2d 209 (7th Cir., 1963), cert. den., 337 U.S. 924 (1964), *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1st Cir. 1965).

2. Equality of Educational Opportunity.

Equality of educational opportunity is conceded to be a constitutional right. It is also an ultimate objective in all educational planning. The elusive question is what constitutes equality of educational opportunity? If all children were born with equal mental capabilities and had equivalent environmental advantages, equal educational resources could be allocated mechanically.

The facts of life are different in that the planning and execution of educational programs is a complex social science.

Does the providing of equal fiscal, physical and teaching resources to all students and all schools constitute the providing of equal educational opportunities? Or, is a school district constitutionally required to evaluate the needs of children individually and by class (socio-economic or other) and provide greater but unequal resources to those who are more disadvantaged than others in order to arrive at the "equal protection" threshold? There is no question that such evaluations are repeatedly made as matters of educational policy. There is also no question that a school district constitutionally may allocate resources unequally for specific classes, e.g., mentally retarded, physically handicapped or culturally disadvantaged, as a matter of educational policy. The question presented in this case is whether, as a matter of Constitutional Law, courts should decree for all the nation, a requirement that all low-achieving students in a school district shall be considered a new class under the Constitution, and order the implementation of a new educational policy formulated by the judiciary and not by educational experts? It is obvious that such is beyond both the power and the expertise of the courts.

For years before the institution of this suit the school district in Denver had sought the optimum of equality of edu-

cational opportunity for all students. School buildings were maintained equally, core city schools were not shorted on educational materials but, to the contrary, they were provided extra dollars, lower pupil-teacher ratios, use of paraprofessionals, compensatory education programs, and many other programs and resources not made available to other schools.

Thus an unequal but greater quantity and quality of resources were furnished the court-designated schools which were found to be "inferior". The fact that the median achievement scores on standardized tests were below average in those schools was in spite of such action. What would have been the result but for the greater efforts and facilities furnished to the specific schools? Undoubtedly even lower median achievement scores and more drop outs.

Until sufficient controlled studies are made with empirical results, any attempt by the courts to decree educational programming through assignment of pupils by race, allocation of resources, or designation of other criteria would be well beyond the ability of the courts to perform and would constitute an unlawful exercise of the power of the courts under the present state of educational social science.

As is shown hereafter, the evidence is insufficient to establish any constitutional deprivation of "equal educational opportunity."

3. Points argued.

Petitioners claim that minority children attending certain Denver schools were consciously treated differently and discriminatorily and have been denied equal educational opportunities. We reply arguendo as follows: First, the existence of unequal educational opportunities in such schools, if true, was not caused by discriminatory acts of the respondents,

and did not, therefore, constitute a constitutional violation warranting judicial intervention.

Second, the trial court's conclusion that certain schools were "inferior" on the basis of median scores on standardized achievement tests was clearly erroneous. Third, there was no competent evidence in the record to support the trial court's conclusion that racial or ethnic imbalance was the cause of inferiority in any schools.

Fourth, the apparent lack of achievement in certain schools not being the result of state action (neither unequal allocation of resources nor racial or ethnic concentration) the remedy to alleviate existing educational difficulties is outside the province of the federal courts, and must be fashioned by the school authorities as educational policy.

B. THE SCHOOL DISTRICT DID NOT CAUSE THE ALLEGED INFERIORITY OF THE COURT-DESIGNATED SCHOOLS.

1. Summary of district court findings that low test scores evidenced inferior schools, that racial and ethnic concentrations caused inferior schools, but that the concentrations were not caused by the school district.

A clear summary of the claims as alleged in petitioner's complaint is found in the opinion of the court of appeals. 445 F.2d 994, A.P. 124. Under the main or second cause of action, three counts were urged at time of trial (the fourth count having been expressly abandoned). The first count, alleging deliberate and purposeful state-imposed segregation, was rejected by the trial court. The second count, which alleged an unequal allocation of resources to the core city schools was also, in effect, rejected by the district court.

The third count attacked the neighborhood school policy, even when operated without segregatory intent, claiming

that it causes racial and ethnic segregation in some schools, which, in turn, denies equal educational opportunity to pupils assigned there. A. 29a, 30a.

The district court made two rulings on the third count. First, the court denied relief merely upon a showing of racial concentrations resulting from the application of the neighborhood school policy, citing *Downs* and *Dowell*. 313 F.Supp. 76, A.P. 74a-75a.

Then the court found that certain schools with high proportions of Negro or Spanish surnamed pupils (the court-designated schools), although not segregated by state action, were, nevertheless, providing an unequal educational opportunity which was caused by the racial and ethnic concentrations.

This circular reasoning was rejected by the court of appeals, which reversed the trial court on the ground that there was no finding of state action causing the racial and ethnic imbalance said to be the cause of the lower achievement scores and inferior educational opportunity.

The trial court found that petitioners were not entitled to relief upon a mere showing of *de facto* segregation (313 F.Supp. 73, A.P. 67a), and that "[A] neighborhood school policy, even if it produces concentration, is not *per se* unlawful if it is carried out in good faith and is not used as a mask to further and perpetuate racial discrimination." 313 F.Supp. 76, A.P. 74a. The district court then rejected petitioners' claim that "the neighborhood school policy has been maintained by the School Board for the purpose and with the effect of segregating minority pupils." 313 F.Supp. 76, A.P. 73a.

The trial court's findings of unequal educational opportunity at the court-designated schools rest solely on the evidence of low average achievement and low morale (313

F.Supp. 77, 91, A.P. 76a, 100a) and that this condition was caused by racial or ethnic concentrations. 313 F.Supp. 80-82, A.P. 83-86a.

The district court reaffirmed this finding in the clearest terms in its later opinion on remedy. Reviewing the earlier order, the district court stated:

> "We found at the trial that the schools in question became segregated as a result of neighborhood housing patterns—at least that this was the substantial factor in producing the result. *It was not caused by positive law or as a result of official action.* 313 F.Supp. 81, 82, A.P. 111a. (emphasis added)

Thus, the trial court, having found unequal educational opportunity and having identified its cause as racial or ethnic concentration, nevertheless found that the concentration was not caused by the school district.

The trial court then became concerned with educational principles as opposed to *Constitutional Principles* and determined that, despite its findings that the neighborhood school policy was constitutional even though it produces (racial) concentrations, the court-designated schools should be desegregated.

2. *The court of appeals, in view of the trial court's findings, correctly reversed, finding no state action causing the educational outcomes at the schools in question.*

(a) The trial court had found that the school district did not cause the racial imbalance.

The opinion of the court of appeals shows that it fully understood that the District Judge had (1) found unequal educational opportunity in the court-designated schools on the

evidence of low test scores and high drop-out rates and other evidence of low morale, and (2) had concluded that the racial and ethnic concentration, "regardless of its cause," was the cause of the unequal educational opportunity. 445 F.2d 1003, A.P. 142a The court of appeals agreed with the district court that constitutional rights would be violated if the education in one school was sub-standard when compared with another school within the same school district, *"provided the state had acted to cause the harm."* 445 F.2d 1004, A.P. 143a (emphasis added).

But the court of appeals also understood that the district court had expressly found that the school district had not caused the racial and ethnic concentrations which had been found, in turn, to be the cause of the educational problems. The court of appeals itself concluded that the "educational difficulties [arise] from circumstances ouside the ambit of state action." 445 F.2d 1004, A.P. 144a. Later, in the discussion of plaintiffs' cross-appeal, the appellate court put it more plainly:

> "The trial court held that cross-appellants [petitioners herein] failed in their burden of proving (1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools." 445 F.2d 1006, A.P. 418a

Racial imbalance in the schools can, and did in Denver, develop over a period of years when an impartially administered and racially neutral neighborhood pupil assignment policy was followed by the school district. But that policy, while it permits racial and ethnic change within school subdistricts, did not cause the adventitious racial imbalance in the schools, and both courts below expressly so found.

(b) The court of appeals correctly based its reversal of the district court on the absence of findings of causal relationship.

Petitioners, ignoring the fact that the district court expressly found no state action in the development of racial and ethnic imbalance in the court-designated schools, proceed to speculate as to various explanations for the same finding by the court of appeals. Rule 52, F.R.C.P., is an adequate explanation.

Petitioners suggest that the court of appeals confused indicia of inferiority with the cause of "inferiority". To the contrary, the court of appeals correctly noted that the indicia (low test scores and dropout rates) were obviously not the cause of the low test scores. 445 F.2d 1004, A.P. 144a.

Petitioners suggest that the court of appeals may have overlooked the district court's finding that racial and ethnic imbalance caused the alleged unequal educational opportunity. The court of appeals was entirely aware of this finding as it was the basis of its reversal as to the core city schools.

Finally, petitioners suggest that the court of appeals overlooked, in the record, the multiplicity of decisions by the school board (as to school locations, size and boundaries, pupil assignments, and educational input) as factors in causing unequal educational opportunity. To the extent these factors were part of the neighborhood school policy, they were held by the district court not to have caused the racial and ethnic imbalances. To the extent they refer to differences in teacher experience, the district court considered it a symptom, not a cause (313 F.Supp. 81, A.P. 83a), and the court of appeals found it insubstantial:

> "[W]e cannot conclude from that one factor [teacher experience]—as indeed neither could the

trial court—that inferior schooling is being offered." 445 F.2d 1004, A.P. 144a.

At the hearing on remedy, Dr. James S. Coleman testified that teacher experience and advanced degrees were not important factors (A. 1557a), and Mr. Smith, an elementary principal called by the plaintiffs confirmed that his new teachers were as capable and competent as those with more experience (A. 1701a).[46]

(c) The court of appeals did not require a showing of racial purpose, whether or not it is required.

The other claimed error, that the court of appeals required a finding of intent to deny equal educational opportunities to the pupils in the racially and ethnically imbalanced schools, is not relevant in view of the district court's finding that the imbalance in the core city schools was not "de jure" or state imposed. In any case, the appellate court's reference to racially motivated intent (in this part of its opinion) occurs only in connection with its observation that instances of judicial intervention in school systems in Pontiac, Cook County, District of Columbia, Manhassett, Hempstead, and Pasadena were cases where de jure segregation was expressly found, with its necessary element of racial purpose. 445 F.2d 1006, A.P. 1480.

This case is clearly distinguishable from *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) in which the issue was whether exclusion by race from a public accommodation could be excused by delegating state authority to a private party by contract. Here we are concerned with the power of the courts over educational decisions involving complex factors not caused by state action, not at-

[46]"Anyone who believes [inexperience] is a serious disadvantage for a teacher, has a faith in experience and degrees which is justified by no known evidence." N. Glazer, *Is Busing Necessary?* Commentary, March, 1972, p. 50, ——CONG. REC. —— (daily ed. March 13, 1972, S-3855).

tempted delegation of state authority with concomitant unconstitutional wrongs.

(d) The neighborhood school policy does not operate as a racial classification.

One other theme in petitioners' argument on this point remains to be dealt with. This is the contention that the school district maintained two kinds of schools, good schools and bad schools, and that the school district arranged to have good schools where non-Spanish white children predominate and bad schools where Negro and Spanish surnamed children predominate.[47] This means, the argument goes, that unequal schools were being provided on the basis of a racial or ethnic classification, which was not justified by any compelling state interest, and therefore was in violation of the Fourteenth Amendment.

But it is at this point that the argument loses sight of its causal predicate, which the court of appeals was careful to keep in view. The cause of the good schools and bad schools, according to the petitioners and the district court (313 F.Supp. 82, A.P. 86a), was the absence or presence of concentrations of children of certain racial or ethnic minorities in the schools. If this is the cause, then the school district cannot be providing or arranging for a poor school at one place and a good school at another unless it also controls the racial or ethnic makeup of the schools. This control, the courts below both held, the school district simply did not have or exert.

Nor did the school district set about to select or identify schools with high Negro or Spanish surname concentrations and proceed to arrange inferior education at such schools. This was manifestly impossible because it was the racial or

[47] "The violation found was not cast in terms of racial segregation but rather as the State's unequal provision of public education to Denver's minority children." (Pet.Br., p. 117).

ethnic concentrations, not the school district's allocation of resources to the schools, which caused, the trial court held, the inferior education.

In other words, since Denver's neighborhood school policy is racially neutral, it does not operate as a mechanism for racial or ethnic classification, and any racial or ethnic concentration which the neighborhood school policy permits or produces is not attributable to school district action, but to housing patterns. Accordingly, even assuming arguendo that the evidence in this case supports a finding that the racial concentration in some schools causes unequal educational opportunity in those schools, the inequality cannot be attributable to the racially neutral classification or to school district action.

3. The court-designated schools were located, built, and assigned attendance areas without any segregatory purpose or effect, and the school district has done nothing since to affect their racial composition.

The Denver school system is not and never has been a dual system (445 F.2d 1006, A.P. 148a), and the school authorities have not refused to admit any student at any time because of racial or ethnic origin. 313 F.Supp. 73, A.P. 67a.

Thus, when each of the court-designated schools was built and assigned its attendance area,[48] the school system was unitary in every sense of the word. Plaintiffs failed to prove that the school authorities or any other state agency had done anything to affect the racial composition of these schools.[49]

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[48]The newest of the court-designated schools (Smith) was built in 1955. (PX 106, A. 2042a; PX 20, Appendix 13-18).

[49]Except, arguendo, at Stedman and Hallett, but with no effect on their present racial compositions.

Not only did the courts below expressly find that there was no such segregatory action, as discussed above, but the elementary school subdistrict boundary maps in evidence in this case show this graphically.

4. Allocation of resources to core city schools were equal or greater.

In their brief, petitioners enumerate fourteen points as indicia of unequal educational opportunities in the court-designated schools. An analysis of those points discloses duplications, repetition of the same matters and nothing of a substantial objective nature to prove causation of alleged inferiority of the schools.

There was no proof and no finding of inadequate or disparate physical facilities or educational materials in the core city schools as compared to those in other parts of the city. Some of the buildings located in the core city were older, but the undisputed evidence was that they were as well maintained as any of the others in the city. Of the court-designated elementary schools, only 4 had been constructed before 1921 and three of those have had new additions since 1960 with the fourth one currently being replaced with a new building. None of the court-designated secondary schools was constructed prior to 1925. See Statement p. 47, supra, as to further details.

Much was made of teacher inexperience and transfers. All teachers in all schools had college degrees and there was no evidence of assignment to court-designated schools of any teacher who was any less educated than those assigned to other schools. There was no evidence that younger teachers were less effective in teaching than older teachers; in fact, the evidence was to the contrary. Much can be said for the greater effectiveness of younger teachers as compared to older ones, particularly many of those ap-

proaching retirement age at the elementary level. There was no evidence and no findings that teachers were more or less competent by reason of their greater or lesser experience in the Denver system or in a single school. See Statement, pp. 49, 50.

The dollar inputs to the predominantly minority schools were not only equal but often in excess of the amounts allocated to the other schools. See Statement, pp. 50, 51, supra. The curricula varied among schools depending on the needs and interests of the pupils but the same basic subjects were taught at each and every one of the schools. A. 1366a.

In the end, the only objective evidence of a cause in all of these fourteen points upon which petitioners could rely is that of teacher inexperience, assignment and transfer; but both lower courts found this was not a material factor in the lack of achievement by the pupils in the court-designated schools.

The other items contained in the fourteen points are not causes (e.g., drop out rates and achievement results) or are discussed in other parts of this brief (e.g., neighborhood schools and boundaries).

The resources allocated to the core city schools being at least equal and in many instances greater in quality or quantity, the conclusion of the trial court of "inferiority" in the court-designated schools must rest primarily upon outputs or results rather than inputs or resources. By reason of other factors not within the control of the state, particularly the early childhood deprivations of children from low socio-economic environments, it is erroneous to infer that below average outputs or achievement levels were caused by unequal inputs or resources.

C. ON TWO OTHER GROUNDS THE DISTRICT COURT'S JUDGMENT SHOULD HAVE BEEN REVERSED.

There were two additional reasons for refusing to affirm the district court's conclusion that Fourteenth Amendment rights were being denied to pupils attending the court-designated schools. The court of appeals did not find it necessary to discuss these additional reasons because of the lack of any finding of a causal connection to state action. But these additional deficiencies in the district court's approach to the core city schools should be discussed, we believe, because of their importance to the entire question of equal protection principles as they apply to public education.

The district judge succinctly summarized his methodology and perception of the problem in the post-trial opinion on remedy:

> "[T]he [de facto] segregated core city schools in question were providing an unequal education opportunity to minority groups as evidenced by low achievement and morale. The causes of this inferiority were held to be the segregated condition, together with concentration of minority teachers, low teacher experience and high teacher turnover in each of the schools." 313 F.Supp. 91, A.P. 100a

Indicia are clearly distinguished from causes, in the court's view. Evidence or indicia of "inferior" schools were found to be low achievement and morale; the cause of such "inferiority" was held to be primarily (313 F.Supp. 81, A.P. 83a, 313 F.Supp. 82, A.P. 86a), racial or ethnic concentrations, together with lower teacher experience. Respondents have previously set forth the evidence on concentration of minority teachers, teacher experience and turnover. See Statement, pp. 47-50.

Both the indicia and the cause of what the district court found to be unequal educational opportunity in its designated schools must be questioned.

1. Achievement test scores are not a valid basis for comparing educational opportunity among schools.

Of the two signs or indicia of inferior schools, one, low morale, was the consequence of the other, pupil achievement.[20] Low morale was a combination of (a) relatively high teacher turnover, which produces relatively lower teacher experience (313 F.Supp. 79-80, A.P. 80a-82a), and (b) relatively high pupil dropout rates (at the secondary level) 313 F.Supp. 80, A.P. 83a. In other words, the district court interpreted the tendency of teachers with seniority, under the negotiated agreement with the teachers' bargaining agent, to transfer to other schools, and the tendency of pupils to leave school when legally permitted, as evidence of low morale within the schools involved. But the court evidently attributed these factors to the low pupil achievement in the schools.

Thus, the sole, or at least dominant, sign of an inferior school, in the district court's view, was relatively low median scores, by school, on standardized achievement test scores. We submit that such evidence is not sufficient as a basis for finding a violation of the Fourteenth Amendment.

The results of tests involved in this suit, the Stanford achievement test given in May, 1968, were reported (PX 83, 379) in two different ways. Both displayed the scores of the individual pupils, by school, along a scale. One scale (a percentile chart) compared the scores of the school's pupils against nation-wide scores of pupils at that grade level. The other scale (a grade equivalent chart) compared the pupils'

[20] "Low standards and *consequently* low morale." 313 F.Supp. 77, A.P. 76a. (emphasis added).

scores against the test publisher's grade equivalent expressed by the grade number followed by a decimal point and a number expressing the month of the school year.[51]

There were eight different tests in the Stanford battery. Plaintiffs averaged the median grade equivalent scores for the eight tests, by school, and compared these averages with a city-wide average, similarly computed. This analysis showed that in the third grade in 1968, the Denver average median grade equivalent was 3.6. Of the court-designated elementary schools, their average grade equivalent ranged from 2.7 (Mitchell, 70.9% Negro) to 3.4 (Elmwood, 91.6% Spanish surnamed) and averaged 3.0. In other words, the average performance on this test by children in the schools selected by the court was about 6 months behind the city-wide average.

But both the percentile charts and the grade equivalent charts also show the *range* of performance, and these charts show that third grade children at Mitchell, for example, tested as high as 7th grade 5th month in word study skills, and above the 85th percentile, compared with the national performance, in all eight tests, and at the 99th percentile in three of them. This wide range of individual pupil performance in the court-designated schools was virtually the same as in all other schools in the Denver system.

Another comparison made with these test data by the school district was between expected or predicted achievement test performance based on IQ tests given earlier, and the actual achievement test results. This would give the staff and teachers some measure of how well their pupils were performing on the achievement tests in relation to their abilities as measured by the IQ tests. Generally, all Denver school children performed at or above their expectancies. The reports to teachers and parents, accordingly, could

[51]Thus, 3.6 means third grade, sixth month.

speak positively and encouragingly about the results of the pupils' and teachers' efforts. Where results fell short of expectancies, the report said so."[59]

All of this shows, we submit, that pupils in the court-designated schools achieved not only throughout the entire range of performance, but also in accordance with their capabilities as measured by the IQ tests. This does not show denial of opportunity to achieve on a district wide basis.

Recent intensive studies of the Coleman Report (PX 500) reach the same conclusion. Henry S. Dyer, Vice President of the Educational Testing Service, writing on "The Measurement of Educational Opportunity" in the published papers deriving from the Harvard University Faculty Seminar on the Coleman Report[60] criticizes both inputs and outputs as valid measures of educational opportunity. Dyer regards it as a serious fallacy to assume that "any difference in the results constitutes a measure of the degree to which [schools] are unequal."[61] He points to both dropout rates and achievement test scores as the usual measurements of results, and says of the latter:

> "The tendency is to assume that if on a reading test the 6th-grade pupils in a slum school average X points lower than those in a school in white suburbia, then X is the measure of the difference between the two schools in the effectiveness of reading instruction. The case may be quite the

[59]Petitioners do not quote, at page 49 of their brief, the full comment on the Wyatt School tests, which said, "A comparison of these scores with those of pupils tested in 1953 reveals gains at all levels of ability. Several deficiencies have been corrected, and the general position of the more able and average pupils is much stronger. A need is indicated for continued remedial work in the language area. The faculty should be well pleased with these achievements." (PX 379).

[60]Mosteller and Moynihan, *On Equality of Educational Opportunity*, Vintage Books, New York, 1972.

[61]Id, p. 515.

> opposite: the slum school may be *more* effective than the suburban school in upgrading reading competence, especially in light of the deficiencies it has had to overcome. Thus, the pupils' level of performance as they emerge from any phase of the educational system tells nothing in itself about how well the system is functioning. One needs to know, in addition, what the pupils have *gained* during the time they have been under instruction, how much of the gain may be reasonably attributed to the instruction, and how much to factors beyond the reach of the school." (Id, p. 515)

As an advocate for petitioners' position has put it, "Insofar as the [equal educational opportunity] theory relies in part on educational outcomes, especially to prove that either inequality or harm result from disparate inputs, it is suspect."[55] Here, there was no finding of effectively disparate inputs, and the court was left only with a disparity of outcomes—differences in achievement test scores. On such a suspect basis a constitutional violation should not rest.

Dr. Coleman has also published a most enlightening critique of his earlier publications and frankly states it was not intended to and should not be used as forensic evidence in determining constitutional issues.[56] He says:

> "It's probably not appropriate to say on achievement grounds alone that segregated schooling does not provide equality of educational opportunity. There is not sufficient evidence to show that the kind of benefits to lower-class children that arise

[55]Dimond, op. cit., pp. 13, 14.

[56]Coleman on The Coleman Report, Education Researcher, March, 1972, Vol. 1, No. 3, p. 13, published by American Educational Research Association, Wash. D.C.

from a socio-economically heterogeneous or racially heterogeneous school can't also be provided by other means. I don't think a judge can say there is prima facie evidence of inequality in educational opportunity on achievement grounds if there is school segregation. In this sense, I think judges have looked at that study and used the results more strongly than the results warrant.

"I remain uncertain about the appropriate role of social science evidence or statistical evidence in relation to the courts. The concept of evidence by lawyers or judges is very different from the concept of evidence in social science. When results show that certain kinds of attendance patterns provide higher achievement for children from lower socio-economic levels, as our results did, the results ought to *contribute* to the question of whether schools should be integrated, and to the decision of how much effort should be put into school integration. But I don't think that a judicial decision on whether certain school systems are obeying or disobeying the constitution ought to be based on that evidence."

2. *The conclusion that racial or ethnic concentrations are the principal cause of "inferior" schools is not supported by expert opinion relevant to Denver or by any other competent evidence.*

The only expert on this issue called by petitioners at the trial on the merits was Dr. Dan Dodson, professor of education from New York City.[57] Dr. Dodson admittedly knew nothing of the problems in the Denver schools (A. 1507a) nor of the minority groups in Denver. A. 1506a. He testi-

[57] It was later, at the hearing on the question of remedy, that the court heard the other educational experts.

fied at length as to generalities of achievement as related to race and socio-economic class. The trial judge pressed Dr. Dodson for his "opinion as to causation." A. 1472a. Dr. Dodson answered by saying that a school has a problem of adjusting its programs to minority children, and then drifted off into an abstract account of negative community attitudes and low morale in predominantly minority schools. A. 1473a. He did not directly answer the question until cross-examination, when he finally stated:

> "Q. Now, isn't it also true that in your study you found that race is not causally related to the achievement level in these minority schools? A. That's right." (A. 1508a)

The court also gathered from Dr. Dodson that the "Negro community" typically regards a majority-Negro school as inferior. 313 F.Supp. 81, A.P. 84a. But the professor was not speaking of Denver, where, in an opinion survey conducted for the Special Study Committee in 1963, only 4% of Negro parents believed that minority children have less opportunity for a good education in Denver's schools. PX 20, Appendix 38, Table 2.

The trial court noted that the two study committees had recognized the possibility that racial and ethnic concentrations might be a causative factor, and that the school board had adopted a policy recognizing the desirability of reducing such concentrations. 313 F.Supp. 81, 82, A.P. 85a, 86a. But views and policy goals such as these do not suffice as proof of a proposition upon which educational policy is to be constitutionally mandated by judicial intervention.

The evidence in this case is, in fact, to the contrary. The significant cause of poor achievement test performance, the experts agreed, was socio-economic class, not race. In addition to Dr. Dodson's admission to that effect (A. 1508a),

Dr. James S. Coleman of Johns Hopkins University, author of the celebrated Coleman Report on Equality of Educational Opportunity testified:

> "The Court: Well they say it's the middle class—upper middle class influence that produces most significantly; whether the students are Negro or whatever they are.
> "The Witness: Yes, sir. That's certainly the evidence of our survey." (A. 1535a, 1536a)

And later:

> "Q. And, regardless of the race, if it's a low socio-economic homogeneous neighborhood, you find low achievement? A. Yes.
>
> "Q. And that is true regardless of the racial composition of the school, if it's a low socio-economic area? A. Yes."
>
> "The Court: Well, that's a problem for the legislators or the school board; not for the Court." (A. 1558a)

In short, if inferior schools are not caused by racial or ethnic concentrations, and if, further, as both courts below have held, such concentrations were not caused by the school district, then the court of appeals was surely correct in refusing to find a violation of the equal protection clause of the Fourteenth Amendment.

D. EDUCATIONAL DIFFICULTIES ARISING FROM CIRCUMSTANCES NOT CAUSED BY STATE ACTION ARE NOT WITHIN THE POWER OF FEDERAL COURTS TO RESOLVE. THE REMEDY FOR EDUCATIONAL PROBLEMS AS DISTINCT FROM CONSTITUTIONAL VIOLATIONS MUST BE LEFT TO THE PLENARY POWERS OF SCHOOL AUTHORITIES.

1. Absent a constitutional violation, there is no authority for a court to order a remedy.

The court of appeals held that federal courts are without the power to play a role in correcting educational deficiencies arising from circumstances outside the ambit of state action 445 F.2d 1004, A.P. 144a, 145a. This holding is soundly based not only on the decisions of four circuit courts which have considered cases of racial imbalance not caused by state action (*Downs*, *Deal*, *Barksdale*, and *Bell* supra), but also on this Court's decision in *Swann:*

> ". . . [I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.
>
> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the

broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." (402 U.S. 1, at 16)

2. *The scope of the remedy is limited by the Civil Rights Act of 1964 as to "de facto segregation".*

The district court recognized that it could not, under existing law, remedy self-imposed "segregation" resulting from housing patterns. Nevertheless, it determined that racial imbalance beyond an arbitrary standard set by the court created a denial of equal educational opportunity. The court's remedy for such denial was reduction of the minority pupil population in each affected school to a point below 50%. This necessarily required reassignment of pupils based on race alone. It also necessarily required, given the geography and housing patterns in Denver, extensive busing to accomplish such reassignment.

Thus, the trial court's remedy was contrary to the various Circuit Court holdings previously cited herein that *de facto* segregation or racial imbalance cannot be judicially changed. In adopting such a remedy, the district court imposed its notions of social and educational policy upon a coordinate branch of government. This was a usurpation of the powers properly delegated by the people of Colorado to the defendant Board of Education. It also violated congressional policy as expressed in Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c. This Court, in *Swann*, recognized and commented on this matter as follows:

"The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Four-

> teenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." (401 U.S. 1, at 17, 18)

The Civil Rights Act of 1964 treats school desegregation in detail and ultimately determines that *de facto* or voluntary segregation shall not be treated by the courts. The Act provides that nothing contained therein "shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. 42 U.S.C. §2000c-6(a)(2).

Since the district court admittedly was not remedying *de jure* segregation in this portion of its order, it was in violation of clear Congressional policy.

3. The Denver school district has constantly been searching for better means to improve educational results.

The Special Study Committee had informed the Denver school board, in 1964, that it was a "real possibility" that "concentrations of races and ethnic groups because of housing patterns" "may result in educational inequalities." (PX 20, A. 2003a) The board promptly acted upon the committee's report and adopted, effective May 6, 1964, Policy 5100, which recognized two important principles: (1) that the neighborhood school principle should be adapted in order to reduce concentrations of minority racial and ethnic groups in the schools,[88] and (2) that the educational pro-

[88] "The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentration and the establishment of more heterogeneous or diverse groups in schools is desirable to achieve equality

gram should be tailored to the individual educational needs of the children."[89]

To implement this policy, and in further responding to the committee recommendations, the board also established pupil assignment guidelines which aimed for maximum racial and ethnic heterogeneity consistent with the neighborhood school policy (PX 102), and established the optional pupil transfer plan recommended by the committee (Howard L. Johnson, A. 299a) known as Limited Open Enrollment (LOE).

The 1964 LOE plan, was used mainly and increasingly by Negroes (DX CG, A. 2126a) as a means to transfer to other schools. It was later, in 1968, changed to make it more effective in furthering racial and ethnic heterogeneity in the schools. The improved plan, Voluntary Open Enrollment (VOE), provided for majority-to-minority transfers with transportation provided. The VOE plan was given wide publicity (PX 10, A. 2112a) and was explained in detail to parents (DX J, A. 2156a). By the fall of 1969, in its second semester of operation, nearly 9% of Denver's Negro elementary pupils chose VOE as a means to transfer to a school where they would be in a minority.[90]

The potential of a voluntary transfer plan such as Denver's with its majority-to-minority limitation and with transportation provided should not be underestimated as an effec-

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of educational opportunity. This does not mean the abandonment of the neighborhood school principle, but rather the incorporation of changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees." (PX 1, A. 1989a, 1990a).

[89] "Because individuals differ greatly in their backgrounds, their capacities, and their motivations, equality of educational opportunity must not be conceived as the same opportunity for each person; that is, for example, as schools with the same curriculum, guidance, and instruction." (PX 1, A. 1989a).

[90] DX VA, A. 2160a, last page (51), and PX S-1, A. 2166a, showing 728 of Denver's 8,250 Negro elementary pupils participating.

tive mechanism for reducing racial imbalance while giving due recognition to individual choice and perception of educational need. Denver's plan should not be confused with freedom of choice plans which have been used elsewhere as a device to impede the disestablishment of dual systems.

In addition to the opportunity and encouragement afforded to Negro and Spanish-surnamed pupils to transfer to schools where they would no longer be in a majority, the school district reaffirmed, in Resolution 1562 adopted May 6, 1970 (A. 1709a), its intention to try to find answers to educational difficulties shown by achievement test results. The text of the resolution is set forth as an appendix to the opinion of the court of appeals. 445 F.2d 1010, A.P. 156a-158a.

4. Even if the courts had the power to intervene in solving the educational problems and the competence to prescribe effective educational measures, the remedy urged by petitioners—racial and ethnic balancing—would not meet the tests of either practical effectiveness or recognition of competing values.

Given the district court's theory that racial or ethnic imbalance causes poor schools, the remedy of racial balancing had at least a surface appearance of consistency. But the experts at the hearing on remedy brought the proceedings about on "a new tack." After hearing Dr. Coleman explain that the social class composition of the school, not its racial makeup, was the operative factor, the district judge caught sight of a new explanation for poor academic achievement: "[I]t's not the schools at all, it's the students and their economic and cultural deprivation that makes the educational experience one that is non-competitive." (A. 1546a)

Dr. Coleman's testimony was consistent with the conclusion of the Coleman Report itself:

> "[T]he apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average found among white students." (PX 500, p. 307)

Dr. Neal Sullivan, testifying mainly from his experience as a school administrator[81] felt that each city should develop its own plan. A. 1589a. He described his experience in Berkeley, California, where a racial balancing plan was adopted as a matter of educational policy. But he felt that in a large city like Boston (with 100,000 public school pupils, comparable to Denver?) the solution to school problems would be the construction of large educational parks with massive state financial aid. A. 1565a. He had no knowledge regarding the Denver school system and could offer no prescription tailored for Denver.

Dr. Robert O'Reilly, who likewise knew nothing about Denver, was called by plaintiffs mainly to give his opinion that compensatory educational programs, as tried in various places in the country, were not significantly effective in raising the scholastic achievement of minority children. A. 1928a. He described such programs as merely increasing the educational inputs, and stated that "[t]here is no indication that these [programs] would necessarily work in an integrated setting." A. 1929a, 1930a. He was utterly unable to suggest any educational program to help minority pupil achievement beyond mere racial balancing. A. 1931a-1934a. And the most he could say for racial balancing was that "[I]t can help." A. 1935a.

Both Dr. Sullivan and Dr. O'Reilly agreed with Dr. Cole-

[81] "School administrators typically think what they're doing is great." O'Reilly, A. 1956a.

man that they were talking about socio-economic balancing, not necessarily racial balancing (A. 1599a, A. 1950a), although Dr. O'Reilly (who had never previously studied or visited Denver, A. 1948a), felt, from talking with others, that there was a correlation between race and social class in Denver (A. 1947a), so that racial and socio-economic balance would be the same thing.

In any case, the Coleman Report, as more recently studied, does not support the conclusion that racial or socio-economic balancing would have significant educational effects.[63] Dr. Thomas F. Pettigrew[64] and others, in one of the papers from the Harvard Seminar on the Coleman Report[65] concludes that:

> "Our findings on the school racial composition issue, then, are mixed . . . the initial *Equality of Educational Opportunity* survey overstressed the impact of school social class. . . . When the issue is probed at grade 6, a small independent effect on schools' racial composition appeared, but *its significance for educational policy seems slight.*" (pp. 351, 351) (emphasis added)

With such doubt as to the educational efficacy of racial or ethnic balancing, it seems fair to raise the question of competing social values which are diminished by any mandatory plan of pupil assignment by racial or ethnic classification.

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[63]See Coleman on the Coleman Report, pp. 118, 119, supra. A current analysis of race and achievement describes several studies which cast doubt upon the theory that racial balance will improve achievement of minority students. D. Armor, *The Evidence on Busing*, The Public Interest, No. 28, Summer 1972, p. 90.

[64]The principal author of *Racial Isolation in the Public School*, (PX 27).

[65]"Race and the Outcomes of Schooling," in *On Equality of Educational Opportunity*, supra note 53.

Beyond the obvious values of a neighborhood pupil assignment plan which includes administrative efficiency, safety, and convenience, there is the matter of the associational values and desires of the pupils and their parents.

The district judge expressed doubt that the Hispano[65] community in Denver would accept reassignment of their children outside their neighborhoods. A. 1515a, 1516a. This view is confirmed in an article by Mr. Alan Exelrod, one of the attorneys for Amicus Curiae, Mexican-American Legal Defense and Educational Fund, in which he reports that "in large urban areas, such as . . . Denver . . . there is little desire for integration. The leaders of these 'barrios' resist education policies which undermine community control of schools and retard the enactment of bilingual/bicultural education."[66]

Another value is the one just suggested—preserving or developing a measure of localized control of school affairs. One certain consequence of the remedy as was decreed by the district court is the ever-increasing centralization and enlargement of school administrative units, with corresponding loss of community control and individual self-determination.[67]

Finally, there is the matter of balancing the interests of all concerned. The court of appeals for the 1st Circuit after holding that the Constitution does not require racial balanc-

[65]"Hispano" is used in Denver because most Spanish origin persons there come from rural New Mexico and southern Colorado (PX 20, A. 2002a) rather than from Mexico. Dr. Valdes (Pet. Br., p. 5, n. 1) writes, " 'Chicano' is the diminutive of 'Mejicano', and is, therefore, quite restrictive, and can be used only when referring to Mexicans or Mexican-Americans." (*La Luz*, June, 1972, p. 61).

[66]*Inequality in Education*, Center for Law and Education, Harvard University, August 3, 1971, p. 28.

[67]See, generally, A. Bickel, *The Supreme Court and the Idea of Progress*, (1970), esp. pp. 134, 135.

ing in the absence of state-imposed segregation, observed that:

> "When the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests exclusively than it would be to disregard them completely." *Springfield School Committee v. Barksdale*, 348 F.2d 261, at 264. (1st Cir. 1965)

The problems of modern education are far too complex to yield to simplistic solutions of mathematical racial or ethnic balancing. As plaintiffs' witness, Dr. O'Reilly, said:

> "So, what I'm trying to communicate to you, I guess, is that this is a very unsettled field. There are no hard and fast rules to go on. It's very unlikely that anybody is ever going to come up with a treatment that is going to be generally effective with minority students at all. What has to be done is basically many, many years of experimentation in which we slowly and carefully identify and develop specific programs designed for specific groups, specific minority groups. Because they differ so greatly." (A. 1932a)

The Denver schools will continue to search for ways to improve education for all, while providing maximum choice of school assignment for each pupil consistent with its established policy of maximum feasible racial and ethnic heterogeneity.[40] This process should not be disrupted by the imposition of doubtful policies through judicial intervention without basis in constitutional violation.

The remedy for racial imbalance as adopted by the Denver School Board in May, 1970, and submitted to the district

[40]Resolution 1562, 445 F.2d 1010 A.P. 156a.

court at the hearing on remedies provided for voluntary transfer (VOE) rather than mandatory, with transportation furnished and space guaranteed. This was not a subterfuge as in *Green*, rather it was a bona fide effort by the respondents to meet the suggestions of the district court made at the close of the trial on the merits. It was a proposal by the Board to give each pupil whose race was the majority in his neighborhood school the right to go to any other school where his race would be in the minority.

Even though the pupils in the core city schools were not subjects of state-imposed segregation, such a plan gave each Negro or Hispano student the *right* to transfer to a predominantly Anglo school, thus meeting all constitutional criteria guaranteed by the equal protection clause. With transportation furnished and space guaranteed, every element of equal protection was present in fact as well as in theory.[40]

In contrast to the petitioners' experts who admittedly knew nothing about the Denver school system and could offer no plans tailored to the Denver problems, substantial expert testimony was received from members of the administrative staff of the Denver public schools. These men knew the city, the schools, the faculties, the available resources and allocation thereof and had worked closely with the Board of Education and the two study committees.

It would be beyond the scope of judicial power and certainly beyond anything that this Court has done heretofore to accept the general non-specific opinions of the petitioners' experts and make them "the law of the land" under the guise of enlarging the scope of *Brown I*. Decreeing racial and ethnic balancing as a constitutionally-required remedy

[40]See *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950): "There is a vast difference — a Constitutional difference — between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar.

for equalizing educational outcomes in all the schools throughout the Nation would be unsound not only as a matter of educational fact, but also as a matter of constitutional law.

CONCLUSION

Respondents pray that this Court order as follows:

1. That the judgment of the court of appeals reversing that part of the district court judgment pertaining to the core-city or court-designated schools be affirmed.

2. That the Court grant the conditional cross-petition for certiorari in Case No. 71-572; and that the judgment of the court of appeals affirming the judgment of the district court in all other respects be reversed.

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In the Supreme Court
OF THE
United States

October Term, 1971

No. 71-507

Wilfred Keyes, et al.,
Petitioners,
(Plaintiffs below),

vs.

School District No. 1, Denver,
Colorado, et al.,
Respondents,
(Defendants below).

BRIEF AMICI CURIAE

On behalf of Robert G. Nelson, Gustav F. Fehlhaber, Patricia Chin, Alfretta Hankins, Mitsuo Murakami, Rose Noe, Marcel G. Ross, Charles Stringer II, Carlos H. Barbano, Adam P. Y. Gee, Frank G. Mastro and Mary D. Garcia in Support of the Position of Respondents

This brief is filed with the written consent of all the parties, pursuant to Rule 42 of the Rules of the Supreme Court of the United States. It is in support of the posi-

tion of the respondents, Denver School District No. 1 et al., that the Denver School District has not discriminated racially among the pupils it serves and should not now be required to do so.

INTEREST OF AMICI CURIAE

Amici curiae are San Franciscans who are, as intervenors, parties in the San Francisco elementary school desegregation case pending before the Court of Appeals for the Ninth Circuit: *David Johnson, et al. v. San Francisco Unified School District, et al.*, Nos. 71-1878, 71-2189; *San Francisco Unified School District, et al., Robert G. Nelson, et al. v. David Johnson, et al.*, Nos. 71-1877, 71-2163; *Guey Heung Lee, et al. v. David Johnson, et al.*, No. 71-2105. On March 1, 1972, the Ninth Circuit set aside the submission of the San Francisco case, stating in its order that the San Francisco case would be set for reargument only after this Court's decision in the case at bar. The Ninth Circuit thus recognized that the case at bar is likely to bear upon the future pupil assignment policy of the San Francisco Unified School District, as it will upon the future pupil assignment policy of Denver School District No. 1.[1]

Robert G. Nelson, Gustav F. Fehlhaber, Patricia Chin, Alfretta Hankins, Mitsuo Murakami, Rose Noe, Marcel G. Ross, Charles Stringer II, Carlos H. Burbano, Adam

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[1]There is also pending before the Ninth Circuit an appeal by the Oxnard School District (California) from a summary judgment that a neighborhood school policy which does not improve racial balance violates a school district's constitutional duty to balance its schools racially (No. 71-2929); *Soria v. Oxnard School District Board of Trustees* (D.C. C.D.Cal. 1971) 328 F. Supp. 155.

P. Y. Gee, Frank G. Mastro and Mary D. Garcia include persons in each of the four major racial classifications presently used by the San Francisco Unified School District: Spanish speaking/Spanish surname; Negro/Black; Other White; and Asian.[2]

Robert G. Nelson, et al., are filing this brief because of their particular concern for San Francisco's public schools. Robert G. Nelson, et al., are also filing this brief because due process of law to the person—which the Fourteenth Amendment is supposed to protect—cannot be afforded solely by class actions in which the plaintiff class is racially defined (see, e.g., A. 1015-1016; 1515a-1516a). The assumption that one or more members of a racially defined group can be taken as representative of an entire racially defined group was reasonable when this Court was asked in *Brown v. Board of Education* (1954) 347 U.S. 483 to forbid exclusion by race created by mistaken belief in the objective reality, definability and relevance of racial groups. It is not reasonable when this Court is asked, even beyond the context of a remedial decree, to require that a school district act as though such beliefs are not mistaken.

We believe it will be helpful to this Court in fashioning a decision which must have nation-wide application to consider the effect upon another Western urban multiracial school district of the adoption of the theories which

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[2]San Francisco uses nine "racial" classifications: Spanish speaking and/or Spanish surname; Other White; Negro/Black; Chinese; Japanese; Korean; American Indian; Filipino; Other Non-White. Because of the total uncertainty of the meaning of "Other Non-White" at its core as well as at its parameters, we do not know whether amici curiae include anyone in this classification or not.

the plaintiffs put forth in the case at bar. San Francisco, like Denver, for many years followed a neighborhood school policy. Pupils were included in an elementary school population on the basis of the proximity of their residence to the school. That policy remained substantially unchanged irrespective of the substantial growth proportionately over the years of San Francisco's Negro population and the more recent substantial growth of San Francisco's Chinese and Filipino populations. No pupil was excluded from a school on account of his race. In 1970, only one out of over a hundred San Francisco elementary schools was without a Negro pupil. In that school more pupils than not were of Chinese ancestry. No schools were without Caucasian pupils.

For several years, claimed "de facto segregation" of Negro pupils has been a matter of political controversy in San Francisco. The school case is not the first litigation resulting from the attractions afforded by multi-ethnic San Francisco to a migrating Negro population. Most of the San Francisco elementary schools which in 1971 the United States District Court found to be "identifiably black" (meaning in this instance 47.3 per cent or more "black") drew their pupils from public housing projects in which, on Federal constitutional grounds, the San Francisco Housing Authority was properly forbidden to impose racial quotas approximating the then proportion in San Francisco of "poor" whites and "poor" Negroes which these public housing projects were built to serve (*Banks v. Housing Authority of the City and County of San Francisco* (1953) 120 Cal.App.2d 1, certiorari denied (1954) 347 U.S. 974; see also *Progress Development Corp.*

v. Mitchell (D.C. N.D. Ill. E.D. 1960) 182 F.Supp. 681; *Cooney v. Katzen* (1963) 41 Misc. 236, 245 N.Y. Supp. 2d 548; *Taylor v. Leonard* (1954) 30 N.J. Super. 116, 103 A.2d 632).

In September, 1971, by order of the United States District Court, San Francisco reassigned by race many of its elementary school teachers and its entire elementary school population, about forty-seven thousand pupils from the kindergarten through the sixth grade. Over twenty-five thousand pupils were scheduled by the school district's computer to be bused. Neither the school district's plan nor the District Court's decree included any provision for notice to the pupil of his racial classification, nor any limitation upon the subsequent use by the school district of the pupil racial classifications memorialized in its computer system (cf. Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer* (1971) 49 Texas L.Rev. 837, 847).

San Francisco was given only six weeks to prepare a plan and nine weeks to implement it. The city was divided into seven new attendance zones. By design, racial quotas were to differ from the schools in one zone to the schools in another by as much as thirty per cent of the total number of elementary pupils in the school district. The district-wide percentage of Negro elementary pupils was assumed to be 28.7 per cent.[3] The projected assignments of Negro pupils ranged from 13.9 per cent in one zone to 37.1 per cent in another. In addition to wide variations

[3]The district-wide percentage of "Negro/Black" elementary pupils has recently been reported by the San Francisco Unified School District to be 32.2 per cent as of November 12, 1971.

in racial quotas, the class sizes and special services projected varied substantially from the schools in one zone to those in another. These disparities raised the issues in *Wright v. Council of City of Emporia* (1972) ___ S.Ct. ___; *United States v. Scotland Neck City Board of Education* (1972) ___ S.Ct. ___; *Serrano v. Priest* (1971) 5 Cal.3d 584; and (to the extent it embraced the same issues as *Serrano*) *Plessy v. Ferguson* (1896) 163 U.S. 537. These issues are before the Ninth Circuit in the appeals in the San Francisco case. Before the District Court and on appeal, Robert G. Nelson, et al., supported the only remedy proffered which was consistent with this Court's remedies decisions, the pupil reassignment plan proposed by the NAACP modified only to exclude the many elementary schools which the District Court found to be "integrated."

Except for the possible self-executing application of Title VIII, Section 803, of the *Education Amendments of 1972*, the District Court's order remains in effect in San Francisco. Motions by the school district and by Robert G. Nelson et al., for a stay were denied on July 7, 1971, and on August 10, 1971. Motions for a stay, or in the alternative for temporary modification of the order to perpetuate the status quo and thereby free those elementary pupils who remain in the system from the threat of reassignment to rebalance San Francisco's schools again in September, 1972, were denied in March, 1972.

PRELIMINARY STATEMENT

In *Wright v. Council of City of Emporia* (1972) ____ S.Ct. ____, *United States v. Scotland Neck City Board of Education* (1972) ____ S.Ct.____, *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, and *Green v. County School Board of New Kent County* (1968) 391 U.S. 430, this Court carefully preserved the distinction between rights and remedies in the school desegregation cases. This Court thereby preserved an aura of impermanence to the racial quotas associated with the administration of the remedies which this Court has allowed. Rights and remedies cannot be neatly packaged for separate impact upon children. To some, therefore, a universal right is inferred from remedies to date unlimited.

With an eye upon the remedy it appears that the harm to which *Brown* was addressed was racial imbalance, for a remedy may reasonably be presumed to be related directly to the harm to be offset. With an eye upon the absence of any period of limitations upon liability for wrongdoing, it appears that wrongdoing has become irrelevant, for one may not conclude lightly that the medieval doctrine of attaint of the blood has come back into fashion. "Segregation" has in this manner become synonymous with "racial imbalance." To some there appears to be no difference between segregation resulting from laws or from racially discriminatory acts by public officials, and racial imbalance resulting from demographic patterns and the choice of persons planning their lives within racially neutral governmental policy. Since racially neutral governmental policy sometimes does not provide racial balance, it follows that a racially neu-

tral policy must in all circumstances give way. A desire for symmetry among school districts has become a substitute for reasoned policy. A desire for educational reform has become an excuse for contradictory demands upon local school districts (A. 1595a). Whether or not a school district's pupil assignment policies exclude pupils by race, it becomes "unconstitutional" for a school district to be color blind. We are thus brought full circle. We are brought, for "benign" purposes, to the very place we were prior to the decisions in *Brown v. Board of Education* (1954) 347 U.S. 483 and *Brown v. Board of Education* (1955) 349 U.S. 294. We are brought to that place at a time of clamor from all directions for reform of the institution of public education.

The case at bar will tell whether a "* * * nonracial system of public education * * * is the ultimate end to be brought about * * *"[4] or whether means have redefined the end. The case at bar will also tell whether the Constitution will allow educational reform to include reasonable local resolution of questions of educational policy. Against a school board's legislative decisions not based upon race, plaintiffs propose that to achieve educational reform they should have been. Plaintiffs in effect propose that to achieve educational reform this Court require pupil assignment by race in every public school in the nation. Such a rule, irrespective of its purpose, would undermine the chief principle upon which court-ordered desegregation must rest, constitutionally, morally, and pragmatically: one may not because of his race be

[4] *Green v. County School Board of New Kent County* (1968) 391 U.S. 430, 436.

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treated differently than another by law or by public officials. Such a rule seeks to foreclose natural racial and ethnic diversity among public schools.

The Constitution allows no such rule. Sensibly, it assigns to all arms of government limited powers. It assigns to legislative bodies controversies not justiciable. It assigns to Federal government enumerated powers. It assigns to this Court the role of arbiter, between the person and government whatever its branch, and among the branches of government whether state or Federal. The case at bar, accordingly, requires not alone that this Court weigh the right of the person that government as well as others treat him as a person and not as a fungible member of an arbitrarily defined group. It requires also that this Court weigh the claims of local school districts that they can best determine whether or in what manner the assignment of pupils by race to improve racial balance will further or impede the education of the individuals committed by law to their charge.

The issue, then, in the case at bar is whether all school districts must assign their pupils to schools by race for the purpose of balancing schools and classrooms racially. It will be soon enough if such a case is presented to decide whether or in what circumstances a school district may do so if it chooses.

SUMMARY OF ARGUMENT

"* * * [I]n what is called a free society all are equal as citizens without proof. Therefore, once a people chooses a free constitution and recognizes it as the

law of the land, there is nothing to prove or disprove about races as such, there is no issue to debate except the honest administration of the law" (Barzun, *Race: A Study In Superstition* (Harper & Row, N.Y., 1937 and 1965), Pref. to 2d Ed. at p. xii).

The plenary authority of school districts which do not distinguish among their pupils by race affords a road to racial integration more likely to consolidate the success already gained than that afforded by extending court-ordered racial quotas throughout the nation. School districts which have consistently pursued even-handed pupil assignment policies, school districts which have in doing so included Negro pupils in seventy-eight out of ninety-two elementary schools (Denver—A. 2038a) and in ninety-nine out of one hundred elementary schools (San Francisco), and school districts which have achieved substantial numbers of stable racially integrated elementary schools should not now be told that the Constitution requires that they orient racially all pupil assignment decisions.

The duty of a school district is to provide the best educational services it can to children within the district without discrimination against any child because of his race. That duty has been fulfilled by the Denver School District both in its "core area" schools and in its four so-called "resolution schools." The only "harm" which the Denver School District has done in either instance is to treat all pupils alike, irrespective of their race. The Denver School District and all others who pursue reasonable methods of pupil assignment which do not distinguish among pupils by race should be allowed to resolve for

themselves competing considerations of educational policy. The governing board of the Denver School District is best able to weigh for Denver the competing policy considerations which must bear upon legislative decisions.

To impose upon a school district a constitutional duty to balance its schools racially would impose upon all school districts a duty to classify pupils racially for the purpose of school and classroom assignment irrespective of its effect upon educational opportunity. To impose such a duty upon school districts would serve to undermine the power of local school boards in a manner which would weaken further the accountability of the other elements of the public school system to local governing boards and to those they serve. Moreover, such use by school districts of racial classifications would require that some school districts violate the Fourteenth Amendment, for such use of racial classifications may violate both due process and equal protection of the law. A racial quota is no less a racial quota by virtue of calling it something else, by allowing one quota one place and a different one elsewhere, or by changing it annually.

At best, the use of racial classification to assign pupils is required only by virtue of interim decisions of this Court, adopted as judicially supervised "equitable remedies" for deliberate exclusion of Negro pupils by the state or the school district. It should be required in no other circumstances without proof of (a) the definability of the group sought to be established or maintained as a legally cognizable "racial" group; (b) the fungibility of the members of the group as subjects of discrimination; and (c) the utility of the racial classification as a cor-

rective measure. That proof must be sufficient to overcome the presumption that racial classification is arbitrary and capricious, and is not the sort of classification which will further any reasonable legislative purpose. No such proof appears in the case at bar.

ARGUMENT

I. A STATE AGENCY'S FORBEARANCE IN THE ADOPTION OF A QUESTIONABLE EDUCATIONAL THEORY AS A BASIS FOR PUPIL ASSIGNMENT DOES NOT CONFER FEDERAL JURISDICTION. THE MISSION AND STRUCTURE OF PUBLIC SCHOOLS THROUGHOUT THE UNITED STATES SHOULD NOT BE RESOLVED BY A FOOTRACE TO THE FEDERAL COURTHOUSE.

The central question at the outset and at the end is whether it is the responsibility of the Denver School District to balance Denver's schools racially. The plaintiffs' argument that the Denver School District has, by allowing minority-dominated schools to exist, denied to plaintiffs equal protection of the law assumes that a school district has a constitutional duty to balance its schools racially. It thereby begs the question. School districts faced with conflicting demands—demands often racially oriented and often pressed by contentious and conflicting factions within a single racially defined group (cf. A. 945A)—cannot reasonably be presumed to be motivated by invidious racial discrimination because they adhere to even-handed policies. Obviously, "no State may effectively abdicate its [constitutional] responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be" (*Burton v. Wilmington Parking Authority* (1961)

365 U.S. 715, 725; Pl.Br., p. 114). But school boards which sense some complexity in educational issues, school boards required to resolve not only competing policy considerations but conflicting demands, cannot reasonably be charged with malignant neglect of duty merely because they can seldom satisfy everyone and can never satisfy some.

School districts are not like the Alabama police officer who "would not lift a finger" to protect freedom riders (*United States v. U.S. Klans, Knights of Ku Klux Klan, Inc.* (D.C.M.D.Ala. N.D. 1961) 194 F.Supp. 897, 901). The responsibility of states to maintain order is plain. The governance of a school district is seldom as simple as police protection against organized violence is at least assumed to be. We would likely discover that affording police protection is no simple matter either if we were to start with the conclusion that New York's finest are uniformly inferior to the village constable by virtue of notably different crime rates with which each must contend. That is in effect the approach which plaintiffs take to public education in general and to Denver's schools in particular. From the existence of racial imbalance, plaintiffs conclude that Denver's educational policies and decisions have been racially discriminatory, irrespective of all evidence to the contrary. From the existence of "unequal" educational "outcomes" measured by arbitrarily defined groups, plaintiffs conclude that they are being denied an "equal educational opportunity."

A. "Equal educational opportunity" is a slogan which means different things to different people.

Every person is entitled to equal protection of the law. In education, this principle has been translated into a demand for "equal educational opportunity." "Equal educational opportunity" relates to a process taking place in school buildings. Beyond that, there is little consensus (see Gordon, *Toward Defining Equality of Educational Opportunity*, pp. 423, 427 et seq. in Mosteller and Moynihan, *On Equality of Educational Opportunity* (Vintage Books, N.Y., 1972); see also Silberman, *Crisis in the Classroom* (Random House, N.Y., 1970) passim). The classical notion of the mid-nineteenth century, with which the first compulsory education laws were introduced, was that the state is obliged through its educational system to "restrain the inherent savagery of children," and to mold a character acceptable to that part of the adult world able politically to establish community standards (Katz, M., *The Irony of Early School Reform* (Harv. Univ. Press, 1968) pp. 117, et seq.). The modern notion was that the state should provide a school building and incidental supplies with teachers equipped to impart literary and mathematical skills which the pupil might or might not learn (see Dewey, *Intelligence in the Modern World* (Mod. Lib., N.Y., 1939) pp. 683-687). Although a shift in emphasis from the school to the child during the modern period resulted in changes in teaching method, the object remained to maximize individual potential (see Cremin, *The Transformation of the School* (Alfred A. Knopf, N.Y., 1961) pp. 104, 201-202). Everyone had an "opportunity" to learn. If the hardware was equal, the opportunity was equal. No one was surprised that out-

comes were different because it has long been believed that people have different talents, aptitudes and interests.

This unsophisticated modern notion of "equal educational opportunity" was largely eclipsed by the publication in 1966 of an expensive study commissioned by Congress: Coleman, *Equality of Educational Opportunity*, U.S. Dept. of Health, Educ. & Welfare, U.S. Gov't. Printing Office, 1966.[5] The Civil Rights Act of 1964 directed the U.S. Office of Education to make a survey and report "concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion or national origin in public educational institutions * * *." A lack assumed is a lack predictably found. But the lack found was not the sort expected (Mosteller and Moynihan, *On Equality of Educational Opportunity* (Vintage Books, N.Y., 1972) pp. 8-12; 117-119). Prior to the Coleman Report, it was believed that schools which Negro children attended would prove to have inferior facilities. Coleman found this not to be the case (Mosteller, op. cit. supra, pp. 8-12). Further, the range of performance within each school was greater than school-to-school variations, at all grade levels, for all racial and ethnic groups (Coleman Report, p. 296; cf. A. 626a). From Coleman's findings, one could reasonably conclude that no one was being shortchanged by the nation's public school system, at least within large geographic regions, and that everyone was being afforded an opportunity to maximize whatever academic potential he brought to school with him (see Mosteller, op. cit. supra, pp. 11-12).

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[5]We shall throughout this brief refer to this publication by its common name, the Coleman Report.

The Coleman Report, however, furnished a toehold for redefining "equal educational opportunity" (see Moynihan, *Sources of Resistance to the Coleman Report*, in *Equality of Educational Opportunity* (Harv. Univ. Press, 1969) p. 25 et seq.). In the school districts studied (which did not include Denver—A. 1561a-1562a) a statistical disparity was found between the median test scores of Negro pupils and the median test scores of white pupils (Coleman Report, pp. 20-21). Since the samples of Negroes studied did not perform as well on the average as the samples of whites on the particular standardized tests provided, an educational lack was assumed to be the cause. "Equal educational opportunity" could now be redefined as educational "outcomes" by racially defined groups. Disparity in the median achievement levels of Negroes and whites on public school achievement tests could now be used to establish group "inequality," contrary to the direction of the Civil Rights Act of 1964 and contrary to the requirements of the Fourteenth Amendment.

B. If "inequality" is to be defined as statistical disparity in the median achievement levels of arbitrarily defined groups, there is no clear way to achieve "equality."

The implication for sensible policy of the Coleman Report redefinition of equal educational opportunity is not at all clear. Perhaps the solution lies in giving new standardized tests to demonstrate group equality. See Mayer, *The Schools* (Harper & Bros., N.Y., 1961) at page 112 for an account of the construction of tests in Rockford, Illinois, which would ensure that middle-class children will *not* do better than lower-class children. Perhaps, on the other hand, Dr. Coleman's standardized tests

are themselves to become required by the Constitution so that the "inequality" of slum children may be preserved.

"There are two ways * * * of looking at the [Coleman Report] and its aftermath. It can, in effect, be judged a worthy enterprise but so flawed in its execution as to be of no real use. . . . This is the view of Henry M. Levin . . . : 'For a piece of large-scale research, there are big portions of data that are worthwhile and salvageable. But there is absolutely nothing in the report to support policy decisions. Its social value is zero.' An alternative view would hold that some findings . . . offer policy makers important information in some areas and point to new questions requiring investigation in others" (Mosteller, op. cit. supra, at pp. 43, 44).

"One of the principal weaknesses of the Coleman Report is that it failed to put sufficient emphasis on the fact that its findings, being based only on cross-sectional data, could be regarded as no more than highly tentative hypotheses and therefore highly inadequate grounds for any firm decisions about the future direction that American education ought to take" (Mosteller, op. cit. supra, pp. 405-06). The central problem in the use of the Coleman Report for policy decisions is that Coleman collected statistics only over a brief period. Dr. Coleman was careful to point out in his testimony in this case that his findings at best described only static, existing, correlations (A. 1542a). To consider all of Coleman's correlations as causation factors would result in bizarre, if not unconstitutional, effects. Cafeterias, for example, have a negative correlation with achievement scores. The more there are the worse pupils do (Coleman Report, pp. 9-12). Yet, presumably, no one

would argue that taking cafeterias out of predominantly Negro schools would improve the educational opportunity of Negro pupils.

1. "The smart will teach the dumb."

The District Court below concluded that "it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students" (App. to Pet. for certiorari, 113a). Perhaps reflecting his earlier preoccupation with peer-group relationships (Coleman, *The Adolescent Society* (Free Press of Glencoe, N.Y., 1961)), Dr. Coleman testified below that "what was the most related to the performance were the characteristics of other students" (A. 1532a). "What that means in effect is that, if the inference is correct, is that a child from a linguistically impoverished background will be most affected by a school situation which has a—which is more linguistic, particularly the rich or different educated environment" (A. 1543a). The middle-class was credited universally with "a majority effect" (A. 1535a), and the mechanism was that of necessity: "I have often used the analogy of an English-speaking child attending a school in which all the children spoke French. • • • [H]e would very quickly come to learn French; not through anything other than the fact of being confronted every minute of the day with the necessity for communicating with those students" (A. 1555a). This theory has obvious limitations in situations and in school districts in which the middle-class does not predominate. Dr. Sullivan had a different picture of the hoped-for improvement in achievement: "But when [the Negro child] came home from the white school and when

he was going back the next day to compete with whitey he started to do his homework * * * (A. 1571a). Another view is embodied in the work of Irwin Katz, who found that Negroes perform best in interracial situations free of social and failure threat, moderately well in all-Negro situations, and worst in interracial situations characterized by social and failure threat (Katz, I., *Review of Evidence Relating to Effects of Desegregation on the Intellectual Performance of Negroes* (1964) 19 Amer. Psychologist 391).

No one presently knows whether the statistically significant median Negro "pupil" will act like the cooperative model projected by Dr. Coleman, the racially-hostile model projected by Dr. Sullivan or the more varied model projected by Dr. Katz. No one, therefore, knows whether or in what circumstances the model will raise or lower his achievement score so as to reduce or exacerbate "inequality of educational opportunity" as redefined by Coleman. By virtue of its single-shot nature, the Coleman Report does not even offer much of a clue. The indications from one study of two hundred sixty-six children are that modest gains in I.Q. scores took place in grades one through four when children were bused from slum schools into suburban schools, *with not more than three bused children* placed in the suburban classroom (see report on Hartford, Conn., Project Concern in Mosteller, op. cit. supra, pp. 408-409). One study of one thousand four hundred ninth graders in Pittsburgh suggests that "desegregation" appears to elevate achievement and lower educational aspirations. One explanation for this result is that majority-white schools discourage high educational aspirations among Negro pupils (Mosteller, op. cit. supra,

pp. 363-364; see also DuBois, *The Autobiography of W.E.B. DuBois* (Int'l. Publishers, N.Y., 1968) pp. 101, 230-231, and Pl.Br., at pp. 33-34). Another explanation, put forward by Irwin Katz, is that integration benefits learning among Negro children by "lowering their aspirations to more effective and realistic levels" (Mosteller, op. cit. supra, p. 364).

A recent article by David J. Armor describes several studies which cast further doubt upon the speculation that racial balance will improve the achievement of Negro pupils. The studies described by Armor were, moreover, "longitudinal" studies. Unlike the Coleman Report, they compared groups of pupils over a span of time (Armor, *The Evidence on Busing* (1972) 28 The Public Interest 90).

In trying to project from static to dynamic situations, the road is seldom plain. Coleman's major speculation was that "attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff" (Coleman Report, p. 302). The table upon which this speculation is based shows an exception: At grade 6, white Northern children show a greater percentage variance in verbal achievement accounted for by student body quality than do Northern Negroes, an exception to the balance of the table (Ibid. p. 303). This exception clouds Coleman's speculation that "minority" children are more affected than others by the attributes of their classmates. It would, however, if race were pertinent and Coleman's methodology were sound, establish that the presence of Northern Negro classmates

sometimes affects adversely the achievement of Northern white children, whereas the presence of white classmates seldom benefits Northern Negro children. For a painstaking review of the possible results and theoretical underpinnings of desegregation strategy, see Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis* (1972) 60 Cal.L.Rev. 275, 408-435.

Projection from static correlations to dynamic situations is not the only weakness in the use of the Coleman Report for policy decisions. Coleman did not correlate his test performance data with predominantly white or predominantly black schools. David J. Armor reanalyzed the Coleman data by breaking Coleman's samples into predominantly black and predominantly white schools. Armor found that according to Coleman's data the average white in a predominantly white school consistently had a higher average verbal achievement score than the average black in the same school, and that the average black in predominantly black schools had an average verbal achievement score higher than the average white in those schools (Mosteller, op. sit. supra, pp. 197, 198, 229). Could it be that most Negroes, like anyone else, are most comfortable, secure and able to achieve well in situations in which they are in the majority? See Bettelheim and Janowitz, *Social Change and Prejudice* (Free Press of Glencoe, N.Y., (1964) p. 87.

The Coleman Report, as well as Dr. Coleman's testimony below, generalized from the measurement of populations. Neither a mean nor a median achievement level demonstrates much about the academic performance

within the populations compared.[6] Comparison of the median of almost any population classification with another will show a disparate result. In 1904, Max Weber postulated that the Protestant ethos had a great influence on the development of Western civilization (Weber, *Die Prostestantiche Ethik und der Geist des Kapitalismus,* 20 Arch. Sozialwiss u. Sozialpolitik 1-54 (1904); 21 Arch. Sozialwiss u. Sozialpolitik 1-110 (1905); see also Tawney, *Religion and the Rise of Capitalism* (Harcourt, Brace & Co., N.Y. 1926)). Efforts to substantiate this thesis continue to the present day, with the current results being that Jewish males possess a high achievement motivation at all socio-economic levels, Catholics the next highest achievement motivation and Protestants the least (see Heckhausen, *The Anatomy of Achievement Motivation* (Academic Press, N.Y., 1967) pp. 31, 160-161). The Civil Rights Act of 1964 mentioned religion as well as race. It is fortunate that Dr. Coleman disregarded both the current research into the effect of religious affiliation and the language of the Civil Rights Act of 1964 and did not classify his samples by religious affiliation.

Dr. Coleman's invidious statistical comparison of one racially defined group with another is highly suspect. It is firmly in the tradition of the measurement of personal traits for the purpose of justifying racial classifications. In 1764, for example, Daubenton was measuring in degrees the position of the head on the top of the spinal column and correlating the measure of that angle with the

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[6]Coleman sometimes used "mean," sometimes "median" and sometimes "average."

"amount of will power" in the several races (Barzun, op. cit. supra, at p. 35). Studies comparing the intelligence, temperament, biological "strength" and "morality" of the several races continue to the present day (see Simpson and Yinger, *Racial and Cultural Minorities* (3rd ed.) (Harper & Row, N.Y., 1965) pp. 45-47). Even if a disparate median level of achievement on standardized tests were a sufficient basis for constitutional principle, it has not even been demonstrated that the median level of achievement at predominantly "Negro" schools is uniformly lower than in predominantly "white" schools. School children in North Dakota, which has a predominantly white population, score well below national norms (Silberman, *Crisis in the Classroom* (Random House, N.Y., 1970) p. 285). At least six predominantly "Anglo" schools in Denver (College View, 74.0 per cent Anglo; Columbian, 66.6 per cent Anglo; Barnum, 69.9 per cent Anglo; Belmont, 71.9 per cent Anglo; Thatcher, 81.1 per cent Anglo; and Sherman, 76.7 per cent Anglo) scored lower in fifth grade achievement than Hallett (84.4 per cent Negro) (Pl.Exh. 106, A. 2042a). Dr. Coleman's invidious statistical comparison becomes even more suspect when one considers that forty per cent of Negro middle-class high school age children attend private schools whereas only thirteen per cent of white middle-class high school age children attend private schools (Mosteller, op. cit. supra, p. 65, fn. 25).

2 "The rich will teach the poor."

Dr. Coleman himself opines that disparity of outcome is the result not of race but of the disparity of social class backgrounds children bring to school. His specula-

tion that racial balance will improve Negro achievement is founded upon a congruence between "class" and "race" (A. 1534a). This Court recognized in *James v. Valtierra* (1971) 402 U.S. 137, that there is no congruence between "class" and "race" (cf. *Jefferson v. Hackney* (1972) 92 S. Ct. 1724).

The experts who testified below were not offered as experts in race relations, in general demography, or in the demographic patterns of Denver. Dr. Coleman described himself as a sociologist (A. 1516a). Dr. Sullivan described himself as the Secretary of the Massachusetts State Board of Education (A. 1563a). Dr. O'Reilly described himself as an educational psychologist and Chief of the Bureau of School and Cultural Research of the New York State Education Department (A. 1910a-1911a). Evidently, Drs. Coleman and O'Reilly are experts in administering psychological tests and Dr. Sullivan is an expert in administering schools. These witnesses nonetheless testified as to conclusions not only regarding Denver population patterns but as to all cities. They concluded—upon what evidence it is difficult to imagine—that every neighborhood in every city is homogeneous both as to "class" and "race" (A. 1551a, 1950a, 1947a, 1593a-1594a). Dr. Coleman further concluded that neighborhoods are always congruent with school attendance zones (A. 1559a).

These same experts are aware that some Negroes and some "Hispanos" are middle-class (O'Reilly, A. 1952a; Sullivan, A. 1594a; Coleman, A. 1532a-1536). Either a given racial and ethnic group is all one "class" or not every neighborhood is homogeneous as to "class" and

"race." Logic cannot have it both ways. Without benefit of the flagrantly inconsistent conclusionary testimony of two psychologists and one school administrator, common knowledge suggests that both conclusions are wrong. City neighborhoods are seldom homogeneous; and "class" is not congruent with "race." State Senator George L. Brown, Jr., testifying for the plaintiffs, was aware that a middle-class black community exists in Denver (A. 892a), as it does in most if not all cities.

The record in the case at bar affords no better basis for overturning the legislative decisions of a school board than is offered by the hodge-podge of sociology, educational theory, and definition of races upon which second-guessing Denver's school board was based. The "equal educational opportunity" argument is at best an effort to incorporate into the Constitution the preference of some of today's school administrators for heterogeneous ability grouping by mistakenly using racial classification for the purpose. Even if the theory of heterogeneous ability grouping is correct, low achievement will not be improved by racial balance, for race and academic achievement are not congruent. Low achievement will not be improved no matter how "race" is defined if the achievement models remain constant. If one sinks promptly to the bottom of the swimming pool with others in one swimming class, one will be no more encouraged about learning to swim than if one sinks promptly to the bottom of the pool with others in a different swimming class.

The theory of heterogeneous ability grouping may, of course, be incorrect. That theory, conveniently revived contemporaneously with the Coleman Report, does not

account for the child who floats when all around him are sinking. Nor does it account for the low achieving pupil in a high achieving classroom. Educational theory is in a constant state of ferment and today's imperative is tomorrow's cause for reform (cf. Cremin, op.cit. supra, pp. 23-57 for the checkered career of the manual training high school; and compare ibid., at p. 297-299 for the evolution of individualized instruction into the "tracking" system with Pl.Br., pp. 80-81 and 95). Heterogeneous ability grouping is now considered by some to be educationally desirable, and academic "tracking" condemned (see *Hobson v. Hansen* (D.C.D.C. 1967) 269 F. Supp. 401, 492). At the same time, the Procrustes' bed approach to racial and ethnic differences has been replaced by demands for black studies and ethnic separation for at least a part of the school day.

3. "The black will teach the white."

There are some who argue that there is a sufficient overlap between class and race that improvement in Negro reading scores *might* result from balancing schools racially, and another objective would be furthered. More children of different races would get to know each other and thereby shed their prejudices (contra Armor, *The Evidence on Busing* (1972) 28 The Public Interest 90, 120-122, Figures 7-10).

The goal is laudable. In setting policy, however, one must consider not only the desirability of the goal but how best to achieve it. The mechanisms by which prejudice may be ameliorated are not well known (see Glazer, *Is Busing Necessary*, Commentary, March, 1972, p. 39,

reprinted in Cong. Record, March 13, 1972, S-3855; see also Simpson and Yinger, *Racial and Cultural Minorities* (3rd ed.) (Harper & Row, N.Y., 1965) pp. 503-521). Allport reports a study of one hundred white boys who lived twenty-eight days in a bi-racial camp. He found that at the end of this experience twenty-five per cent "showed a marked lessening of prejudice during the period of camping, but about the same number showed a marked increase in prejudice" (Allport, *The Nature of Prejudice* (Beacon Press, Boston 1954) p. 280, and see pp. 395-457 on the characteristics of the prejudiced personality). Until we know much more about each set of boys, there is no way of knowing even as a matter of reasonable probability whether particular strategies add to or subtract from the sum total of racial prejudice. The circumstances in which the members of racially defined groups meet, as well as personal background and individual personality, appear to be material. In addition to sociocultural factors (Ibid., pp. 218-339) and personality factors (Ibid., pp. 395-457) that might contribute to fostering attitudes of prejudice, Allport described contact effects: Casual contacts and contacts where the group traditionally discriminated against is of lower status tend to reinforce negative stereotypes (Ibid., pp. 264, 276). Equal status contacts and those in which the member of the class discriminated against has higher status tend to lessen prejudice (Ibid., p. 276). There are, accordingly, those who recommend that if the object is to mitigate racial hostility, we should make sure that schools are balanced racially only within the same social class. (see National Academy of Sciences, *Freedom of Choice in Housing, Opportunities and Constraints,* Advisory Committee to H.U.D., Washington, D.C. 1972).

The counter-productive effect of balancing schools by social class results from the mistaken impression from casual contact that class differences are related to visible physical indicia by which race often becomes defined (cf. Barzun, op.cit. supra). "One of the central sociological hypotheses in the integration policy is that integration should reduce racial stereotypes, increase tolerance, and generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom. Our surprise was increased substantially when we discovered that, in fact, the converse appears to be true" (Armor, *The Evidence on Busing* (1972) 28 The Public Interest 90, 102).

The occasion for surprise should not be that the sociologist's data has failed to verify the sociologist's hypothesis, nor even that some sociologists prefer axioms to hypotheses. The chief occasion for surprise should be that the sociologist who studied under Allport is surprised. Casual contact carries with it a screening effect which allows the observer to "see" only those aspects of behavior which confirm his predispositions (Allport, op. cit. supra, at p. 264). Thus one observer, encountering a newspaper article describing a school with "no graded courses in geography, American and Ohio history, natural science, government and other required subjects" where the children spent time in school copying diary entries referring to plowing and cleaning the raspberry patch, ironing, and feeding the turkey broilers commented: "One's first reaction to such an education might be one of sympathy for the children deprived of their birthright in a free society. Upon further consideration, however,

the example illustrates not the depravity of the Amish parents, but the sharp difference in the educational task of a stable farming society and that of a rapidly changing highly industrialized society" (Coleman, *The Adolescent Society* (Free Press of Glencoe, N.Y., 1961) p. 2). Later on the same distinguished author criticizes grading and deplores the fact that the adolescent has no useful work to perform (Ibid. pp. 3, 317).

Neither school boards nor Federal courts can reasonably be expected to do away by fiat with racial prejudice. Law alone, like other social forces, and like laws affecting other institutions, may not be able to alter these relations beyond a certain point, and in some situations it cannot make much difference. But some law commentators who have addressed themselves to compelling racial balance have been as simplistic about goals and methods as sociologists are uncertain about both. In *Sweatt v. Painter* (1950) 339 U.S. 629, this Court held that the exclusion of a Negro plaintiff from a law school on account of his race was inherently unequal treatment. Some law commentators have suggested that this holding could be reformulated to say that a law school attended only by Negroes is inherently unequal; and that this reformulation of *Sweatt v. Painter*, supra, could serve as the foundation of a constitutional duty. Such a duty would require not only the admission of a pupil otherwise qualified to the school of his choice, but also the deliberate structuring of all schools so that the choice would be among like alternatives. One visible "equalization" would be to balance the racial composition of all the schools in a system. "Equal educational opportunity" would thereby

become equated with racial balance, and racial balance would be a constitutional imperative (see *Developments in the Law—Equal Protection* (1969) 82 Harv.L.Rev. 1065); Kaplan, *Segregation Litigation and the Schools—Part II The General Northern Problem* (1963) 68 Harv.L.Rev. 564; Wright, *Public School Desegregation: Legal Remedies for de facto Segregation* (1965) 40 N.Y.U.L.Rev. 285; *Hobson v. Hansen* (D.C.D.C. 1967) 269 F.Supp. 401, 497, 503-506).

Lawyers might with profit ponder the words of Edmond Cahn, commenting upon the origins in the writings of a distinguished sociologist of the national origins quota system in the Immigration Act of 1921:

"Only a generation ago, McDougall was a leader in his profession; as recently as 1943 Roscoe Pound saw fit to assign reasons for not adopting McDougall's concepts of social psychology. Yet, anyone who has a sufficiently strong stomach to read McDougall's *Is America Safe for Democracy?*—a book published while he was professor of psychology at Harvard—will find it filled with racist slander, crude propaganda and arrant nonsense. The book provided a cloak of pseudo-scientific respectability for agitation resulting in the Immigration Act of 1921 and the national origins quota system.

"Social psychology is certainly not to be charged for all time with McDougall's sins against science. On the contrary, it is the law educators who will be blameworthy if they undertake the use of psychological theories and studies in a naive and credulous spirit. We cannot afford to settle for less than the truth. For if a license to purvey loose opinions as scientific facts is given to those who will testify on

the egalitarian side, why is not a similar license available to the William McDougalls?

"* * * Our search for truth requires an unremitting awareness of covert interests—interests ranging from the very finest to the basest——

"* * * [T]here is no substitute for the vigilant exercise of critical intelligence. Where public justice is concerned, an educator has no more right to play the dupe than the deceiver" (Cahn, *Confronting Injustice* (Little, Brown and Company, Boston, 1966) pp. 356, 357).

C. The strategies for improvement of pupil achievement which plaintiffs urge be required by the Constitution would create conflicting constitutional duties.

Good intentions do not always produce unmixed blessings. In 1909, a distinguished educator, Leonard Ayres, published a book, *Laggards In Our Schools* (N.Y., 1909). He collected data from school records, and statistics and reports collected and published by government agencies showing that schools were filled with children over age for their grade and that most students dropped out before finishing the eighth grade. Criticized on methodological grounds, he conducted another study of over two hundred thousand elementary school children. It confirmed his earlier work. Although Ayres' concern was efficiency and parsimony in school operation, one major outcome was the widespread practice of age promotion regardless of achievement, the practice about which plaintiffs now complain bitterly (compare Callahan, *Education and the Cult of Efficiency* (Univ. of Chi. Press, 1962) pp. 14-18, 165-168 with Pl.Br., pp. 52, 53). The choice between age promotion and achievement pro-

motion is never easy. Surely it would not lower the dropout rate, one of plaintiff's measures of inequality of educational opportunity (Pl.Br., p. 53), to require that children spend their school days with younger children. The reaction of the sixteen-year-old put into the sixth grade is predictable, irrespective of race.

Recently, "educational input" in the form of dollars spent upon facilities has been re-emphasized in *Rodriguez v. San Antonio Independent School District* (D.C. W.D. Tex., 1969) 299 F.Supp. 476, (1972) 337 F.Supp. 280, review granted June 6, 1972, U.S. Sup. Ct. Dkt. No. 71-1332; and in *Serrano v. Priest* (1971) 5 Cal.3d 584. The theory of equality of input upon which these cases are based appears to be a reversion to a pre-Coleman Report measurement of "equal educational opportunity." We will not presume to guess whether it is the California Supreme Court or Dr. Coleman who is in the backwater. Certainly it is not Leonard Ayres, echoed below by Dr. O'Reilly, who would lower the dropout rate (A. 1938a), increase the efficiency of the teacher by increasing the "information transmitted" (A. 1953a) without any costly preparations (A. 1962a) by eliminating minority-dominated schools. Dr. O'Reilly's opinion was that expensive compensatory education programs were "valueless" (A. 1929a). Amazed at this turn of events, the District Court below repeated its question and Dr. O'Reilly explained that "it's nothing particularly new about any of these things" (A. 1929a).

Inconsistently with their thesis that Anglo pupils are the chief "learning resources" and in pursuit of one aspect of the equal dollar theory, plaintiffs argue that the

quality, experience and stability of teaching staffs is inferior at minority-dominated schools (Pl.Br., pp. 40-43). Even if this proposition were true generally, which is doubtful, it does not appear to be true in Denver. Plaintiffs' Exhibit 510 (A. 2124a) discloses, for example, that Wyatt elementary school, with an enrollment of only two per cent Anglo pupils had in 1968 a median teacher experience level exceeding the city-wide average.

Dr. Coleman testified only that, in general, teacher characteristics had some effect on achievement (A. 1531-1532a). According to the Coleman Report, teacher variables that showed some effect on Negro achievement were: "the teachers' own education (positive effect), and the score on the vocabulary test (positive effect). Teachers' attitudes showed a slight effect in some grades (negative effect of preference for middle-class students); as did experience (positive effect), while localism and proportion white show little or no effect. For other minority groups, similar results hold, except that teachers' experience shows inconsistent directions of effect, suggesting that it has no effect of its own * * *" (Coleman Report, pp. 317-318).

Measuring teacher effectiveness has been more of a continuing puzzle to education researchers than to common sense. It would be strange indeed if the Federal courts were now to embark upon the elaborate and futile efforts which have for years characterized education research into the measurement of teacher effectiveness. See Koerner, *The Miseducation of American Teachers* (Houghton Mifflin Co., Boston, 1965) pp. 52-55: It is a commonplace that there are good and bad teachers of all races, ages

and salary levels and the fervent hope of all parents is that the school district will hire competent teachers. As in San Francisco, the Denver School District pursued a policy of allocating more teachers per pupil to schools in which achievement levels were lower (A. 1327a-1329a).

School boards are today faced with a bewildering variety of conflicting standards for pupil assignment as proposed mandatory alternatives to geographic proximity:

1. An equal distribution of Negro pupils throughout a district. This appears to be the standard allowed by this Court in its recent remedies decisions: *Wright v. Council of City of Emporia* (1972) ___ S.Ct. ___; *United States v. Scotland Neck City Board of Education* (1972) ___ S.Ct. ___; *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1.

2. An equal distribution of "minority" pupils throughout a district. This appears to be the standard being urged as a constitutional requirement by plaintiffs in this case and in Corpus Christi, Texas (see *Cisneros v. Corpus Christi Independent School District* (D.C. S.D.Tex. 1971) 330 F.Supp. 1377 (appeal pending); see, contra, *United States v. Midland Independent School District* (D.C. W.D. Tex. 1971) 334 F.Supp. 147).

3. An equal distribution of low-achieving pupils throughout a district. This is a standard being urged as a constitutional requirement in a class action being litigated against the San Francisco Unified School District for its maintenance of an academic high school (Lowell High) to which admissions are by academic achievement

(*Berkelman et al. v. San Francisco Unified School District*, No. C-71-1875, D.C. N.D. Cal.).

4. A distribution of pupils throughout several districts so that (i) Negro pupils, or (ii) minority pupils, or (iii) low-achieving pupils will always be in a minority. This distribution offers three possible standards. It is distinguished from the others, however, by its involvement of more than one school district and is in Federal litigation in Richmond, Virginia, Detroit, Michigan, and Indianapolis, Indiana (*Bradley v. School Board of the City of Richmond, Virginia* (D.C. E.D. Va. 1972) 338 F.Supp. 67; reversed (1972) ___ F.2d ___; *Bradley v. Milliken* (D.C. E.D. Mich., 1971) 338 F.Supp. 582; *United States v. Board of School Com'rs. of the City of Indianapolis, Indiana* (D.C., S.D., Ind. 1971) 332 F.Supp. 655.

5. A distribution of pupils among schools so that the average "wealth" of the families represented in the schools is equal. This standard is being pressed upon the Duluth, Minnesota, school district (see Hubert, *The Duluth Experience*, Saturday Review, May 27, 1972, p. 55 et seq.).

6. An equal distribution of pupils classified by sex.

7. An equal distribution of pupils classified by achievement without regard to sex. Standards 6 and 7 are also involved in San Francisco's Lowell High case.

8. An equal distribution of pupils classified by religion. Religion as well as race is specified in the Civil Rights Act of 1964. Presumably, this standard would raise the same type of constitutional question as does the use of race as a standard for pupil assignment to schools.

9. An equal distribution of pupils among schools in which dollar inputs are equal. This standard is offered by *Rodriguez v. San Antonio Independent School District* (D.C. W.D. Tex. 1969) 299 F. Supp. 476; (1972) 337 F.Supp. 280, review granted June 6, 1972, U.S. Sup.Ct. Dkt. No. 71-1332; and by *Serrano v. Priest* (1971) 5 Cal. 3d 584.

Any of these standards might require "equal distribution" of pupils either to schools or to classrooms. Each of these standards conflicts with the other, because each defines differently the group upon which the standard is based. Each standard except the last assumes that children learn more from each other than they do from their teachers. The geographic area throughout which the "learning resources" found in other children can be distributed is limited only by travel time, and perhaps not by that for the home itself is viewed by some as a sufficiently universal detriment to encroach upon it further. Dr. Coleman has argued in favor of replacing the family environment of the low achiever as much as possible "with an educational environment—by starting school at an earlier age, and by having a school which begins very early in the day and ends very late" (Coleman, *Equal Schools or Equal Students?* (1966) 4 The Public Interest 70, 74; see also, Levine, *Ocean-Hill Brownsville: Schools in Crisis,* (Popular Library, N.Y. 1969) p. 143). Others advance similar views in seeking to expand the school year, the number of years in school and the children subject to regulation by the public school system (see, e.g., Cremin, *The Transformation of the School* Alfred A. Knopf, N.Y., 1961) pp. 325-332 for an account

of "the best-laid plans of the teaching profession for American education in the post-war decades," which was to embrace "a comprehensive public school system concerned with all young people from the age of three through twenty, those in school as well as those outside").

There is some evidence that it is Negro children who can least afford to have the family undermined or replaced, that it is Negro children who most need the family to be supported and strengthened (see Simpson and Yinger, *Racial and Cultural Minorities* (3rd Ed.) (Harper & Row, N.Y., 1965) pp. 349-355; Erikson, *Identity, Youth and Crisis* (W.W. Norton & Company, N.Y., 1968) at p. 311: "Can Negro culture afford to have the 'strong mother' stereotyped as a liability?").

It is curious in itself that an institution whose professional representatives admit teaching failure and credit the home with the production of the institution's chief "learning resources"—other children—should look chiefly to further encroachment upon all homes as the solution to its problems. For an account of the results of a similar venture with the "platoon school" operated from 8 A.M. to 5 P.M. and on Saturdays, see Callahan, op.cit. supra, at pages 126-147. For an account of the origin of the kindergarten in philanthropic concern with the problem of juvenile crime, see Katz, M., *Class, Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971), at pages 121-122. For accounts of the results of ventures which sought to carry out entirely the replacement of the home with the institution, see Katz, M., *The Irony of Early School*

Reform (Harv. Univ. Press, 1968) for a discussion of Horace Mann's New York Reform School, and Katz, M., *Class, Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971), at pages 45-47 for a discussion of the Massachusetts Reform School (which represented, in 1848, the first form of compulsory schooling in the United States).

For discussions of like efforts to force the acculturation of American Indian children, see Burnette, *The Tortured Americans* (Prentice Hall, N.Y., 1971) at pages 24, 25; and Schusky, *The Right to be Indian* (The Indian Historical Press, Inc., San Francisco, 1970) at pages 50, 51. One would think that the outcome of public school ventures to replace the home has been sufficiently grim, uniformly, to give pause to the most ardent advocates of forced acculturation:

> "Education is and has been a farce. The overriding purpose of education in years past was to separate the Indian child from his home and his heritage.
>
> * * * * *
>
> "The implications are clear to anyone who has undergone the educational experience on a reservation: Indian students, while they recognize the value of education, must, if they have any dignity or pride, resist the kind of training they are subjected to. * * * Added to these handicaps is the awareness that the goal of the school system fostered by the BIA is not education but acculturation. Never have I known one teacher in an Indian school or one BIA employee who troubled himself to learn the Sioux language or to acquaint himself with the cultural background of his students" (Burnette, *The Tortured Americans* (Prentice Hall, N.Y., 1971) pp. 24, 25).

Against views that see the solution to all social ills in an expanded public school system aimed at forced acculturation are arrayed other voices who see in the public school system itself an institution specifically designed to invade the mind and shape the personality, the greatest danger of all. The danger inherent in such an institution is magnified by the increased central direction which must follow inevitably upon the undermining of local school boards. Some wish to escape into alternative systems (*Wisconsin v. Yoder* (1972) 92 S.Ct. 1526; *Pierce v. Society of Sisters* (1925) 268 U.S. 510; *In the Matter of Skipwith* (Dom.Rel.Ct., 1958) 14 Misc.2d 325; 180 N.Y.S.2d 852). Others demand freedom within the system (*Meyer v. Nebraska* (1923) 262 U.S. 390; *Tinker v. Des Moines Ind. Com. School Dist.* (1969) 393 U.S. 503). Others see *choice* as the essence of the protection afforded not alone by *Yoder* and *Pierce* but by universal state statutory exemptions from public school attendance extended to pupils attending private and parochial schools. A benefit made available by the state to those who can pay is required by the Constitution to be extended to all by the equal protection doctrine of *Griffin v. Illinois* (1956) 351 U.S. 12. Choice, therefore, cannot constitutionally be restricted to those who can pay.

There are advocates of a voucher plan to make the choice among educational alternatives which are available to those who can afford private schools economically possible for the many. Notwithstanding *Griffin* (and notwithstanding the millions of "G.I. Bill" dollars spent at Baptist and other denominational colleges following World War II), versions of the voucher plan have al-

ready twice run afoul of lower Federal courts concerned at extending choice to the private expenditure of public funds at church supported schools (*Wolman v. Essex* (D.C.S.D. Ohio 1972) 40 Law Week 2724; *Lemon v. Sloan* (D.C.E.D. Pa. 1972) 340 F.Supp. 1356). If choice cannot be made available by indirect public support of alternative school systems, then choice must be made available within the system. Some regard the neighborhood school as offering choice. Some advocate programs such as Black House in Berkeley and its counterpart in Washington, D.C., to make radically different choices available, including in Washington, D.C., the introduction by direct public subsidy of religious fervor if not religion itself into the promotion of racial and cultural identity (see Gross and Osterman, *High School* (Simon & Schuster, N.Y., 1971) pp. 285, 301).

Some have lost the faith. They advocate no school at all: See Illich, *DeSchooling Society* (Harper & Row, N.Y., 1971); Reimer, *School is Dead* (Doubleday & Co., Inc., N.Y., 1971; cf. Whitehead, *The Aims of Education* (Mentor Pub. Co., N.Y., 1929). Even this Court has recognized that neither graduation certificates nor tests devised by psychologists are fair measures of ability (*Griggs v. Duke Power Co.* (1971) 401 U.S. 424).

Still others suggest a realistic appraisal of what formal schools can and cannot do and a sensible limit to the aims of public education: ". . . [P]eople ask no more of schools today than they did a hundred and twenty-five years ago. Even then the schools were asked to do the impossible . . . stop crime and check immorality by teaching obedience. . . . [R]eformers

should begin to distinguish between what formal schooling can and cannot do. They must separate the teaching of skills from the teaching of attitudes, and concentrate on the former. . . . [I]t is of course impossible to separate the two. . . . But there is a vast difference between leaving the formation of attitudes untended and making them the object of education. This is a radical position, despite the ordinary presumption to the contrary" (Katz, M., *Class, Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971) pp. 141, 142).

A school board may reasonably question the notion that equality of result can measure equality of opportunity. It may reasonably question the notion that a median can fairly be used to compare one racially defined group with another for the purpose of deducing group opportunity from tests given to individuals. *Individual* opportunities not *group* opportunity was specified in the Civil Rights Act of 1964, as indeed the Fourteenth Amendment itself requires. The use by the District Court below of a definition of "equal educational opportunity" as "equality of educational outcome" by group was not consistent with judicial obligation to the person under the Fourteenth Amendment. Theories of education are pertinent to educational debate but they often serve chiefly to obscure the problem facing the teacher just as they obscure the legal problem facing this Court. When teachers teach, they do not teach a group. They teach a person. It is the person not a group which the Fourteenth Amendment assigns to this Court the duty to protect. There is no conflict between the requirements of teaching and the requirements of the Constitution.

D. "Equal educational opportunity" affords no standard for measurement of a school district's performance of its constitutional duty.

In light of all the learning published by educators, sociologists, psychologists, philosophers, and concerned laymen it is tempting to adopt Edmund Gordon's definition of "equal educational opportunity" which is no definition at all: "Equalization of educational opportunity in a democracy requires parity in achievement at a baseline corresponding to the level required for social satisfaction and democratic participation. It also demands opportunity and freedom to vary with respect to achievement ceilings" (Mosteller, op.cit. supra, p. 433). Satisfying as this may be to today's thoughtful educational theorist, it provides no guide to courts. If an output advocate such as Dr. Coleman arrives first with conflicting strands of current educational theory seductively interwoven to promote heterogeneous ability grouping as a constitutional requirement, then socio-economic "integration" or an "easily measurable" incongruent substitute—race—is to be decreed. If an input advocate arrives first, then additional expenditures or compensatory education programs are to be decreed. If a John Dewey arrives again at the doorstep (if he has not then been foreclosed), then individual instruction is to be decreed. The "opportunities" will still vary, but not by the exercise of choice and self-selection within the framework of local school district judgments. They will vary by operation of the decrees of Federal courts.

If a proportion of Negro pupils in each classroom is the constitutional right of every white child, and a proportion of white pupils is the constitutional right of every

Negro child, it is difficult to see how this right can be realized short of chartering a fleet of airplanes. It is impossible to provide the national statistical averages in many cities now or in the foreseeable future. Such impossibilities cannot be the basis for a constitutional duty. Requiring a fair share of everyone available necessarily results in a different "opportunity" from school district to school district, just as in-district variations now provide different "opportunities." There can be no real "equalization" (see Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined* (1968) 35 Univ. of Chicago L.Rev. 583, 596-598).

No one seeks an "equal" opportunity for his child. He seeks the "best" within the constraints of his individual circumstances. For one child, this may be in a highly competitive, high achieving classroom (U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (U.S. Gov't Printing Office, 1967) at pp. 102-103). For another, this same situation may be a disaster. See Dennison, *The Lives of Children* (Vintage Books, N.Y., 1969) for accounts of children damaged by conventionally structured schools, and a persuasive argument against the trend toward larger and more impersonal educational units. Some send their children to parochial schools; for others, watching children being released for religious training is damaging (see *Illinois ex rel. McCollum v. Board of Education* (1948) 333 U.S. 203). The compulsion to seek and find what seems best is universal, and, to most, unrelated to the color of the children:

> "* * * theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is

no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile opinion, and no teaching concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things are seldom equal, and in that case, Sympathy, Knowledge and the Truth, outweigh all that the mixed school can offer" (W.E.B. DuBois, *Does the Negro Need Separate Schools* (Journal of Negro Education, July, 1935) p. 335; reprinted in Myrdal, *An American Dilemma* (Harper Bros., N.Y. 1944) p. 902).

"Equal educational opportunity" affords no standard for the measurement of a school district's performance of its duty. It affords no standard against which courts or school districts may presently measure fair treatment of the person. It is a slogan which reflects a great public controversy about the purpose and effect of public schools, a controversy which at bottom is not justiciable. That controversy should not be resolved by the happenstance of which educational theory or which mix of theories is first pressed upon this Court. It should not be resolved by the happenstance of which theory or which mix appeals to one lower court but not to another. It should be resolved by allowing local school boards democratically to exercise their function, for the Constitution can carry only so much excess baggage. It is not fitting that the political-sociological concept of an "equal educational opportu-

nity" should transform Federal courts into ex-officio school boards meeting at irregular intervals. The Constitution assigns to Federal courts no such task. Courts, moreover, must be sure footed. No educational theory advanced as an alternative standard for pupil assignment to schools achieves the stability which should be reflected in fundamental constitutional principle. Such theories are made no more digestible by throwing them all into one pot to make some kind of jumble stew. (Pl.Br., pp. 103, 104). Neither the problems of educational policy nor the problems of reducing racial hostility are likely to yield either to such culinary arts or to the court-ordered solutions which sometimes result (see Schoettle, *The Equal Protection Clause in Public Education* (1972) 71 Colum. L.Rev. 1355).

II. A NEIGHBORHOOD SCHOOL POLICY IS A REASONABLE LEGISLATIVE POLICY. IT IS A REASONABLE COMPROMISE OF CONFLICTING DEMANDS AND COMPETING CONSIDERATIONS OF EDUCATIONAL POLICY, A GOVERNMENTAL FUNCTION BEST PERFORMED BY LEGISLATIVE BODIES AND NOT BY COURTS.

The claims of the Denver School District and the State of Colorado to a compelling interest in a neighborhood school policy are at least as persuasive as are the claims of plaintiffs on behalf of a racially defined group to a racially measured benefit from pupil assignment by race. When one considers the variety of conflicting standards which class action plaintiffs would today have judges substitute for geographic proximity as the basis for pupil assignment to schools, it is not difficult to see why a policy of pupil assignment based solely upon geographic

proximity was adopted in the first place. It is not difficult to see why it has in some instances been adhered to tenaciously. If a school board were obliged to take everyone's advice, it would likely join Mr. Illich[7] in the view that the best decision would be not to have schools (see Aesop, *The Miller, His Son, and Their Donkey* (Aesop's Fables, Grosset and Dunlap, 1947) p. 50 et seq.). A neighborhood school policy is a reasonable legislative compromise of competing policy considerations.

A. Denver's policy meets expectations long established.

Denver's neighborhood school policy is more than an administrative convenience. It enjoys the presumption that attaches to all legislation not on its face discriminatory, by race, by economic circumstances, or by length of residence. It meets the expectations which often attach to long standing policies (cf. *Perry v. Sindermann* (1972) ___ S.Ct. ___). It therefore enjoys the values of precedent which attach to such policies. To deny to today's urban minorities an amenity of urban living allowed by the greater density in urban than in rural areas would deny to today's urban dwellers an amenity available to others in the past. To deny to the minorities which populate many cities today the political influence over local school district legislative and administrative policies available to yesterday's urban dwellers would deny to today's urban dwellers a fundamental right also enjoyed by others in the past. Today's and tomorrow's urban dwellers—of all colors and persuasions—are as entitled to

[7]Illich, *DeSchooling Society* (Harper & Row, N.Y., 1971).

an equal political opportunity as to an equal educational opportunity.

Brown v. Board of Education, supra, was but one instance of a broad purpose pursued by this Court in other cases. Racial classifications are not the only suspect classifications. This Court has persistently struck down state laws and practices discriminatory against newcomers. The right to change one's residence has become a fundamental right by virtue of constitutionally required removal of disabilities upon newcomers: A state may not exclude indigents (*Edwards v. California* (1941) 314 U.S. 160). A state must apply to newcomers the same standards as it applies to others for welfare qualification (*Shapiro v. Thompson* (1969) 394 U.S. 618). A state may not exclude newcomers from the voting franchise (*Dunn v. Blumstein* (1972) 92 S.Ct. 995).

When a state may not discriminate against newcomers, a fortiori it may not discriminate against some newcomers on account of their race. A state may not countenance in its judicial processes the use of racial classifications to exclude newcomers from housing opportunities (*Shelley v. Kraemer* (1948) 334 U.S. 1; *Barrows v. Jackson* (1953) 346 U.S. 249). A state may not place upon its legislative processes disabilities which would preclude altogether participation by state and local legislative bodies in efforts to increase housing opportunities available to newcomers. (*Reitman v. Mulkey* (1967) 387 U.S. 369; *Hunter v. Erickson* (1969) 393 U.S. 385).

These cases do not, as plaintiffs suggest (Pl.Br., p. 108), imply that a constitutional requirement of proportionate

inclusion by race follows from a policy forbidding the deliberate exclusion of newcomers. The Constitution no more requires the assignment of residential billets by race than it requires a state to issue marriage licenses only to racially mixed couples by virtue of *Loving v. Virginia* (1967) 388 U.S. 1 (cf. Bittker, *Case of the Checker-board Ordinance*, (1962) 71 Yale L.J. 1387). *Reitman* and *Hunter* do not imply that a state must legislate in some particular manner, nor do they imply that a state may allow no personal rights to exist under its laws. *Reitman* and *Hunter* entailed the balancing of the nation's interest in freedom of population movements against private interest in rental property and property after it has been sold. A man's interest in rental property is ordinarily commercial and his interest in any property after he has sold it is tenuous. A man's interest in his children is seldom commercial. Nor does he customarily sell them. His interest is continuing, and is an interest at least as fundamental as having a beer with the boys (*Moose Lodge No. 107 v. Irvis* (1972) 92 S.Ct. 1965).

This Court has nowhere suggested that reasonable legislative policies applicable to all alike must be remade to accommodate newcomers. Nor has this Court suggested that any racially, ethnically, or economically defined group has standing to speak for all newcomers, those arriving tomorrow as well as those who arrived yesterday. On the contrary, this Court has held in a long line of cases that a state may not discriminate between newcomers and those already there. These cases imply that a drastic change in policy falling largely upon newcomers might by that effect alone offend the Constitu-

tion. Upon what principle, then, is Denver to be precluded from offering to newcomers to its public school system the same services and privileges and political franchise afforded to those who came before?

That all are entitled to an equal political opportunity lies at the heart of *Baker v. Carr* (1962) 369 U.S. 186. The breakdown of local communities and local political boundaries attendant upon mandatory racial balance strikes at the heart of the political franchise which that case and its progeny sought to insure for all alike, irrespective of race. Small wonder that some regard "busing" as merely another example of the maintenance of control by "whites" over "blacks" (see Knowles and Prewitt, *Institutional Racism in America* (Prentice Hall, N.Y., 1969) pp. 31-35).

B. The neighborhood school appears to enhance academic achievement, and it invites community participation as well.

There is some evidence that the neighborhood school is more likely than not to enhance academic achievement in the early grades, and that its perpetuation may be particularly important to Negro pupils. "Non-metropolitan" pupils who are traditionally transported to consolidated schools consistently achieve at a lower level in all subjects than do metropolitan students for all races and regions (Coleman Report, pp. 221-251; see also Mosteller, op.cit. supra, p. 374). Although there is considerable decline in the relative achievement of Negroes as compared to whites in all rural areas, there is "little or no decline" in the northeast, midwest or west metropolitan areas (Coleman Report, p. 220), areas which have traditionally maintained neighborhood schools.

In addition, the neighborhood school has in many cities become the focus for small scale neighborhood community activity, tangential to direct instruction of pupils. The neighborhood school is often the focus for family community involvement, in activities such as the PTA, candidates' nights for local elections, boy scouts, the recycling of tin cans and bottles for "ecological" purposes, community bazaars, and many other activities in which people like to engage collectively on a small scale. Such activities need not extend to "local control" and the type of cataclysmic controversy which this twentieth century version of democratic localism can create (compare Mayer, *The Teachers Strike: New York, 1968* (Harper & Row, N.Y., 1969) and Levine, *Ocean Hill-Brownsville: Schools in Crisis* (Popular Library, N.Y., (1969) with Katz, M., *Class Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971) pp. 15-22, 127-128). The neighborhood school affords a means and a degree of participation and local community involvement which tends to meet the needs manifest in controversies such as *Ocean Hill-Brownsville*, without their disruptive effects.

C. A neighborhood school policy excludes no person on account of his race. Its abandonment is more likely than not to contribute to greater geographic separation of racially defined populations, and to an adverse effect upon schools available to the poor and disadvantaged as well.

People move for a great many reasons having nothing to do with the race of their neighbors, the race of their children's classmates, or the race of their children's playmates. Moving sometimes amounts to a vote with the feet, but population movements are complex phenomena. The

notion that racially homogeneous neighborhoods, when they occur, result from "white" flight is often mistaken. The dimension of the migration of Southern rural Negroes into both Southern and Northern cities belies any such simplistic explanations as either "black flight" or "white flight." Migrating populations homogeneous as to social and economic class sometimes exert a "pushing effect" upon Negroes and whites alike (see Simpson and Yinger, *Racial and Cultural Minorities* (3rd Ed.) (Harper & Row, N.Y., 1965) at p. 330: "[T]he newer Negro families were of a lower socio-economic level. Both the Negro and the white families who had supported the interracial school and neighborhood began to move out").

The migration of populations is not the only phenomenon with a pushing effect. Many cities have become familiar with the pushing effect of redevelopment which has too frequently used the power of eminent domain to produce high-cost housing unsuitable for family living or beyond the means of parents. Often, shifts in racial and class demographic patterns are not so much a matter of people moving out as of which people move in.

Neither the massive Negro migration into cities nor urban redevelopment are the last contributors to shifts in demographic patterns which will affect the racial and class patterns of urban areas.[76] San Francisco, for example, is experiencing a dramatic growth in the number of immigrants of Chinese ancestry. These immigrants tend to

[76]For a description of the changed proportions by national origin of today's immigration resulting from removal of the national origins quota system in 1965, see Andersson and Boyer, *Bilingual Schooling in the United States* (Southwest Educ. Dev. Lab., U.S. Gov't Printing Office, Wash. D.C. 1970) Vol. II, pp. 60-61.

flow into neighborhoods long occupied primarily by families of Chinese ancestry. This is occurring at the same time as the descendants of earlier residents are moving out, dispersing themselves throughout the city. Similarly, San Francisco is experiencing a dramatic growth in Filipino immigration. Filipino immigration alone had the effect of reducing the Negro proportion in one San Francisco elementary school from forty-five to nineteen over a five-year period.

All such migrations place great demands upon a city's housing supply and contribute to increased density. One reason people move is that they have been educated, in part by public policy, to maximize consumption. Housing is one means, indeed the chief means, of consumption. Schools are another. As city amenities such as neighborhood schools diminish, the displacement of residents to suburbia is accelerated, particularly among those whose values are least compatible with increased density and most compatible with mowing the lawn on Saturday morning. Most cities have experienced such population turnovers several times since the nineteenth century. A few cities seem to be experiencing it for the first time.

All experience to date points to but one overall result for the public school in the city: affluent families withdraw from the school system, either for the suburbs or for private schools. The effect upon the public school system is to increase the proportion of the immigrant poor of all races. Unless plaintiffs' reliance upon Dr. Coleman is wholly misplaced, the predictable effect of the policy urged by plaintiffs upon the Denver School District would be to reduce the proportion of pupils who

tend to achieve at higher levels, and thereby reduce the proportion of such pupils available for the heterogeneous ability grouping which plaintiffs would like all school districts to pursue. That this predictable acceleration of population displacement actually occurs has been demonstrated time and time again, and quite recently in San Francisco. To the extent that the immigrant poor are over-represented among "racial" minorities the effect is to increase the "concentration" of racial minorities in city public school populations. The effect also, of course, is to conscript for "desegregation" on the basis of income.

A neighborhood school policy allows parents of all races to participate in the ethical choices involved in racial integration, but it does not allow to parents the freedom to choose among schools solely upon the basis of the race of its pupils. Neighborhood schools are not maintained by race. To the extent that small attendance zones keyed to neighborhood schools afford freedom of choice predicated upon race, they burden choice as much as do larger attendance zones. Absent unusual circumstances, to attend a school in a neighborhood one must live there. To attend school elsewhere, one must move. Larger attendance zones offer to people the same choice about the race and social class of their children's classmates as do neighborhood schools, but they encourage people to move for other reasons as well. Larger attendance zones mean only that to the extent allowing choice is the cause of racial imbalance, people move farther and cities integrated—whether by race or by social class—thereby become more difficult to achieve.

D. At worst, the neighborhood school is a mild form of pluralism, pluralism which is constitutionally protected in its more extreme forms.

Consensus about the forms and effects of authoritarian structures appears to be dissolving at the same time as belief in the effectiveness of public schools to create entirely new forms of human beings appears to be increasing. This tension between the images of the school as culture-destroyer and the school as savior has always been felt in immigrant groups. It is now felt among the black and the poor (see Coles, *The South Goes North* (Little, Brown & Co., Boston, 1971) p. 591). As in the past, the public school aspires to assimilation (Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row, N.Y., 1970) pp. 115-151). But today the question has become "assimilation into what?" and the virtues of pluralism have been noted (see Glazer and Moynihan, *Beyond the Melting Pot* (MIT Press, Cambridge, Mass., 1963); see also MALDEF Brief, p. 26). Pluralism, moreover, may be the heart of the city (Jacobs, *The Death and Life of Great American Cities* (Random House, N.Y., 1961).

Pluralism has found shelter in the Constitution. Pluralism has found shelter in protected schools (*Pierce v. Society of Sisters* (1925) 268 U.S. 510), in protected activities (*Tinker v. Des Moines Ind. Com. School Dist.* (1969) 393 U.S. 506), and most recently in protected cultures (*Wisconsin v. Yoder* (1972) 92 S.Ct. 1526). The right of the person to enjoy this sort of pluralism is regarded as so fundamental as to have its exercise a constitutional right. Yet the mild form of pluralism repre-

sented by the neighborhood school is regarded by some as so malevolent as to require its destruction by constitutional mandate. Its malevolent nature is considered an outcome of city neighborhoods where like-minded people with the same incomes, educational levels and color are assumed to cluster together to avoid contact with a larger world which is assumed to be uniformly white and middle-class. This is the same image that many urban dwellers have of suburbia, except that the larger world which the suburbanite is supposed to be avoiding is assumed to be racially and economically mixed, as well as cosmopolitan. When a city has diverse elements in its population, the neighborhood is considered confining and destructive (see, e.g., Dodson, *Education and the Powerless* in Passow, ed., *Developing Programs for the Educationally Disadvantaged*, Teacher's College Press, Colum. Univ., 1968) p. 332). When the city becomes uniform, at least as to its public school population, the entire city acquires a confining and destructive image. The thrust then is toward amalgamation of school districts.

These images are not new. Neither is the use of such images by some representatives of the institution of the public school to render politically impotent those who are supposed to be the institution's beneficiaries (see Katz, M., *The Irony of Early School Reform* (Harv. Univ. Press, 1968) p. 213, et. seq.; Schusky, *The Right to be Indian*, (The Indian Historical Press, Inc., San Francisco, 1970) at pp. 50-52). The institutional response to the spectre of parental participation in schools—indeed, participation by anyone deemed "educationally conservative"—in ways not institutionally approved is sometimes spectacular (see,

e.g., Cremin, op. cit. supra, at pp. 341-343; Urofsky, ed. *Why Teachers Strike: Teachers' Rights and Community Control* (Doubleday & Co., N.Y., 1970) esp. p. 18).

In the case at bar the conversion into impotence of a political opportunity to reform a small part of the institution of American public education is again threatened by attack upon a democratically chosen local school board. It is easier to influence the climate in a school in one's neighborhood than the climate in a school located elsewhere. It is more difficult to influence a school with no easily ascertainable attendance zone. It is impossible to influence a school with a massive clientele, or a school run from the Federal courthouse or from the District of Columbia. These obvious facts are overlooked and it is the neighborhood school which becomes a monster that creates "feelings of low self esteem, political impotence, isolation and inferiority, both in the minority children and their parents." (Pl.Br., p. 103). One of the conclusions of the Coleman Report, that both Negro and white children expressed a high self-concept, as well as a high interest in school and learning compared to other groups, is overlooked (Coleman Report, pp. 280, 281, 319). Instead, the portion seized upon is that Negroes were like other minority groups in "expressing a much lower sense of control of the environment than whites" (Ibid., p. 319). In the same manner, Dr. Dodson concluded that the factors present in the neighborhood school "combine to teach these children of the minority that they are powerless people and consequently as all people tend to do when they feel powerless, they resign in apathy * * *" (A.1474a; Dodson, op.cit. supra, p. 332).

One might more reasonably conclude that no one has any choice but to resign in apathy from an institution whose professional political representatives are so adept as to use justified feelings of impotence in dealing with the institution to make sure that all who must deal with it will remain impotent. In a paper published in 1930, retracting the conclusions of a study published in 1923 making comparisons between racial and ethnic groups based on Army Alpha scores in World War I, Brigham cautioned: "A safe procedure is to disregard what a psychologist calls his test, and to study the test itself as an instrument more or less adequate to its purpose. Most psychologists working in the test field have been guilty of a *naming fallacy* which easily enables them to slide mysteriously from the score in the test to the hypothetical faculty suggested by the name given to the test" (Brigham, *Intelligence Tests of Immigrant Groups* (1930), 37 Psych. Rev. 158, reprinted in Jenkins and Paterson, *Studies in Individual Differences: The Search for Intelligence* (Appleton-Century-Crofts, Inc., N.Y. 1961) pp. 285, 286). Dr. Coleman's "sense of control of environment" test was based upon the responses (agree or disagree) to three statements: "good luck is more important than hard work for success"; "every time I try to get ahead, something or someone stops me"; and "people like me don't have much of a chance to be successful in life" (Coleman Report, p. 320). The responses to the first question correlated dramatically with achievement scores (Ibid., p. 323). Perhaps only the iconoclast would wonder whether those who perceive that the rain falls on the just and the unjust or those who have Hora-

tio Alger programmed into their personality have the greater "sense of control of environment." One thing is certain: if the opportunities for influence in the real world are decreased, one's "sense of control" *should* be impaired. Some interpret "majority schools"—predominantly white schools—in that light (see Knowles and Prewitt, *Institutional Racism in America* (Prentice-Hall, Inc., N.Y., 1969) pp. 32-35, 44-45).

One need not look to the weaknesses in psychological testing for an explanation of Dr. Dodson's selective perception of the neighborhood school. Dr. Dodson has made it quite clear elsewhere that he is bent upon the destruction of local government and the neighborhood school simply as a means of "inducing dysfunction into the system"—referring, of course, only to the local school system—and co-opting for the institutional politician the positive aspects of "black power." He does not expect to further racial integration. His object is to administer the therapy offered by self-assertion, by asserting himself on behalf of those who need self-assertion to overcome feelings of powerlessness. See Dodson, *Education and the Powerless* in Passow, ed., *Developing Programs for the Educationally Disadvantaged* (Teacher's College Press, Colum. Univ., 1968):

> "Today the sociologists are coming up very rapidly with their version [of] infant damnation. When one is through reading our 'verified hypothesis,' he feels like saying 'For God's sake, if this is all we see in the human potential with which we work, we had better turn them over to the Black Muslims and resign from the business.' Somehow when youths get

a dose of that ideology, and take power, they show considerable intelligence, and ability" (Ibid., 334).

"The alternative to this so-called integration approach resides in the Negro group itself taking power and moving under self-direction * * *. This approach calls for conflict * * *. This does not necessarily mean violence. It means inducing dysfunction into the system * * * until the social order comes to recognize the interdependency of the whole to its parts" (Ibid., p. 338).

"Negroes must learn the art and skill of taking power—as they rapidly are doing" (Ibid., p. 338).

"Every classroom should be a laboratory in how to take power, how to shield the group from power which is abused * * *" (Ibid., p. 339).

A school board may reasonably doubt that operating classrooms as laboratories in which to teach pupils how to take power by racially defined groups will reduce racial friction and hostility in integrated or in any other classrooms. A school board may reasonably consider its duty to be to provide an education for all rather than to engage in restructuring government along racial lines. It is not reasonable to predicate Federal jurisdiction upon a school board's unwillingness deliberately to create "dysfunction" in a local public school system so that some of its constituency will feel that they have been able to assert themselves.

II. A neighborhood school policy does not disrupt parental expectations either as to the justification for compulsory education or as to choice among schools.

Parents and their children have claims upon the institution of the public school as legitimate as those of sociologists, educational theorists, institutional politicians, school district lobbying associations, teachers' colleges, school administrators' associations, teachers' unions, and racially defined pressure groups. It is reasonable for a local school board to take parental claims into account. The rights of parents serve a purpose beyond recognition of the natural feelings of parents for their children. We have in the Nazi and Fascist regimes the clear historical lesson of the result of law under which children belonged to the state. See, e.g., *Decision of the Vormundschaftsgericht*, Frankfurt Am Main-Hochst, Germany, May 4, 1937, 7 Deutsches Recht 446 (1937), translated in Simpson & Stone, *Law and Society* (West Pub. Co., 1949), at p. 1874; see also *Decision of the Amsgericht*, Wilster, Germany, Feb. 26, 1938 (67 Juristische Wochenschrift, 1938), translated in Simpson & Stone, *Law and Society*, at p. 1264: "• • • one of the boys expressed his desire to enter the Hitler Youth. But his parents would not allow it. From these facts the Court has concluded that B. is abusing his right of custody over his children and endangering their spiritual welfare. Therefore the Court has decided to deprive him of his right of custody • • •."

This Court recognized in *Wisconsin v. Yoder* (1972) 92 S.Ct. 1526 that the rights of parents are essential to the preservation of a free society. Most parents of all races

prefer the neighborhood school.[8] This preference is based in part upon its convenience, and the parental supervision which such convenience allows. It is also based in part upon the fact that the abandonment of the neighborhood school is advanced by some as a moral duty. Many parents regard the moral and ethical instruction of their children as the highest moral duty of parents. They do not regard such instruction as the proper function of the state. They are not willing to yield to the state the moral instruction of their children merely because some parents as well as some schools fall short in performing their obligations. Few parents regard the institution of the public school as Jehovah; fewer have the faith of Abraham (compare The Holy Bible, King James Trans., Genesis, c. 22, with Fiss, *A Theory of Fair Employment Laws* (1971) 38 Univ. of Chicago L.Rev. 235, 248-249, and with Cong. Record, Senate, Feb. 23, 1972, pp. S. 2380, 2381). Many parents have had experience in competing with state agencies in moral instruction of their children, and are therefore particularly sensitive to plans which lengthen school days without, in the parental view, compensating benefits (cf. *Wisconsin v. Yoder* (1972) 92 S. Ct. 1526; *West Virginia Board of Ed. v. Barnette* (1943) 319 U.S. 624;

[8]According to a Gallup poll on "busing to achieve desegregation" reported in Havemann, *Report*, National Journal, No. 16 at p. 632 (Wash., D.C., Apr. 15, 1972), 15% of the "whites" are in favor, 79% are opposed, with 6% having no opinion; 45% of the "blacks" are in favor, 47% are opposed with 8% having no opinion. Cf. A. 1015-1016 regarding a similar poll of affected parents in Denver. Obviously such polls are not helpful except to suggest that opinion about "busing" does not divide along racial lines. That polls show a policy to be favored by most does not make a policy right. It does not make it wrong either, for right and wrong are matters of individual thought and conscience. A poll measures neither.

Engel v. Vitale (1962) 370 U.S. 421). Travel time has been a source of controversy at least since 1902 (Smith, *Pupil Transportation: A Brief History* (1972) 11 Inequality in Education 6). Upon the evidence that it is after all the home which produces the school's chief "learning resources" parents would seem to have the better claim.

Many parents do not readily accept the notion that the law requires that they be afforded due process before their television set can be repossessed, but forbids that they be afforded an effective say, individually or collectively, in where, or for how long, or for what purpose their children are to be required to attend school (compare *Blair v. Pitchess* (1971) 53 Cal.3d 258 with *San Francisco Unified School District v. Johnson* (1971) 3 Cal. 3d 937). Such law has little moral force.

The success of compulsory education, if it has been successful, does not lie in the legal sanctions which can be brought to bear upon recalcitrant parents. The success of compulsory education lies in parental consensus, parental willingness to assign instruction to public schools. That consensus derives its moral force from the justification for compulsory education: a child is required to attend school for his own benefit. A shift to justifying compulsory education not upon the benefit to the child but upon the benefit to be derived by another from his presence, accompanied at the same time by increased burdens and loss of expectations, is highly disruptive of the delicate balance between the interest of the parent and the interest of the state in the instruction of the child. The person to benefit from the child's

presence may not be a classmate. It may be a teacher who does not wish to change *his* school assignment, a school administrator who wishes to shield himself from criticism based on low median achievement scores, or one or more political organizations who wish to enhance their prestige among "racial" or "professional" factions. In such circumstances the disruption attendant upon abandonment of the neighborhood school is quite likely to be accompanied by acrimony and an outright refusal of parental cooperation.

Acrimony is merely heightened by the easy tendency to characterize legitimate parental concerns as expressions of racial bigotry. The abandonment of the neighborhood school has frequently been grounded not in any firm knowledge of what will or will not benefit this or that racially defined group but simply in a desire to symbolize goodwill by the tender of someone else's child, or in a desire to administer some kind of mass therapy by constitutional mandate. A school board may reasonably doubt that such claims can be sufficient to justify disruption of a balance predicated by parents upon natural law within the penumbra of fundamental rights guaranteed by the First Amendment. A local school board's democratic recognition of parental claims should be afforded great weight.

III. THE RACIAL STANDARD FOR PUPIL ASSIGNMENT WHICH PLAINTIFFS URGE IS A SUSPECT STANDARD. MOREOVER, REQUIRING ITS USE IN A MULTI-RACIAL AND MULTI-ETHNIC COMMUNITY MAY RESULT IN A DENIAL OF EQUAL PROTECTION AND A DENIAL OF DUE PROCESS OF LAW TO SOME MINORITY PERSONS WHO ARE NOT "NEGRO," "HISPANO," "CHICANO" OR "ANGLO" AND TO SOME "NEGROES," "HISPANOS," "CHICANOS" AND ANGLOS" AS WELL.

A. Racial classification is a suspect if not illegal standard for the assignment by government of benefits and burdens.

Plaintiffs set against Denver's racially non-discriminatory pupil assignment policy the most suspect of the several conflicting standards by which courts are being asked to mandate the assignment of pupils, the race of the pupils. Prior to *Brown v. Board of Education*, racial classification by government could be used to intern American citizens solely because of their racial ancestry, for racial classifications were merely "suspect" (*Korematsu v. United States* (1944) 323 U.S. 214.) *Sweatt v. Painter* (1950) 339 U.S. 629 overruled *Plessy v. Ferguson* (1896) 163 U.S. 537 sub silentio. Until recently most were of the opinion that *Brown* similarly overruled *Korematsu* sub silentio, particularly in view of the emphasis in *Bolling v. Sharpe* (1954) 347 U.S. 497 upon the suspect nature of racial classifications. Some mistakes are too great and too fraught with implications to acknowledge publicly.[9] But the trouble with unacknowledged bastards is that they

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[9]See Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (Univ. of Chicago Press, 1969); cf. Goebbels, *The Goebbels Diaries* (Lochner Trans., N.Y., 1948, Eagle Bks. Ed.) p. 176: "It's a life-and-death struggle between the Aryan race and the Jewish bacillus * * *. Fortunately, a whole series of possibilities presents itself for us in wartime that would be denied us in peacetime. We shall have to profit by this."

often surface, with followers, to claim the throne. Today, the calm confidence, the wisdom and the fairness of the relocation of American citizens because of their Japanese ancestry is to be acknowledged by using its principles to ends currently perceived by some as equally good (see *Hobson v. Hansen* (D.C. D.C. 1967) 269 F.Supp. 401[10]; *United States v. School District 151 of Cook County, Illinois* (D.C.N.D.Ill., E.D. 1969) 301 F.Supp. 201; *Developments in the Law—Equal Protection* (1969) 82 Harv. L.Rev. 1065, 1087; Wright, *Public School Desegregation: Legal Remedies for de facto Segregation* (1965) 40 N.Y.U.L.Rev. 285, 297). Racial classification is reasonable —indeed it is to be required—so long as its object is some expedient purpose of the moment.

If *Korematsu* still lives and racial classifications are merely suspect and not illegal, it would still be a surprise to find them required at the end of the road. To those who hailed *Brown* as the dawn of enlightenment about "race," it would be a surprise to find racial classifications required of school districts which have for many years operated and continue to operate "just schools." It is easy enough to see why racial classifications for the purpose of distributing state rights and obligations should be illegal per se. "Among the words that can be all things to all men, the word 'Race' has a fair claim to being the most common, the most ambiguous, and the most explosive" (Barzun, op.cit. supra, at p. 1).

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[10]See also Hansen, *Danger in Washington: The Story of My Twenty Years in the Public Schools in the Nation's Capital* (Parker Pub. Co., N.Y., 1968).

At best, "race" is definable only with reference to the time, place and purpose of the definition. One normally has in mind a model of how one thinks others would define a particular race (Alexander and Alexander, *The New Racism* (1972) 9 San Diego L.Rev. 190, 198-203). The Alexanders' "model" points up the fact that local custom is critical to any effort to define the indicia of a "race." Every operating definition of "race" is a function of time and place as well as purpose (*Hernandez v. Texas* (1954) 347 U.S. 475). It was largely law establishing the classification, supportive of social custom, which gave "Negro" the core of meaning which it had. It is largely new interpretations of salutary laws forbidding racial discrimination, interpretations corroborating the premise of a passing social custom, which give "Negro" the core of meaning which it still has (see Banton, *Race Relations* (Basic Books, N.Y., 1967) pp. 300-303 on the effect of stereotypes as creating self-fulfilling prophecies).

If racial classifications are now to be constitutionally required legal classifications for the purpose of assigning children to public schools, plaintiffs should at a minimum be required to establish that the "Negro" classification has some meaning at the time and in the place in which the use of such a classification for pupil assignment is sought to be required. Plaintiffs have not done so. They have, on the contrary, established that "race" has been consistently considered immaterial by the Denver School District in its pupil assignment policies.

B. Non-discrimination is not discrimination; nor is it exclusion by race.

Plaintiffs argue that whether an act or policy is racially discriminatory must be determined not by its object but by its effect (e.g., Pl.Br., p. 114). Non-discrimination is to become discrimination by virtue of the effect of failure to discriminate among pupils by race. Plaintiffs thus stand upon its head the fundamental principle that one may not because of his race be treated by government differently than another.

When the benefit or burden of an act or policy falls cleanly upon one racially defined group and not at all upon another, the act or policy may be a denial of equal protection. The act or policy may be a denial of equal protection because the congruence of race and benefit or burden may itself demonstrate that the act or policy is arbitrary and capricious, for racial classifications are themselves arbitrary and capricious. These principles are easy to apply. A state may not require a permit for wooden laundry buildings and grant such permits only to Caucasians (*Yick Wo v. Hopkins* (1886) 118 U.S. 356). A railway company may not allot some dining car tables to white passengers and others to Negroes. Such quota systems are unlawful racial discrimination (*Henderson v. United States* (1950) 339 U.S. 816).

This Court has upon several occasions disclaimed approval of racial quotas in public schools, for racial quotas of pupils in schools are as likely to result in a revival of caste based upon racial indicia as in its complete demise.[10a]

[10a] Plaintiffs' confusion of "caste" with "class" (compare Pl.Br. at pp. 33 and 125 with pp. 39, 40) is comprehensible in the light of the considerable disagreement among sociologists as to whether

A racial quota is necessarily exclusionary as well as inclusionary in two ways: First, if to achieve and maintain the racial balance of a classroom of thirty pupils, a quota of fifteen black and fifteen white pupils is established, the quota includes only fifteen black pupils. It excludes all black pupils who exceed that number and who would, absent the limit, be in the classroom. Second, by including fifteen black pupils on the basis of race, fifteen white pupils are thereby excluded on the basis of race.

Since quotas are necessarily exclusionary as well as inclusionary, Denver can hardly be said to have violated a constitutional duty by declining to establish racial quotas. The establishment of racial quotas for schools and classrooms would be squarely contrary to *Brown's* prohibition against the exclusion of persons by race. Based as it has been and continues to be upon geographic standards alone, Denver has pursued faithfully the policy laid down by this Court. Denver's policy seeks to avoid deliberate exclusion by race. It seeks at the same time to avoid deliberate inclusion by race, for such deliberate inclusion necessarily entails deliberate exclusion by the same suspect standard. Yet the plaintiffs here urge in effect that what was unlawful racial discrimination when

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"caste" and the rigidity and lack of mobility associated with it, ever had any application to the American Negro, Myrdal notwithstanding (see Simpson and Yinger, *Racial and Cultural Minorities* (3rd Ed.) Harper & Row, 1965) pp. 245-259). Strictly speaking, it would seem that the only groups in our society treated with caste-like rigidity are children, and (except for the very few who transcend the common fate by their attachment to the few remaining institutions in which age is venerated, or at least no disability) the elderly. "In the debate on the question whether or not there are castes in the United States it is well to remember that caste and class are not realities, essences, but concepts" (Ibid., at p. 245).

practiced by a railroad upon its passengers is required by the Constitution to be practiced by school districts upon the nation's children.

Plaintiffs argue in effect that *Brown's* prohibition of racial discrimination requires racial discrimination because Denver's non-discriminatory policy does not fall upon all alike. It does not, according to plaintiffs, fall upon all alike because the median level of achievement of Negro and "Hispano" pupils is less than the median achievement level of "Anglo" pupils. It does not, according to Dr. Dodson, fall upon all alike because black pupils, unlike white pupils, need the therapy to be afforded by his power to create dysfunction in another local school system. These are curious means by which to seek to benefit Negro pupils. They are also curious conclusions from the evidence offered by the Coleman Report and the record in the case at bar. The Coleman Report data shows, if anything, that the average pupil in the racial majority in any school tends to achieve better than the average pupil in the racial minority in that school (supra, at p. 21). The record in this case offers no achievement data in Denver by race. There is, therefore, no basis for concluding that it is the Negro or the Hispano pupils in Denver's minority-dominated schools who are adversely affecting the school's average achievement level. Evidently, the District Court considered "Hispanos" to be as "knowledgeable" as "Anglos."

Plaintiffs reach their conclusion by a circular chain of reasoning: The Denver schools in which Negro and Hispano pupils predominate tend to have lower median achievement levels than do selected Denver schools in

which Anglo pupils predominate. Since Negro and Hispano pupils are disproportionately represented in the Denver schools with lower median achievement levels, it must be the Negro and Hispano pupils whose median achievement level in those schools is lower. Since Negro and Hispano pupils are in general as capable of performing as well as anyone else—an item with which we certainly agree—the Denver school district must be depriving its Negro and Hispano pupils of a benefit which the Denver School District is making available to its Anglo pupils. The only discernible such benefit is "knowledgeable fellow students", i.e., Anglo pupils.

This chain of reasoning assumes a great deal. It assumes that "Negroes" and "Hispanos" are fungible among the group defined as "Negro" and "Hispano." It assumes at the same time that "Anglos" are not fungible among the group defined as "Anglo", for one would otherwise suppose that the Anglo pupils in Denver's minority-dominated schools already provide "knowledgeable fellow students"; or, alternatively, it assumes that "Anglos" are also fungible but provided in insufficient numbers. It assumes either that it is the children and not the homes from which they come which generate learning, or that children from homes supportive of education are an adequate substitute for homes supportive of education.[10] It further assumes that it is possible for the Denver School District to provide an institutional substi-

[10] "Children from homes strongly supportive of education may not be influenced in achievement as much by variations in school factors as will children from homes not supportive of education (Coleman Report, p. 22).

tute for the home. How simple it would be if that were so!

There is an inherent limit upon the fungibility of institutions just as there is a limit upon the fungibility of people. The school cannot replace the home. There is also an inherent limit upon the effectiveness of social work and psychiatry remote from its intended beneficiaries. This Court observed in *Brown* that the deliberate exclusion of pupils by race does those excluded psychological harm. Indeed it does. One does not need Kenneth Clarke's experiment with several dolls and a few children to agree with that common sense proposition (Cahn, *Jurisprudence* (1955) 30 N.Y.U. Law Rev. 150, 161-165). That exclusion by race is an indignity to the pupil excluded—and an indignity also to those who identify with him—is well within the requirements for judicial notice. Plaintiffs, however, would construe this Court's just observation as having set aside the requirements of judicial notice to conclude, contrary to all evidence and experience, that "minority" children are more insulted than are "Anglos" by laws and practices which exclude pupils from schools because of their race (Pl.Br., pp. 103-104). That proposition is untenable.

Mistaken notions of racial superiority are but the counterpart of the mistaken self-perception of racial inferiority which this Court noted in *Brown*. Ideal self-perception is not easy to achieve, for "race pride" has positive as well as negative aspects (see Barzun, op. cit. supra., Pref. to 2d Ed. at p. xix). The psychological data offered in *Brown* is not universal today, if it ever was. It predated the rise of significant black nationalist

movements (see Essien-Udom, *Black Nationalism: A Search for Identity in America* (Univ. of Chicago Press, 1962) p. 5). It predated demands by some minority persons for racially oriented schools and studies, such as those in Berkeley, California, and Washington, D.C., from which whites (and in the case of Berkeley's *chicano* La Casa, Negroes) are excluded. It predated such contributions—presumably positive but in any event entitled to First Amendment free speech protection—as Donald W. Howie's unique analysis of *Brown* I: *The Image of Black People in Brown v. Board of Education* (1971) 1 The Black Law Journal 234.

One immediate effect of schools such as those in Berkeley and Washington, D.C., has been to condone by the support implicit in the use of Federal public funds the substitution of "black" attitudes of racial superiority for "white" (see, e.g., Gross and Osterman, *High School* (Simon & Schuster, N.Y., 1971), pp. 293, 300). The effect of allowing any racially defined group to exclude from public facilities persons of another race appears to be the same. If, therefore, the effect of Denver's neighborhood school policy were exclusion by race, which it is not, the burden of mistaken perception of *race* as determinative would not fall upon black and white pupils differently. It would fall upon both alike.

Not only does the effect of deliberate pupil exclusion by race fall alike and adversely upon black and white self-perception, but considering Negro pupils alone, the possible harm to self-perception which could result from the policies which plaintiffs in effect urge be required nationally may be as great as those resulting from segre-

gation laws and the deliberate exclusion by race which accompanied those laws. Self-perception is a tricky business, as the existence of the profession of psychiatry attests. We do not presume to guess about the self-perception of all Negro children or all of any-other-kind of children. The myths concerning Negroes of even thirty years ago seem absurd today (see Myrdal, op.cit. supra, pp. 106-108; cf. Barzun, op.cit. supra, passim). New myths tend to replace old myths (see Clark, *Dark Ghetto* (Harper & Row, N.Y., 1965) pp. 129-133, criticizing the current "cultural deprivation" theory; Erikson, *Identity, Youth and Crisis* (W. W. Norton & Company, N.Y., 1968) p. 304: "A clinician may be forgiven for questioning the restorative value of an excessive dose of moral zeal"; see also Murray, *The Omni-Americans: New Perspectives on Black Experience and American Culture* (Outerbridge & Dienstfrey, N.Y., (1970) pp. 98-112; Schragg, *Village School Downtown* (Beacon Press, Boston, 1967) pp. 171-172; and Katz, M., *Class, Bureaucracy and Schools* (Praeger Pub. Co., N.Y., 1971) pp. 111-112).

A local school board may reasonably question whether a Negro or "Hispano" child's self-perception might in some instances be damaged by law and school district pupil assignment policies which tell him that too much association with those who live in his neighborhood will retard his intellectual development. It may well question whether a pupil assignment policy based upon an invidious and misleading statistical comparison of the median achievement level of one racially defined group with the median achievement level of another might damage the self-perception of some children.

Policy based upon such an invidious comparison would in any case serve to mark Negro pupils by race as members of a group from which not much can be expected. Plaintiffs themselves note that performance is sometimes affected by expectations (see Rosenthal and Jacobson, *Pygmalion in the Classroom: Teacher Expectation and Pupils' Intellectual Development* (Holt, Rhinehart and Winston, N.Y., 1968). Plaintiffs do not seek escape from the mechanism by which this effect sometimes occurs. They seek instead to reinforce it. Plaintiffs choose to ignore the likely effect of their own panacea upon expectations from Negro pupils. They complain instead about the long standing and almost universal practice of paying some attention to achievement levels *in schools* for the purpose of central decision making about the allocation of resources *to schools* (Pl.Br., pp. 33, 34).

In Denver, for example, a lower pupil-teacher ratio—that is, fewer pupils per teacher—was deliberately fostered in schools with lower average achievement (A. 1327a-1329a). It is difficult to see how such a practice can be considered adverse to the pupils in schools with lower average achievement levels; but the adverse effect of this practice, if it is adverse, does not fall upon Negro pupils alone. The vice of the practice, if it is a vice, stems from central direction. To the extent that the practice treats the pupil in a school with a lower average achievement level as a member of group, it does *by school* the very thing which plaintiffs seek to require be done *by race*. The effect upon Negro pupils of limited expectations would hardly be improved by a constitutional rule requiring the deliberate balancing of pupils by race on

the ground that as a racially defined group Negro pupils do not achieve well. Laws not only set standards but help to create habits of conformity to them.

C. It is reasonable for a school board to balance the harm likely to result from the adoption of a policy of pupil assignment by race against the harm which plaintiffs argue results from treating all pupils alike for the purpose of assignment to schools.

Brown v. Board of Education was addressed to the deliberate exclusion of one race by another in a subculture polarized bi-racially. The harm likely to result from abandonment of a racially neutral standard for pupil assignment in cosmopolitan and pluralistic communities, neither wholly separate nor wholly integrated, cannot be readily assessed. Courts are ill-equipped to make such assessments. A school board elected by the people must be sensitive to the wishes of those actually affected. It can at the same time accommodate better than can a court the process of compromise inherent in democratic formulation of policy.

When the Fourteenth Amendment is turned from a judicial shield into a legislative sword, neither the person nor the racially defined group enjoys any longer the sanctuary from legislative excess contemplated by judicial review. The tangible burden of departure from San Francisco's neighborhood school policy has fallen most heavily upon pupils of Chinese, Latin and Filipino ancestry, not because of contacts with Negroes in school, which is nothing new in San Francisco, but because of the effect of dispersal upon special programs which ethnic minorities often want and need (cf. MALDEF Br., p. 26). Many

pupils of Chinese, Latin and Filipino ancestry need bilingual instruction in public schools, a need having its origin not in ethnic background but in existing ethnic environment. Special programs are sometimes essential to assimilation of pupils into the larger community.

It borders upon the frivolous to argue as some have done in San Francisco, that all children can benefit from learning Chinese. It is doubtless true that many children other than those of Chinese ancestry could benefit from learning Chinese, just as they could benefit from learning Spanish, or Italian, or Greek, or Russian, or the first language of other bilingual groups in San Francisco. It does not, however, seem likely that the child from a Spanish speaking home, who is having difficulty with English, will be encouraged by burdening him with learning Chinese in the first grade. Moreover, teachers bilingual in Chinese and English are scarce. The voluntary "concentration" of young children whose first language is Chinese is sometimes the only way in which such children can be aided—voluntary "concentration" not because of racial or ethnic background but because of the need of a child for a particular educational benefit.

A neighborhood school policy is not segregation merely because it allows self-selection to create ethnic diversity among schools. Racially and ethnically diverse schools are equal and not separate, for racial imbalance resulting from self-selection excludes no one by racial or ethnic ancestry. Nor does it freeze more firmly into the institution of the public school the insensitivity often reflected in the nation's most centralized, longest standing

and least successful program of forced acculturation, that of American Indian children:

> "ITEM: The students in a sixth grade English class in a school on a Chippewa Indian reservation are all busily at work, writing a composition for Thanksgiving. The subject of the composition is written on the blackboard for the students (and the visitor) to see. The subject: 'Why We Are Happy the Pilgrims Came!'" (Silberman, *Crisis in the Classroom* (Random House, N.Y., 1970) p. 173).

Plaintiffs themselves recognize that a constitutional duty measured by "benefit" to Negroes alone is untenable, for they seek to dispose of all "Hispanos" as well. "Hispano" is not defined universally as plaintiffs suggest (Pl. Br., p. 5). Normally, "Hispano" means "native[s] or resident[s] of the southwestern United States descended from Spaniards settled there before annexation" (Webster's Third New International Dictionary (G. & C. Merriam Co., 1961)). "Hispano" is not equivalent to Mexican-American, Chicano, Latino, Puerto Rican or Spanish-speaking and/or Spanish surname any more than Anglo is the equivalent of Saxon. "These three names—'Mexican,' 'Spanish American,' and 'Latin American'—are the three designations about which there has been the greatest status battle. 'Mexican American' (with or without hyphen) is increasingly used * * *. In recent years, *chicano* (diminutive of *Mexicano*) has come into increasing use as a self-referent, notably among the young, and especially among the militent" (Grebler, Moore, and Guzman, *The Mexican American People* (The Free Press, N.Y., 1970) p. 386; see also Ibid., Table 16-2 *Self-designation in Spanish and English*, by Income, Los Angeles and San Antonio Survey Re-

spondents 1965-1966; and Ibid., pp. 601-604 for a history of the changes in census designations).

Admiral Farragut might fairly have called himself a "Spanish-American" (Roosevelt, Theo., *Fear God and Take Your Own Part* (George H. Doran Company, N.Y., 1916) p. 363). Self-designations often differ from labels applied by others. "To infer that all Hispanos are non-white is fallacious, malicious sometimes, and always unjustified .... The term 'Anglo' should always be used whenever it is necessary to differentiate between Americans of Spanish, Mexican or other Hispanic or Hispanic-Indian background and Americans of European background other than Spanish" (Valdes, *What You Are* (1972) 1 La Luz 56, 57). Some "Anglos" who identify with the Irish Free Republic would disagree, just as Dr. Valdes rightly protests: "In the same spirit that a Bolivian-American resents being called a Spanish-American or Mexican-American, so too do the one million descendants of the original Spanish colonizers resent being called Mexicans or Mexican-Americans ..." (Ibid., p. 58). The diminutive *chicano* has little application in Denver, where most "Hispanos" come from rural Colorado and northern New Mexico (A. 2002a).

In the absence of any evidence in the record as to its meaning as "used throughout the record" (Pl.Br., p. 5) or as to the indicia which are to govern a public official's placing a child in any such "racial" category for any operative purpose, "Hispano" is a vague classification. Since people often at least think they know what Negro means, plaintiffs try to do what *they* think best for all "Hispanos," and at the same time solve the vagueness inherent in the "Hispano" classification by pointing to one attribute—low

reading achievement scores—allegedly shared with Negroes. Plaintiffs are compelled to their peculiar effort to reclassify Hispanos for special treatment as Negroes by the necessity to impress a unique set of problems upon the "Negro" group. For when Negro and non-Negro groups share the same problems, the irrelevance of the Negro classification to pupil assignment to schools and classrooms becomes apparent. Classifications irrelevant to a valid purpose are certainly not to be required by the Fourteenth Amendment. Some feel they should be prohibited by it (cf. Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James* (1971) 69 Mich.L. Rev. 1259).

For the same reasons which motivate plaintiffs in the case at bar, there is a compulsion to widen the "Negro" group to include Mexican-Americans in Corpus Christi, Hispanos in Denver, Chinese in San Francisco, Puerto Ricans in New York and American Indians in Arizona. The only common problem shared by such groups in public schools is low average achievement scores on standard tests, although most pupils of Chinese ancestry in San Francisco do not share even that problem. The ultimate absurdity of plaintiffs' "racial" classification of "Negroes" is demonstrated by considering the fact that, among all racial groups, boys notoriously get lower grades in elementary schools than do girls. If plaintiffs' theory were correct, one should conclude that boys are suffering from a lack of equal educational opportunity in predominantly male classrooms. Should we then be required by the Constitution to balance boys with girls more closely? Or should we be required to reclassify boys for special treat-

ment as "Negroes?" Or should we be required to develop equations on the order of the Lorentz transformation by which we may weight Negroes, blacks, Chinese, Japanese, Mexicans, Filipinos, Samoans, boys, girls, Hispanos, Indians, Armenians, Italians, Germans, Russians and so on? And have we not already, by embarking upon racial classifications in schools, increased geometrically the opportunities for schoolmen who are inclined to do so to discriminate against a child because of his ancestry?

In San Francisco, these are not idle rhetorical questions. In San Francisco, the average scores on achievement tests among pupils of Chinese ancestry is high. Are pupils of Chinese ancestry, therefore, to be classified as "white" for the purpose of assignment to schools with "Negroes"?[11] Or must they be classified for school assignment as "Negro" by virtue of California laws which at one time excluded some of their ancestors (see *Guey Heung Lee v. Johnson* (1971) 404 U.S. 1215; Yankwich, *Social Attitudes as Reflected in Early California Law* (1959) 10 Hastings L.J. 250). Must San Francisco provide in each school (or in each classroom?) pupils in each of its nine "racial" classifications? Or is it San Francisco's constitutional duty to classify all of the low achievers among the pupils in its "racial" categories, taken together, for treatment as "Negroes" and all the high achievers for treatment as "white," and then to balance its schools so that each have an approximately equal proportion of high and low achievers?

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[11]Americans of Chinese ancestry have waited long enough for an answer to this question (see *Gong Lum v. Rice* (1928) 275 U.S. 78).

Neither reason, nor science, nor anything in the record in the case at bar offers anything to justify any of such racial classifications as legally cognizable classifications for the assignment by the state of benefits or burdens. If children are to be required by the Constitution to be handicapped by public officials, children are entitled to be handicapped at least as fairly as horses. If we wish to address ourselves to slow learners and low achievers, we can address ourselves to slow learners and low achievers. That requires no *racial* classification.

IV. CONSTITUTIONAL STANDARDS AGAINST WHICH A PUBLIC BODY'S PERFORMANCE OF ITS CONSTITUTIONAL DUTY MAY BE MEASURED SHOULD NOT BE ABANDONED TO THE VARIED SUSCEPTIBILITIES OF LOWER COURTS TO CONCLUSIONARY SOCIOLOGICAL TESTIMONY AND REVANCHIST ESSAYS IN AMERICAN HISTORY.

The central question at the outset and at the end is whether it is the responsibility of the Denver School District to balance Denver's schools racially. Whether the question is posed as one of rights or of remedies, or as one of proof, disproof, or causation, that central question remains.

A. The remedies decisions in the school desegregation cases offer no ascertainable standard of constitutional duty.

Plaintiffs have shown only that the Denver School District has not considered itself obliged to abandon its long-standing policy of providing schools convenient to those whom the schools are to serve, in favor of assignment of pupils by race. Plaintiffs' charge that Denver's schools are insufficiently balanced racially requires at the outset a standard of a sufficient pattern, for a pattern of pupils by race cannot otherwise be insufficient.

The proper recipe for inclusion in and exclusion from specific schools to avoid "isolation" is entirely speculative. This Court's remedies decisions offer no standard of sufficiency better than that offered naturally by Denver's schools. Plaintiffs object to a school 27.5 per cent Anglo, 38 per cent Negro and 29.7 per cent Hispano (Pl.Br., p. 122). If interracial contact is the goal, this mix seems ideal. The "Anglo" percentage is greater than many cities can currently produce.

This Court's remedies decisions offer neither a measure from which one may deduce when "desegregation" has been accomplished nor a measure of sufficient racial patterns for any other purpose. "Desegregation" is to be measured not by motive but by effect. Yet school districts subject to "desegregation" are forbidden to create new attendance zones in which the proportion of pupils by race is about equal (*Wright v. Council of City of Emporia* (1972) ____S.Ct.____; *United States v. Scotland Neck City Board of Education* (1972) ____ S.Ct. ____). School districts subject to "desegregation" are thereby forbidden to reach for the "majority effect" which the plaintiffs in the case at bar consider to be vital to the improvement of Negro pupil achievement (supra, at p. 18). A school board's speculation about the effect upon shifts in racially defined populations of a Federal remedy which denies to all pupils in a school district the benefit of Dr. Coleman's prescription is not relevant. Yet judicial prognosis of the effect of population shifts upon the self-perception of all Negro pupils requires the perpetuation of a county-wide school system (*Wright v. Council of City of Emporia*, supra; *United*

States v. Scotland Neck City Board of Education, supra). The perpetuation of minority-dominated schools throughout an entire school district is required, for the creation of new attendance zones in which the proportion of white and black pupils would be about equal would have the effect of increasing the proportion of black pupils in some schools. Yet San Francisco was subjected to "desegregation" because it allowed some minority-dominated schools to exist within a framework of pupil assignment without regard to race, and San Francisco was allowed at the same time to increase the proportion of black pupils in some schools by minimizing them elsewhere.

One effect of this flexibility of equity has been to substitute asymmetry among school districts resulting from Federal court remedies decisions for asymmetry among school districts resulting from the legislative decisions of school districts alone. Another effect in San Francisco was the destruction of stable integrated elementary schools and the substitution for them of schools deliberately imbalanced racially in compliance with a Federal decree. Still another effect was to set San Francisco upon the long and divisive road of annual petitions and orders for further relief. The District Court's refusal to order San Francisco's elementary schools to be balanced evenly the first time assures Federal court supervision of San Francisco's pupil assignment policy in perpetuity, if "desegregation" remedies were at the outset correctly grounded in the understanding that racial imbalance is sufficient to show a violation of a constitutional duty conferring Federal jurisdiction.

If racial imbalance caused by the pupil assignment policy of a Federal District Court stands on some different footing than racial imbalance caused by the pupil assignment policy of a school district, one may reasonably ask what part of the Constitution exempts Federal court equity power from the requirements of equal protection and due process of law? What part of the Constitution allows to equity so much flexibility that Federal District Courts are always correct and school districts are always wrong? There is no end to the conundrums which Federal court remedies cases have put to school districts: Can they keep racial data without its being used as proof of racially discriminatory intent? Can they fail to keep racial data without its absence being used as proof of racially discriminatory intent? Can they build a new school, or not? Can they repair a school in a "predominantly black" neighborhood, or not? Can they assign a "black" teacher to a "black" school, or not? Can they allow a "white" child to transfer out of a "predominantly black" school for *any* reason? Can they meddle with the natural racial balance of a school attendance zone? If they do not strike the correct balance, will they then have committed an act of segregation by law? And what is the correct balance? Is it measured by pupil population in the school district, by adult population in the school district, or now, by pupil population or adult population in whatever three or more suburban areas someone might later think the school district should be required by the Constitution to merge with? If, on the other hand, they do not meddle with the racial balance of a school attendance zone, then are they guilty of an act of segregation by law, by virtue of "failure" to correct racial imbalance?

Uncertainty is compounded by the problem of the proper number of kinds: Two classifications as in *Racial Isolation in the Public Schools*?[12] Or six as in Denver? (A. 2038a). Or seven as in the Coleman Report? Or nine as in California? Uncertainty is further compounded by the recently enacted *Emergency School Aid Act*, Section 720 (9), (10). For the purpose of granting Federal aid to local school districts, Congress has determined that "minority isolation" consists of schools dominated by the aggregate of an open ended number of "racial minorities" (*Emergency School Aid Act*, Section 720 (9), (10).

As San Franciscans, we find the history of Denver's aborted plans for the creation of larger attendance zones by the use of "complexes" distinctly poignant. If innovations once adopted cannot be modified or postponed without thereby risking Federal court plenary authority in perpetuity over the school district, perhaps school districts will be more cautious in adopting innovations. Plaintiffs here argue that Denver's abandonment of its "complex" plan in favor of a plan allowing voluntary "majority to minority" pupil transfers was racially discriminatory (Pl.Br., p. 16). Yet neither the NAACP nor the District Court in San Francisco chose to abstain when San Francisco initiated the first stage of its like plan embracing roughly ten per cent of San Francisco's elementary schools and made clear its intention to adopt similar "complexes" throughout San Francisco (see *San Francisco Unified School District v. Johnson* (1971) 3 Cal.3d 937). San Francisco's "failure" to adopt quickly enough a city-wide plan of assignment of elementary pupils by

[12]U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (U.S. Gov't. Printing Office, 1967).

race was state action requiring a decree directing the adoption of a city-wide plan of assignment of elementary pupils by race.

How high, in short, is up? Those who seek in good faith responsibly to administer school districts by law and free of racial discrimination are damned if they do and damned if they don't. With school districts compelled to labor in the absence of rules, which is the absence of law, in a climate of racially oriented political propaganda, respect for law is itself undermined. School men who do wish to discriminate against pupils by race are afforded the best possible situations in which they may do so freely, for there is no measure by which the racist may be distinguished from the missionary.

B. Shifting to school districts the burden of disproving an intent to segregate merely affords another means to compel the adoption of racial quotas, a means suited chiefly to setting an equivocal constitutional standard against due process of law.

Plaintiffs would shift to local school districts the burden of disproof once an unspecified number of acts of "intentional segregation" have been shown (Pl.Br., p. 66). Given the evidence which plaintiffs offer as acts showing "intentional segregation" there would be little use in a requirement that some "segregatory action" be shown. Purity of heart is impossible to prove. Even Uncle Tom who gave his life rather than reveal the whereabouts of fugitive slaves became to some a symbol of black betrayal some while ago.

The natural and necessary actions of school districts —and that is all plaintiffs offer in this case—can easily be reinterpreted. If black teachers are assigned to pre-

dominantly black schools those schools are then said to be "identified" as "Negro" schools. If black teachers are assigned to "white" schools, then educational opportunities are being depressed at "black" schools because the children have no role models. If portable classrooms are located at a predominantly black school, that act becomes an effort to "contain" black students (App. to Pet. for Certiorari, 29a). If they are not, the educational opportunity is unequal because the pupils are then either in overcrowded classrooms or have an extended school day because they are transported elsewhere. If compensatory education programs are initiated, the accusation is that pupils are being "contained" in their old neighborhoods by the attractiveness of the school program. If compensatory education is not provided, pupils with a greater need are being discriminated against because they are not given more than children who need less. If a replacement school is built and opens with a twenty-seven percent Negro pupil population, it becomes "earmarked for minority occupants" (Pl.Br., p. 24). If school boundaries are drawn in a traditional fashion along a busy thoroughfare, then Negro pupils are being "segregated" if a disproportionate number live on one side of the street (1132a-1133a). And if school boundaries are drawn without regard to such a thoroughfare to include a greater proportion of Negro pupils in a school, then Negro pupils are being discriminated against because they must—unlike white pupils—cross a dangerous street or because such gerrymandering has included too few or too many.

Under this sort of Freudian analysis, the allocation of the burden of proof is dispositive. Constitutional rights and corresponding duties become mere matters of a

lower court's judgment at a given moment as to the sufficiency of the racial balance in a school district.

> "[I]n Detroit, one charge against the school board, accepted by Judge Roth, was that the board built small schools of 300 in order to contain the population and make desegregation more difficult. Paul Goodman and many others would argue that even schools of 300 are probably too large. In San Francisco, on the other hand, the argument was that schools were expanded to 'contain' the black and white population. The Detroit judge, it seems, would have preferred the large San Francisco schools, and the San Francisco judge would have preferred the small Detroit schools * * *" (Glazer, *Is Busing Necessary*, Commentary, March, 1972, 39, 48, reprinted in Cong. Record, Senate, March 13, 1972, S-3855, 3860).

Constitutional rights and corresponding duties should not depend upon the views of a single judge as to a sufficient pattern of pupil assignment by race. The redemption of constitutional rights should not have to depend upon waiting for the "right" judge.

Nor should constitutional rights and corresponding duties be so uncertain as to result in the imposition of conflicting duties in the same case, as has happened in the case at bar. The disparate treatment below of Denver's "core area" schools and its so-called "resolution" schools simply imposes upon the Denver School District conflicting duties. Denver has been told in one breath that its constitutional duty lies in classifying its pupils racially and that it must gerrymander four of its school boundaries to improve racial balance. It has been told in the next

breath that it need not classify racially and reassign all of its pupils on a racial basis. Such conflicting duties merely put off upon conflicting standards of proof substantive legal questions of the greatest moment.

When substantive questions are put off upon conflicting standards of proof, or when the "burden of proof" is shifted to require proof of a negative, the substantive rule comes to be wholly fictional and recognized as such however vigorous the disclaimer in dicta. Some such changes do not matter much. But some changes do. School desegregation cases result in mandatory injunctions disposing of an entire racially defined class, whether a member of the class wants such a "benefit" or not. They are sometimes even accompanied by the explicit denial of the right to intervene by persons who purport to speak for the class. Shifting the burden of proof in such unique "class actions" is particularly dangerous to the integrity of the judicial system. What is perceived as "discrimination" by a bystander may be perceived as a benefit by the person actually affected. Some pupils of Chinese ancestry, for example, view predominantly Chinese schools as superior in spite of a long history of prejudice and discrimination against Orientals in California. As Dr. Coleman commented about students in small town schools who were considering going to the University of Chicago: "They didn't know any better—all they were after was an education" (Coleman, *Adolescents and the Schools* (Basic Books, Inc., N.Y., 1965) p. 26). Nothing is more frustrating to the social engineer than the member of an oppressed minority who does not believe himself to be oppressed.

The constitutional requirement that there be a case or controversy assures an adversary process, which in turn justifies both the doctrine of res adjudicata which is supposed to bind the members of a class in a class action and the doctrine of precedent which binds everyone (*Sierra Club v. Morton* (1972) 92 S.Ct. 1361; but see, e.g., *Henry v. Godsell* (D.C. E.D. Mich. 1958) 165 F.Supp. 87, and *Davis v. School District of Pontiac, Inc.* (D.C. E.D. Mich. 1970) 309 F.Supp. 734, (6th Cir. 1971) 443 F.2d 573). The case or controversy disappears, and the adversary process disappears along with it, if a political organization can, by producing statistics and the history of some normal and necessary actions that can after the fact be construed as "segregatory", force a school district to choose between protracted litigation (which the school district must lose because undefined insufficient racial balance proves racial discrimination) and protracted transportation of the district's pupils. The only ones hurt are those who are to be allowed no voice, individually or collectively, the "beneficiaries" of the institution. For the parents of those "beneficiaries," be they white, black, red, or brown, recourse against a public institution which sometimes has as much in common with the jailor as with the fairy godmother is undercut by the very judicial system to which they must look for redemption of the pledge of due process of law.

A change to constitutionally required racial quotas in public schools is of too great moment for indulgence in legal fiction. For court-ordered and judicially supervised racial quotas would thus be impressed into the Constitution itself; the voting franchise would be undermined;

and unique "class actions" allowed at the outset as a means of protecting the person would have become instead the means for denial of due process of law. Worse still: required adoption of racial quotas accompanied neither by judicial supervision nor by a definite standard by which such quotas are to be established and administered would afford unlimited opportunities for racial discrimination beyond the establishment of quotas themselves.

C. Even if Denver committed "segregatory acts," equity should not require a district-wide remedy. Experience should preclude such a remedy.

Plaintiffs argue that only system-wide relief "promises to effectively remedy the effects of past discriminatory policy" (Pl.Br., p. 65). Admitted failure of proof as to most Denver schools is to be excused because all the school district's actions should be considered "prima facie illegal" where "the school authorities have been found guilty of intentional segregation as to some action" (Pl. Br., p. 66). Plaintiffs equate "the objective of equalizing educational opportunity" with the objective of racial quotas. Not only would plaintiffs shift to the school district the burden to explain why it has not established and maintained racial quotas in all of its schools, but they equate the "flexibility" of equitable remedies with the requirement that equity always go as far as this Court has most recently allowed.

Even equity power has limits (cf. *Sixty-seventh Minnesota State Senate v. Beens* (1972) 92 S.Ct. 1477). The remedy which plaintiffs urge upon Denver is not likely to be effective except in furtherance of Dr. Dodson's purpose to introduce dysfunction into another local public

school system. Plaintiffs' "remedy" for racial imbalance would be impermanent. It is, moreover, directed at the wrong body. Racial imbalance as well as the deficiencies in the institution of the public school would continue because both problems stem from conditions over which school boards have the least control and are at the same time the most vulnerable as the scapegoat.

In San Francisco, one immediate and direct effect of disruption of the entire system was the loss of about one-eighth of San Francisco's elementary school population. There is reason to believe that the loss was greatest among pupils formerly in schools which even the District Court in San Francisco found to be "integrated." We trust that in view of the pupils of Negro ancestry and Chinese ancestry included in San Francisco's dramatic pupil loss, characterizing that loss as "white" flight would be a further misuse of racial classification.

If school districts must provide against voluntary population movements, they will be hard pressed to stay one step ahead of their pupils. Mrs. Lewis "found that moving out of the core city to an integrated area provided only temporary integration" because other Negroes followed her (Pl.Br., p. 85). Senator Brown found his political position compromised because when the elimination of certain optional zones was discussed, the area in which he and another black elected official lived were to continue in the optional zone (A. 866a-867a, 875a). Senator Brown moved to another optional zone between a predominantly white and a predominantly black school, and his daughter attended the predominantly white school (A. 876a-877a). Barrett school was constructed to serve his residence area

and opened in 1960 as a predominantly black school, even though in 1957 Senator Brown's family was the first black family in his block (A. 876a-878a).

The population shifts which affected plaintiffs' witnesses have been demonstrated time and time again in cities which have been affected by Southern school remedies cases (see *Calhoun v. Cook* (D.C.N.D. Ga. 1971) 332 Fed.Supp. 804, order vacated in part (5 Cir. 1971) 451 F.2d 583). Even if it were proper that they seek to do so, neither school boards nor courts can any more assist Negro families to escape from other Negro families than they can assist white families to exclude Negroes.

Insofar as plaintiffs seek a remedy which will reform education, relief against Denver's school board undercuts the wrong body. Whatever requiring racial balance might do to improve racial balance temporarily, it would not improve educational opportunity. "Affirmative action to relieve racial imbalance" has enabled some to disguise the overdue public confession of the near bankruptcy of the public school (see Greer, *The Great School Legend* (Basic Books, N.Y., 1972) passim). "Racial imbalance" has enabled some to disguise the simple fact that the Negro community has succeeded where so many others have failed in stripping the emperor of garments never there. Since children will teach children when the institution has been unable to, one might reasonably conclude that it is not the institution which has been doing much teaching of anybody. By virtue of disguising teaching failure behind racial imbalance, the chief effect of "affirmative action" to date has been to leave the rabbits in charge of the lettuce patch. Many public school administrators today

have the most enthusiasm for "desegregation" and "equal opportunity" programs which require the expenditure of vast sums on large impersonal education parks (Sullivan, A. 1601a-1602a; Passow, ed. *Developing Programs for the Educationally Disadvantaged* (Teachers College Press, Colum. Univ., N.Y., 1968) pp. 314-316). They have no enthusiasm for compulsory reassignment of effective teachers to schools with low achievement levels. They are not even enthusiastic about such mild teacher "coercion" as offering higher pay scales for service in schools with low achievement levels. The NEA did not endorse *Brown* I or *Brown* II after studying the matter in 1959 (Lieberman, *The Influence of Teachers' Organizations Upon American Education* in Henry, ed. *Social Forces Influencing American Education*, National Society for the Study of Education, Sixtieth Yearbook, Part II, Univ. of Chi. Press, Chicago 1961). It is, therefore, not surprising that there is no comment from that quarter about teacher turnover in Denver's "core area" schools (A. 281a). There is no request from that quarter to remove seniority transfer provisions from teachers' union contracts. Such requirements exist in Denver as elsewhere (A. 260a, 261a, 266a, 308a). Equity has as much power over teachers' unions as over school boards; but there is only willingness to join in undermining local school boards and in compelling children and their families to undergo the educational and social trauma which accompanies frequent reassignment and larger more impersonal custodial institutions.

Neither the Constitution nor the flexibility of equity requires that Federal courts be used toward such ends. We find no evidence in the record in this case of any act

or policy which excluded pupils by race from Denver's schools. The Denver school board is entitled to retreat from experiment with boundary gerrymandering by suspect pupil assignment standards without suffering Federal jurisdiction in perpetuity. But if an experiment commits a school board irrevocably, then equity should direct itself to nothing beyond that experiment. Even then, equity should consider whether a court's judgment about such an experiment should be substituted for the judgment of a democratically chosen school board. Effective local democratic expression is a vital balance against the vast bureaucracy which the institution of the public school has become.

CONCLUSION

Plaintiffs argue not that laws requiring that school districts distinguish among pupils by race are wrong, but that the South simply had the wrong such laws. The right such laws, they say, should now be required by this Court. If we seek to teach our children that a man may not be judged by the color of his skin—if freedom of association is our goal—the lesson cannot be taught by constitutionally compelled racial classification by school districts. If we seek to teach our children that we value self-government, the lesson cannot be taught by removing the governance of public schools almost entirely from local democratic accountability in the guise of correcting the effect of racial discrimination.

The result would be the same whether racial quotas be explicitly approved or brought about by continued con-

flicting demands or an impossible burden of proof upon local school boards. To require that school districts substitute the racially defined population for the person under the Fourteenth Amendment coincident with the revival of Social Darwinism would be dangerously shortsighted (see, e.g., Ardrey, *The Social Contract* (Kingsford Press Inc., 1970); Jensen, *How Much Can We Boost IQ and Scholastic Achievement?* (1969) (39 Harv.Educ.Rev. 1). To impose upon school districts a constitutional duty to classify pupils racially for the purpose of school and classroom assignment would serve chiefly to perpetuate the myth that it is race which determines behavior, ability, accomplishment, and character. Given the purported correlation between race and academic achievement upon which plaintiffs base their argument that a school district must classify and assign its pupils racially, it would serve also as a measure—by race—of the nation's view of a pupil's prospects for academic success. No school district should be compelled by the Constitution of the United States to do that to any child.

The decision of the Tenth Circuit below should, therefore, be affirmed as it relates to Denver's "core area" schools. Certiorari should be granted and the decision of the Tenth Circuit reversed in No. 71-572.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-507

WILFRED KEYES, *et al.*,

Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the 10th Circuit.

BRIEF AMICUS CURIAE FOR SAN DIEGO UNIFIED SCHOOL DISTRICT.

Introduction.

This brief is filed with the written consent of both parties, pursuant to Rule 42 of the Rules of the Supreme Court of the United States. It is in support of the position of the Respondents, Denver School District, No. 1, *et al.*, that the Supreme Court should affirm the decision of the Court of Appeals which refused to order racial balancing of schools in the absence of proof that the racial imbalance was the result of racially motivated conduct.

Interest of Amicus Curiae.

For the past several years the San Diego Unified School District, like many other large northern city school districts,[1] has been struggling with some of the same conditions which are present in the *Denver* case. Over the past three decades the San Diego area has experienced a large influx of Negro and other minority group residents.[2] These new residents tended to congregate together in certain areas of the city, and as a result the neighborhood schools in some of those areas have a disproportionate number of minority students as compared to other areas of the city.[3]

Some of these minority students presented special educational problems. For example, some had come from other parts of the country where there were lower educational standards; others entered school with little English-language background, and many came from economically deprived families. In an attempt to alleviate many of these problems, the San Diego Unified School Board has formulated a plethora of compensatory and other educational programs[4]—all of which

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[1]The San Diego Unified School District is one of the largest urban school districts in the United States, serving some 128,317 pupils in its 33 secondary schools (grades 7-12) and 124 elementary schools (grades K-6).

[2]A review of the San Diego City Schools Pupil Racial Ethnic Census for the past several years illustrates this trend. In 1965-66 the figures for the three largest racial and ethnic pupil groups were as follows: Spanish Surname 8.0%, Other White 80.6%, and Negro 9.3%. By 1971-72 the respective figures were: Spanish Surname 10.6%, Other White 73.1%, and Negro 12.8%.

[3]The San Diego City School Pupil Ethnic Census, 1971-72 (Publ. Jan. 72) indicated that 21 of the District's 124 elementary schools and 5 of the District's 33 secondary schools had individual or combined Negro and Spanish Surname enrollments of 50% or more.

[4]Several of these programs (*E.g.*, The Fremont-Silvergate Model Schools Program and the Balboa Park Program) were

are designed to assure that each child has an equal educational opportunity no matter what his race, ethnic, economic or social background.

However, some individuals have not been satisfied with the School District's actions, and commencing in 1967 the San Diego School District has been almost continuously involved in litigation brought by various parties seeking to require the San Diego School District to adopt a policy of forced racial and ethnic balancing of its pupil population.[5]

By granting certiorari in the *Denver* case, for the first time the United States Supreme Court is in a position

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designed to provide an opportunity for pupils from various ethnic and socio-economic groups to come together for the purpose of developing mutual respect and understanding.

In addition, commencing in 1966, the San Diego School District initiated a voluntary ethnic transfer program with the school district paying all transportation costs. Each year participation in that program has increased, and in 1971-72 1,957 students took advantage of this program.

[5]In December 1967 a so-called "class action" suit seeking "integration" was filed. (*Carlin v. Board of Education, San Diego Unified School District*, San Diego Superior Court, No. 303800). In July 1969 that suit became inactive with the filing of a similar suit by the then California Attorney General, Thomas C. Lynch (*People v. San Diego Unified School District et al.*, San Diego Superior Court, No. 312080). Although the School District was successful in obtaining a dismissal of this latter suit, on appeal, the California Court of Appeals for the Fourth Appellate District reversed and remanded the case for trial (*People ex rel. Lynch v. San Diego Unified School District* (1971) 19 Cal.App.3d 252, 96 Cal. Rptr. 658). On November 11, 1971, following a denial of hearing by the California Supreme Court, the San Diego School District petitioned the United States Supreme Court for a writ of certiorari. On February 29, 1972, California's present Attorney General, Evelle J. Younger, replied to that petition by stating that he intended to dismiss the action. On March 27, 1972, the United States Supreme Court denied the petition for the writ of certiorari. (*San Diego Unified School District v. California* (1972) 405 U.S. 1016). On April 6, 1972, that case was dismissed, but within two weeks the original *Carlin* plaintiffs re-commenced their action, and at present, a trial is set for October 1972.

to decide what should be the respective role of the courts and the local school authorities in determining what should or must be done when racial imbalance, not the result of a prior *de jure* segregated system or prior discriminatory acts, exists. In this decision the San Diego Unified School District is vitally interested.

Opinions Below.

The Opinion of the Tenth Circuit Court of Appeals is reported at 445 F.2d 990 (App. Pet. Cert. 122a-158a). The various opinions of the District Court are reported at 303 F. Supp. 279 (App. Pet. Cert. 1a-19a); 303 F. Supp. 289 (App. Pet. Cert. 20a-48a); 313 F. Supp. 61 (App. Pet. Cert. 49a-98a); and 313 F. Supp. 90 (App. Pet. Cert. 98a-121a).

Jurisdiction.

The Supreme Court has jurisdiction to review the Tenth Circuit decision by a writ of certiorari pursuant to 28 U.S.C. Section 1254(1). This jurisdiction was invoked by the granting of said writ on January 17, 1972.

Question Presented for Review.

ARE SCHOOL AUTHORITIES REQUIRED TO RACIALLY BALANCE THEIR SCHOOLS REGARDLESS OF THE CAUSE OF THE IMBALANCE OR ARE THEY FREE TO ADOPT OTHER METHODS FOR PROVIDING EQUAL EDUCATIONAL OPPORTUNITY?

Statement of the Case.

In June 1969, the plaintiffs (petitioners herein) brought a "class action" against the Denver School District, its Board of Education, and Superintendent seeking broad injunctive relief to require defendants (respondents herein) to remedy the alleged racial seg-

regation and unequal educational opportunity in certain of defendants' schools.

Plaintiffs' complaint consisted of two causes of action. The first cause of action related to the so-called "resolution schools" consisting of six Northeast Denver elementary schools, two junior highs, and one high school affected by three resolutions adopted by the Board of Education in the spring of 1969 and thereafter in June 1969 rescinded. As to these schools, the trial court found affirmative discriminatory acts. (303 F. Supp. 289, at 294-295, App. Pet. Cert. 32a-35a; 313 F. Supp. 61, at 67-69, App. Pet. Cert. 52a-57a).

The second cause of action related to a larger number of Denver schools which plaintiffs alleged were either segregated or providing unequal educational opportunity. After finding that said schools were not *de jure* segregated, (313 F. Supp. 61, at 69-76, App. Pet. Cert. 57a-74a), nor that the neighborhood school policy had been intentionally used to segregate these schools, (313 F. Supp. 61, at 76-77, App. Pet. Cert. 74a-75a), the trial court proceeded to review a group consisting of twelve elementary schools, two junior high schools, and one senior high school. These "court designated schools" were generally located in the north-central part of Denver in what the court referred to as the "core aren" and were stated to have been selected because of their high (70% or more) concentration of Negro and "Hispanic" pupils.* (313 F. Supp. at 77, App. Pet. Cert. 76a-77a). The major thrust of the

*The court specifically noted that some of these schools had already been discussed in regard to the First Cause of Action, "but they are included here *because of their racial concentrations, if not in every instance their educational inferiority*". (313 F. Supp. 61, at 78, App. Pet. Cert. 77a). [Emphasis added.]

plaintiffs' claim as to these schools was that the racial concentration in those schools made them inferior, and thus the students attending them were denied equal educational opportunity. (313 F. Supp. 61, at 81, App. Pet. Cert. 83). Based primarily upon his conclusion that regardless of its cause, racially concentrated schools produce lower achievement and an inferior educational opportunity, (313 F. Supp. 61, at 77, 83, App. Pet. Cert. 76a, 89a), the trial court ordered that these "court designated schools" be "desegregated" and that grades 1-6 be racially balanced with an "Anglo" composition in excess of 50 percent. (313 F. Supp. 90, at 98, App. Pet. Cert. 116a).

On appeal the Tenth Circuit Court of Appeals, after affirming the other District Court findings, reversed as to the "court designated schools", holding that the trial court's ruling pivoted on a conclusion that Denver's neighborhood school policy violated the Constitution because it resulted in racial and ethnic imbalance and that this conclusion was contrary to the Tenth Circuit's previous holdings on this issue. (445 F.2d at 1007, App. Pet. Cert. 151a).

Thereafter the plaintiffs petitioned for a Writ of Certiorari to seek review of the Court of Appeals' decision. On January 17, 1972, the United States Supreme Court granted the writ of certiorari.

The brief of this Amicus will be limited to a discussion of the part of the case presented by the Circuit Court's reversal of the trial court.

Summary of Argument.

I.

The Tenth Circuit Court of Appeals correctly applied existing law when it reversed the trial court's ruling that pupil racial imbalance, regardless of its cause, results in a deprivation of equal educational opportunity. The decisions of the United States Supreme Court and every Federal Appellate Court which has considered the situation have indicated that there is no federal constitutional duty to racially balance the schools in the absence of proof that the inbalance was the result either of a prior *de jure* system, or purposeful discriminatory action.

II.

Recent empirical studies indicate that the problem of providing equal educational opportunity to minority students is very complex and that racial composition of the classroom, if at all related to achievement, accounts for only a small proportion of the differences among the schools. A very recent study indicates that racial balancing may not achieve the intended beneficial results and may, in fact, be counterproductive.

III.

In light of the problems presented by varying local conditions, the Supreme Court should not adopt one solution to the problem of providing equal educational opportunity, but should allow local school authorities the flexibility to work out their own solutions.

Argument.

I.

THE TENTH CIRCUIT PROPERLY RULED THAT ABSENT A PRIOR HISTORY OF SEGREGATION OR DISCRIMINATORY ACTS THERE IS NO CONSTITUTIONAL DUTY TO REMEDY PUPIL RACIAL IMBALANCE.

A. The Federal Circuit Courts of Appeal Have Uniformly Held That Absent a Prior History of Segregation or Other Discriminatory Acts, There Is No Constitutional Duty to Remedy Pupil Racial Imbalance.

Whenever Circuit Courts of Appeal have been faced with the issue of pupil racial imbalance in the absence of proof of prior discriminatory acts, they have reached consistent conclusions.[7] (*E.g. Bell v. School City of Gary, Indiana* (1963 7th Cir.) 324 F.2d 209, 213, *cert. denied* (1964) 377 U.S. 924 (no constitutional duty to change innocently arrived at school attendance districts merely because shifts in population had increased or decreased the percentage of Negro or white pupils); *Downs v. Board of Education* (1964 10th Cir.) 336 F.2d 988, 998, *cert. denied* (1965) 380 U.S. 914 (no requirement to abandon or destroy the neighborhood school system even though it results in racial imbalance where it was maintained with no intention or purpose to maintain or perpetuate segregation); *Springfield School Committee v. Barksdale*

[7]There has been a divergence of opinion in some trial courts. *E.g.*, compare *Blocker v. Board of Education of Manhasset, New York* (1964 E.D.N.Y.) 226 F. Supp. 208 and *Soria v. Oxnard School District* (1971 C.D. Cal.) 328 F. Supp. 155, with *Lynch v. Kenston School District Board of Education* (1964 N.D. Ohio) 229 F. Supp. 740 and *Gomperts v. Chase* (1971 N.D. Cal.) 329 F. Supp. 1191.

(1965 1st Cir.) 348 F.2d 261, 264 (no requirement to remedy racial imbalance at all costs); *Deal v. Cincinnati Board of Education* (1966 6th Cir.) 369 F.2d 55, 61, *cert. denied* (1967) 389 U.S. 847, (1969 6th Cir.) 419 F.2d 1387, 1390, *cert. denied* (1971) 402 U.S. 962 (no constitutional duty to bus children out of their neighborhoods or transfer classes, or select new schools to alleviate racial imbalance caused not by the school board but by the racial character of the neighborhoods in which the schools were located); see also, *Offermann v. Nitkowski* (1967 2nd Cir.) 378 F.2d 22, 24; *Sealy v. Dept. of Public Instruction of Penn.* (1958 3d Cir.) 252 F.2d 898, 901, *cert. denied* 356 U.S. 975.)

Thus in its decision in June, 1971, the Court in the Denver case could accurately state:

> *"We never construed Brown to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue.* [citations omitted]" (445 F.2d at 1005) [Emphasis added.]

The Circuit Court cases decided since *Denver* have continued to affirm its principles. (See *e.g. Lawlor v. Board of Education of the City of Chicago* (1972 7th Cir.) 458 F.2d 660 wherein the Court affirmed a trial court decision dismissing a complaint which alleged that the School Board's action had "forced whites to move out" and encouraged the segregation of "black people" within certain schools, stating:

> "If separation in racially imbalanced schools were the result of unlawful discrimination, school officials would be under an affirma-

tive duty to remedy the situation. However, the mere fact of imbalance of races is not alone a deprivation of equality of educational opportunity in the absence of purposeful invidious discrimination." (458 F.2d at 662).

Thus, since *Brown*, every Federal Appellate Court which has been directly confronted with the issue of racial imbalance has held that there is no constitutional duty to remedy pupil racial imbalance when it is not the product of some prior action of segregation or purposeful discrimination.[8]

B. Recent Supreme Court Decisions Indicate That Racial Imbalance Existing in a Unitary School System Does Not Require Judicial Interference in the Absence of a Finding of Specific Discrimination.

Within the last year the United States Supreme Court on three different occasions has expressed agreement with the principle that racial imbalance *per se* is not unconstitutional.

1. *The Charlotte Case*

In *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, the Court illustrated that point in dealing with a case from a former dual school system. The Court upheld the power of a federal district judge to use "cross-busing", "pairing", and "grouping" techniques to remove the last vestiges of a dual

[8]The remedying of racial imbalance has been ordered by some of these same Circuit Courts where there was a specific finding that it was the result of purposeful discrimination. (See *e.g., Davis v. School District City of Pontiac* (1971 6th Cir.) 443 F.2d 573, *cert. denied* 404 U.S. 913; *United States v. School Dist. 151 of Cook County, Illinois* (1970 7th Cir.) 432 F.2d 1147, *cert. denied* (1971) 402 U.S. 943).

school system.[9] In addition, however, the court laid down the following guidelines:

(a) *A Unitary School Need Not Be Racially Balanced.*

The appellant school board argued that the District Court order imposed a racial balance requirement of 71%-29% for each of its individual schools. The Supreme Court disagreed.[10] It saw the use made of mathematical ratios as no more than a starting point and thus within the District Court's "discretionary powers, an equitable remedy for the particular circumstances". (402 U.S. at 25.)

Moreover the Supreme Court stated:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach

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[9]In accordance with *Brown* and the Supreme Court's later implementation decision (*E.g., Brown v. Board of Education of Topeka* (1955) 349 U.S. 294 (requiring all deliberate speed); *Griffin v. County School Board of Prince Edward County* (1964) 377 U.S. 218 (prohibiting the closing of public schools to avoid desegregation); *Green v. County School Board* (1968) 391 U.S. 430 (holding freedom of choice plans an unacceptable substitute for desegregation) racial imbalance has been ordered remedied by several Southern courts in an attempt to create a unitary school system where none existed previously and wipe out the last vestiges of state imposed segregation. (*See e.g., United States v. Jefferson County Board of Education* (1966 5th Cir.) 372 F.2d 836, *affirmed en banc* (1967 5th Cir.) 380 F.2d 385, *cert. denied* 389 U.S. 840; *Hobson v. Hansen* (1967 D.D.C.) 269 F. Supp. 401, *remanded sub nom. Smuck v. Hobson* (1969 D.C.Cir.) 408 F.2d 175).

[10]The Supreme Court noted that the District Court itself had stated: " 'This court has not ruled, and does not rule that "racial balance" is required under the Constitution . . . *nor that the particular order entered in this case would be correct in other circumstances not before this court*' (emphasis in original)." (402 U.S. at 25n.9.)

would be disapproved and we would be obliged to reverse. *The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.*" (402 U.S. at 24.) [Emphasis added.]

(b) *A Unitary School System May Have "One-Race" or Virtually "One-Race" Schools.*

The court stated:

> "No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." (402 U.S. at 26.)

However, the Supreme Court noted that in certain metropolitan areas minority groups are often concentrated in one part of the city and stated:

> "In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law." (402 U.S. at 26.)

(c) *There Is No Duty to Racially Balance Schools in the Absence of a Constitutional Violation.*

The Supreme Court held that where there is a dual school system a court has broad remedial powers including the right to take such drastic steps as "gerry-

mandering" of school attendance zones and "pairing" or "grouping".

The Court noted, however:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." (402 U.S. at 28.)

(d) *Establishment of a Unitary School System Satisfies Constitutional Requirements.*

In conclusion the Supreme Court stated:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown* I. The systems will then be unitary in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but *in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to*

affect the racial composition of the schools, further intervention by a district court should not be necessary." (402 U.S. at 31-32) [Emphasis added.]

2. *Spencer v. Kugler*

Although the *Charlotte* case factually involved a former state segregated school system, many thought that its teachings would have applications to all courts, both north and south. This forecast seemed justified by the United States Supreme Court's handling of the case of *Spencer v. Kugler* (1971 D.N.J.) 326 F. Supp. 1235. In that case, a three judge Federal Court held that a complaint which sought inter-district pupil racial balancing did not state a claim upon which relief could be granted. Although the Court reached its decision before publication of the *Charlotte* decision, in its written opinion the Court reviewed the *Charlotte* case and noted that it fully supported the Court's disposition of the plaintiffs' claims. (326 F. Supp. at 1241-1243.)

The plaintiffs appealed and the United States Supreme Court affirmed *per curiam,* (1972) 404 U.S. 1027.

3. *Wright v. Council of City of Emporia*

In the very recent decision of *Wright v. Council of City of Emporia, Virginia,* 40 U.S.L.W. 4806 (U.S. June 22, 1972) the Supreme Court was again faced with a situation arising from a former state segregated school system. Soon after a Federal District Court had ordered a "pairing" plan for the Greens-

ville County School District, the City of Emporia tried to withdraw from the County System and operate its own school system. Although the majority of the Court found that under the circumstances this withdrawal would impede the dismantling of the former dual school system, they were careful to point out that their decision was not based upon any racial balancing concept. The opinion stated:

> "We need not and do not hold that this disparity in the racial composition of the two systems would be a sufficient reason, standing alone, to enjoin the creation of a separate school district. The fact that a school board's desegregation plan leaves some disparity in racial balance among various schools in the system does not alone make that plan unacceptable. We observed in *Swann, supra* that 'the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. 402 U.S. at 24.'" (40 U.S.L.W. at 4810-4811.)

The Supreme Court's consistent language and treatment of these three recent cases indicates that in dealing with a unitary school system the fact of racial imbalance alone does not give a court the right to interfere and order that it be remedied.

II.

RECENT EMPIRICAL EVIDENCE OFFERS NO EXCUSE FOR CHANGING THIS RULE.

In *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483 the Supreme Court in overruling the "separate but equal" doctrine of *Plessy v. Ferguson* (1896) 163 U.S. 537 was able to cite several sociological and psychological treatises for the proposition that:

> "Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." (347 U.S. at 494.)

Plaintiffs and others have emphasized this finding and would have the Supreme Court blindly extend it to all cases where pupil racial imbalance exists regardless of cause. In support of this contention in the Denver case, they pointed to the low average achievement scores of the "court designated" area schools and leaped to the conclusion that only by racially balancing these schools will the minority students receive equal educational opportunity.

Whatever may have been the extent of sociological and psychological knowledge in 1954 as applied to the effects of segregated school systems on minority pupils, today we know that the problem of providing equal educational opportunity to minority groups is very complex and is not dependent upon just one factor such as the racial proportions in a school or classroom.

A. The Coleman Report and Later Studies of Recent Data Indicate That the Racial Composition of a School Has Little Effect on the Educational Achievement of the Students.

In July, 1966, the COLEMAN REPORT was published.[11] Its results were startling and questioned some of the basic assumptions hitherto prevalent in the field of education. Contrary to what the investigators thought they would find, the survey indicated that minority schools, even in the south, did not differ substantially in physical facilities (COLEMAN REPORT pp. 9-11) and that what differences were shown did not relate closely to achievement (COLEMAN REPORT p. 312). The key factor in predicting achievement appeared to be the socio-economic background of the students (COLEMAN REPORT pp. 21, 302).

Although the report found higher achievement in schools with a high proportion of white students, it noted:

> ". . . The apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on

[11]The Civil Rights Act of 1964 provided that the United States Office of Education should undertake a survey and report within two years concerning the lack of availability of equal educational opportunities by reason of race, color, religion, or national origin in the public schools (42 U.S.C. 2000 c-1). The Commissioner of Education entrusted the operation to a team headed by James S. Coleman of Johns Hopkins University. Initially a massive survey was undertaken involving some 570,000 school pupils, 60,000 teachers, and information on the facilities available in over 4,000 schools. This massive study was published in two parts, the REPORT ON EQUALITY OF EDUCATIONAL OPPORTUNITY, [EEOR—often called the COLEMAN REPORT], and a Supplemental Appendix containing a part of the survey data [EEOS] upon which the report was based.

> the average, found among white students. The effects of the student body environment upon a student's achievement appear to lie in the educational proficiency possessed by that student body, regardless of its racial or ethnic composition." (COLEMAN REPORT pp. 307-310).

More recently there have been some independent reanalyses of some of the survey data included in the COLEMAN REPORT. See Cohen, *Defining Racial Equality in Education* (1969) 16 UCLA Law Review 255, who states that on the basis of his analysis of the earlier data he has concluded that:

> ". . . if recent research is correct, racial composition—if at all related to achievement—accounts for only a small proportion of school-to-school performance differences among blacks. The research seems to show that other measures of school resources are more important than racial composition, but it also seems to show that all of these factors are of almost negligible importance to achievement; family background, social and economic status, and community characteristics appear to be by far the most important predictors of achievement in school. None of these are elements over which schools have traditionally had much control." (16 UCLA L.Rev. at 258-259).

In March 1972, a series of 14 papers derived from a Harvard University Faculty Seminar analyzing the COLEMAN REPORT and its data were published in a volume entitled ON EQUALITY OF EDUCATIONAL OPPORTUNITY edited by Frederick Mosteller and Daniel P. Moynihan [hereinafter cited as MOSTELLER].

After analyzing the COLEMAN REPORT and commenting upon its finding regarding the general equality of school facilities and the new emphasis on non-school factors, the editors commented:

> "In this respect the EEOR was part of a generally new phenomenon which was unsettling both to the advocates of social change and to the analysts of social conditions. Especially with respect to matters of race, the period of the EEOR, which is to say the mid-1960's, had been preceded by a half century, at very least in which social science had been the unfailing ally of social change in this field. Not infrequently social scientists had been advocates as well as analysts, and there had been little if any tension between their dual roles. Social science had come to the aid of the widest range of causes, and not least that of educational equality. A distinctive feature of *Brown v. Board of Education of Topeka* had been the introduction by the plaintiffs of social science information purporting to prove that segregated schools were inherently unequal, and that the disadvantage was sustained by the Negro children. What then was to be made of social scientists apparently turning on their old allies with a report that implied that this was all greatly exaggerated, *and that the low levels of educational achievement came from generalized social conditions against which schools could hardly expect to prevail, save in the most marginal ways?*" (MOSTELLER p. 31) [Emphasis added.]

The papers themselves tended to support the COLEMAN REPORT findings.

In "The Coleman Report and the Conventional Wisdom" Professor Christopher H. Jencks concentrated his efforts in analyzing the data from northern urban elementary schools. Among his conclusions was the following:

> "The achievement of lower-class students, both black and white, was fairly strongly related to the socio-economic level of their classmates. This usually meant that a student's achievement was also related to the race of his classmates, since blacks' classmates tended to be poor classmates and vice versa. If the socio-economic level of a lower-class child's classmate was held constant, however, their race had no relationship to his achievement." (MOSTELLER p. 71).

Professor David J. Armor in his paper "On School and Family Effects on Black and White Achievement: A Re-examination of the USOE Data" found:

> "The results are strongly suggestive of the conclusion that the determinants of student achievement are more likely to be found in the home than in the school." (MOSTELLER p. 224).

After examining the data gathered in regard to the achievement of blacks in integrated schools he concluded:

> "In other words, even those black students in integrated and higher socio-economic environment still achieved at a lower level than whites. The most likely explanation for this is that their *individual family background* is still more disadvantaged than that of white students in the same environment. Thus, while integration may

be an important factor for black achievement, blacks might still never attain full achievement equality until their individual family life style catches up to that of whites. The policy implication here is that programs which stress financial aid to disadvantaged black families may be just as important, if not more so, than programs aimed at integrating blacks into white neighborhoods and schools." (MOSTELLER p. 226).

Professors David K. Cohen, Thomas F. Pettigrew, and Robert T. Riley in their paper entitled "Race and the Outcomes of Schooling" studied the effect of racial composition in the sixth grade of northern metropolitan schools. They concluded:

"Our findings on the school racial composition issue, then, are mixed. Although the initial EEOS analysis overstressed the impact of school social class, it would not be profitable to perform a complete reanalysis at both the school and student level at grades nine and twelve given the problems of unmeasured school selection processes. When the issue is probed at grade six, a small independent effect of schools' racial composition appeared, but its significance for educational policy seems slight. The evidence suggests that student body racial composition at grade six acts more as a 'proxy' than a 'mediator' of the school social-class effects. *Until the breadth of the EEOS data can be combined with sufficient longitudinal information on students and their schools, stronger results on this point will not be forthcoming.*" (MOSTELLER pp. 351-352). [Emphasis added.]

B. New Evidence on the Effects of Integration Raise Serious Questions About the Advisability of a Court Imposed Program of Racial Balancing.

Very recently one of the first longitudinal studies on the effects of racial composition in the schools[12] has been published by Professor Armor in an article entitled "The Evidence on Busing" appearing in the Summer 1972 issue of a magazine called THE PUBLIC INTEREST [hereinafter cited as ARMOR].

Professor Armor's findings were based on the study of data collected over the past five years from several voluntary integration programs in five northern cities (Boston, Massachusetts; White Plains, New York; Ann Arbor, Michigan; Riverside, California; and Hartford, Connecticut).

His purpose in collecting the data was to determine if in fact integration had a positive effect for Black students. His findings were as follows:

1. *Achievement.*

"None of the studies were able to demonstrate conclusively that integration has had an effect on academic achievement as measured by standardized tests. Given the results of the Coleman study and other evaluations of remedial programs (e.g., Head Start), many experts may not be surprised at this finding. To date

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[12]To a certain extent Professor Armor's studies had been forecast by St. John, the Relation of Racial Segregation in Early Schooling to the Level of Aspiration and Academic Achievement of Negro Students in a Northern High School, a 1962 thesis presented to the Faculty of the Graduate School of Education of Harvard University. The unexpected results of that study were summarized in Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem* (1963) 58 Nw. U. L. Rev. 157, 202-203.

there is no published report of *any* strictly educational reform which has been proven substantially to affect academic achievement; school integration programs are no exception." (ARMOR p. 99)

2. *Aspiration and Self-Concept.*

"In the METCO study [Boston] we found that there were no increases in educational or occupational aspiration levels for bused students . . . on the contrary, there was a significant decline for the bused students, from 74 per cent wanting a college degree in 1968 to 60 per cent by May 1970. (ARMOR p. 101).

3. *Race Relations.*

"One of the central sociological hypotheses in the integration policy model is that integration should reduce racial stereotypes, increase tolerance, and generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom. Our surprise was increased substantially when we discovered that in fact, the converse appears to be true. The data suggest that, under the circumstances obtaining in these studies, integration heightens racial identity and consciousness, enhances ideologies that promote racial segregation, and reduces opportunities for actual contact between the races." (ARMOR p. 102).

4. *Long-term Educational Effects.*

". . . [T]here does seem to be some strong evidence that middle-class suburban or prep schools have an important "channeling" effect not found in black schools. The effect is prob-

ably due to better counseling and better contacts with college recruiting officers. Whatever the reason, black students attending such schools may have doors opened for them that are closed to students attending predominantly black schools. Given the lack of positive effects in other areas, these findings may have great significance for future busing programs, and further research is urgently needed." (ARMOR p. 106).

5. *Program Support.*

"We must conclude that the busing programs we have reviewed seem to have considerable support from both the black and white communities. In most cases, black parents were highly supportive of the various busing programs. Like the students in our own study, black parents stressed quality education as the most important benefit of such programs, whereas white parents in receiving schools tended to stress the experience of coming into contact with other races. We must point out, however, that *none* of the programs reviewed involved *mandatory* busing of white students into black communities; cities facing this situation might present a very different picture of white support. Moreover, it is unlikely that many in the black community have seen the data on achievement reported here; much black support may be based upon premises regarding academic gain which our findings call into question. Whether or not black support will be affected by such findings remains to be seen." (ARMOR p. 107).

Professor Armor then concluded:

"It seems clear from the studies of integration programs we have reviewed that four of the five major premises at the integration policy model are not supported by the data, at least over the one-to-five-year periods covered by various reports. While this does not deny the possibility of longer-term effects or effects on student characteristics other than those measured, it does mean that the model is open to serious question." (ARMOR p. 109).

6. *Policy Implications.*

In regard to policy implications he stated:

"The most serious question is raised for mandatory busing (or induced integration) programs. If the justification of mandatory busing is based upon an integration policy model like the one we have tested here, then that justification has to be called into question. The data do not support the model on most counts. There may be justifications for school integration other than those in the integration policy model, but then the burden must fall upon those who support a given school integration program to demonstrate that it has the intended effects (with no unintended negative side-effects). It also must be demonstrated that any such program is at least supported by the black community." (ARMOR p. 114).

III.

IN THE ABSENCE OF PROOF OF CONSTITUTIONAL VIOLATIONS LOCAL SCHOOL AUTHORITIES SHOULD BE ALLOWED TO FORMULATE THEIR OWN SOLUTIONS TO THE PROBLEM OF PROVIDING EQUAL EDUCATIONAL OPPORTUNITY.

If our educational system is to work, solutions to the problems of providing equal educational opportunity must come not from the Courts, but from those best equipped to resolve these questions: The members and staff of the State Boards of Education, the local Boards, and the professional local Administrators. This is a teaching of the Court in *Deal v. Cincinnati Board of Education* (1966 6th Cir.) 369 F.2d 55:

> "In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read *Brown* in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice." (369 F.2d at 61.)

Chief Justice Burger made similar pronouncements while still a Circuit Judge. In the course of his dissent in *Smuck v. Hobson* (1969 D.C. Cir.) 408 F.2d 175 he made the following statement:

> "Several commentators have expressed views which undergird what Judge Danaher [another dissenting Judge] has said as to the need for

> caution and restraint by judges when they are asked to enter areas so far beyond judicial competence as the subject of how to run a public school system. We have little difficulty taking judicial notice of the reality that most if not all of the problems dealt with in the District Court findings and opinion are, and have long been, much debated among school administrators and educators. There is little agreement on these matters, and events often lead experts to conclude that views once held have lost their validity." (408 F.2d at 196.)

The above statement is particularly appropriate in the instant case where as a result of some of the recent empirical studies established views may in fact have to be subject to an "agonizing reappraisal".

There is no dispute that there is a problem in providing equal educational opportunity to minority students. The question is how to solve it. The plaintiffs in *Denver* want this Court to adopt one solution. Many educators, even before Armor's study, were not so sure that plaintiffs' solution of racial balancing would be an instant panacea. They questioned if there really is a causal relationship between racial imbalance and the low achievement of minority students or if the low achievement is not caused by other factors, some beyond the ability of the school to remedy. This is not to say that the schools should give up—but it certainly means that the schools have a great deal of experimenting to do before they can be sure how to best allocate their limited resources to solve this problem.

Mosteller and Moynihan reached a similar conclusion when they wrote:

> "The nation has acquired a goal, or, if it has not, we think it should accept it—equal educational opportunity defined as approximately equal distributions of achievement (but not just for cognitive skills) for the different ethnic/racial groups. *This is a goal it does not know how to attain.* Given a vital, prosperous, and still largely optimistic society, it follows that a period of fairly intensive educational experimentation and research is in order—and is likely to occur." (MOSTELLER p. 45). [Emphasis added.]

With these thoughts in mind the court should allow the local school boards flexibility to experiment and not bind them to just one solution.

Conclusion.

For many years the United States Supreme Court has focused its efforts on implementing the *Brown* decision in areas which had a former dual school system. Now for the first time, it has before it the question of pupil racial imbalance arising in areas where there was no state imposed segregation.

In this latter situation the court should not leap to the conclusion that the same methods necessary to remove the last vestiges of racial segregation are required where pupil racial imbalance exists in a unitary school system. At least until it gains more familiarity in this field, the court should adopt a case by case approach

and attempt to allow local authorities a chance to solve this problem before mandating one solution.

In this situation the court should more than ever reaffirm as its policy and as the policy for lower federal courts its pronouncement in *Swann v. Charlotte-Mecklenburg Board of Education, supra:*

> "[I]t is important to remember that judicial powers may be exercised only on the basis of a Constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."
>
> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad *discretionary* powers of school authorities; *absent a finding of constitutional violation, however, that would not be within the authority of a Federal Court.*" (402 U.S. at 16) [Emphasis added.]

The court should avoid the "educational thicket" and affirm the decision of the Court of Appeals which refused to order racial balancing of schools in the

absence of proof of a prior *de jure* system or specific discriminatory acts.

Dated July 24, 1972.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-507

WILFRED KEYES, et al.,

Petitioners,

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF OF JEWISH RIGHTS COUNCIL, INC. AS AMICUS CURIAE

Interest of the Amicus

The Jewish Rights Council, Amicus, was founded in 1971 for the purpose of ensuring and promoting equality of all persons before the law, and in that manner to strengthen and

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preserve the security and constitutional rights of Jews in America through the preservation of the rights of all Americans. The Jewish Rights Council believes that the welfare of Jews in the United States is inseparably related to and dependent upon the equality of treatment of all Americans. The Jewish Rights Council's membership includes over one hundred Rabbis from over a dozen States, representing Orthodox, Conservative, and Reform Congregations.

The instant case raises an important, if not crucial, issue under the Equal Protection Clause of the Fourteenth Amendment, involving the imposition by a Federal Court upon an elected School Board of ethnic quotas of pupils in public schools. Public education has been one of the keystones for the unprecedented success of the Jew and other minorities in this country, and therefore the Jewish Rights Council has a particular interest in quality as well as equality in public educational facilities. Being composed of members of a persecuted minority, the membership of the Jewish Rights Council is especially sensitive to any and all forms of discriminations based upon race, religion, or ethnic background. On the other hand, the Jewish Rights Council believes that it is extremely important for the preservation of our American way of life with its concomitant "American dream" that the rights of one group of persons shall not be sacrificed in the name of the promotion of another minority group. In so doing, the Jewish Rights Council wishes to make it crystal clear that there must never be any retreat from the principle of *Brown v. Board of Education*, 347 U.S. 483 (1954), that a State should not be able to keep a person out of a public school (or other facility) merely on the basis of race, religion, or ethnic background.

Consent to Filing

This Brief is being filed with the consent of all parties to the proceeding.

Opinions Below

The opinions of the District Court are reported at 303 F. Supp. 279; 313 F. Supp. 61; and 313 F. Supp. 90. The opinion of the Court of Appeals is reported at 445 F.2d 990.

Statement of the Case

This case arose when a newly elected school board rescinded Resolutions 1520, 1524 and 1531 of the previous school board in Denver, Colorado; and the newly elected school board instituted Resolution 1533 instead. The rescinded Resolutions 1520, 1524 and 1531 sought to achieve a system of ethnic quotas in the pupil compositions of various schools by means of redistricting their respective boundaries; whereas the newly instituted Resolution 1533 provided for a voluntary pupil exchange program between various districts.

The plaintiffs below brought a Civil Rights action against the school board in two causes of action which are pertinent here:

Cause I: The rescission of Resolutions 1520, 1524, and 1531 constituted a violation of the Constitution.

Cause II: *Count 1*: Both old and new defendant school boards were guilty of deliberate segregation in a "core" area of the City of Denver.

Count 2: The defendants had purposely maintained inferior schools in certain designated predominantly minority schools.

Count 3: The defendants' neighborhood school policy was a violation of the Constitution.

The District Court held for the plaintiffs on Cause I and on Cause II, Count 2 only. The Court of Appeals affirmed the judgment of the District Court, except for Cause II, Count 2 on which the Court of Appeals reversed the judgment of the District Court.

ARGUMENT

POINT I

A Federal Court Has No Power to Require a School Board to Adopt a Plan to Achieve Ethnic Quotas of Pupils in Neighborhood Schools.

The stigma of racial segregation, caused by a school board's refusal to allow a single person of a given ethnic or racial background to attend a public school, is intolerable in America under the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954). Such segregation prevents, for example, a Black person from ever attending a certain school no matter what ability the Black person may possess, no matter where he lives, no matter how hard he tries. It is simply intolerable in a society such as ours under the Fourteenth Amendment. An entirely different question is presented where a school board merely continues a long-standing and traditional neutral policy of neighborhood schools in the name of public safety, health, welfare and morals; for these objectives of a

society under ordered liberty are the primary responsibility of the States of which the school board is an agent. The State has plenary "police power" with regard to these functions; and there is no Federal jurisdiction which can properly operate in this area, so long as the State and its agents remain neutral with regard to race, religion, and ethnic origin.

There are many legitimate "police" functions served by the neighborhood school. With the increasing problem of groups of students "all over the land [who] are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins" (Black, J. dissenting in *Tinker v. Des Moines Community School District*, 393 U.S. 503 at 525; 1969), a Federal Court should be especially careful not to undermine the primary authority of the school board. Moreover, the neighborhood school ensures that pupils and teachers know each other better, so that outside untoward influences, such as drug-peddlers, are easier to detect, isolate, and eradicate. Thus, the role of the Federal judiciary should be most sensitive to the needs of the legitimate local "police" functions and responsibilities of school boards; and therefore the courts should limit the scope of appropriate judicial function and interference in the workings of the school boards accordingly, lest the judiciary unintentionally undermine the whole system of public education. Clearly the Federal Courts are ill-equipped to cope with the day to day exigencies faced by school boards.

In view of the foregoing, it seems imperative that a great deal more than a mere preponderance of the "sharp conflict" of evidence (445 F.2d 990, 1001) should be required before a Federal Court intervene in the internal affairs of a school board. See: *Milky Way v. Leary*, 305 F. Supp. 288, 292 (S.D.N.Y., 1969), aff'd 397 U.S. 98 (1970).

It should be stressed repeatedly that this case emphatically is not a case of segregation, but rather is a case involving a finding of de facto racial "imbalance" brought about by housing patterns resulting from private choices. The judicial finding below of a racial or ethnic "imbalance" necessarily implies a finding of a departure from some arbitrarily conjectured ethnic quota. Yet this Court itself has warned of the tremendous difficulties and chaos which would result from the imposition of such quotas in "a population made up of so many diverse groups as ours". *Hughes v. Superior Court of California*, 339 U.S. 460, 464 (1950). And racial quotas themselves may exacerbate "community tensions and conflicts" particularly among the non-quota minorities "through the whole gamut of racial and religious concentrations". *Ibid.*

The instant case does not at all raise a "segregation" issue as in *Brown v. Board of Education, supra*, but merely poses the question of the appropriateness of a Federal remedy of ethnic quotas to change ethnic pupil ratios brought about by private housing patterns in a neighborhood school system.

The interference of the District Court below in the affairs of the school board would not be so serious were it not for the fact that the forgotten child in all of this is the poor black, Hispanic, etc. or white pupil in the predominantly white school who is "being conscripted only on the basis of income" and who may not "escape", as may his more affluent neighbor, either to the suburbs or to a private school. Nathan Glazer, "Is Busing Necessary?" *Commentary*, Vol. 53 Number 3, March 1972, p. 39 at 45-46 (published by the American Jewish Committee, one of the Amici jointly with the Anti-Defamation League in this case). Especially is this state of affairs compounded by the fact

that the District Court put heavy reliance upon the relatively low Achievement Test results of students in "designated schools" (445 F.2d 990 at 1003). Just the other day, a California District Court held that IQ tests were unconstitutionally used by a school district because they resulted in a disproportionately large number of Black children being sent to mentally retarded classes. *Larry P. v. Riles*, 41 LW 2033 (D.N. Cal. June 21, 1972). Can constitutional rights depend upon the latest fashions in educational testing?

Many years ago, just after the *Brown, supra,* decision, the late Professor Edmond Cahn cautioned against using "expert" sociological testimony for any purpose other than to *support* legislative action or merely to reinforce common knowledge:

"It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature. Today the social psychologists – at least the leaders of the discipline – are liberal and egalitarian in basic approach. Suppose, a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; ... What then would be the state of our constitutional rights?" "Jurisprudence", *1954 Annual Survey of American Law*, 809 at 826.

Implicit in the notion of racial quotas, to change racial mixes brought about by private housing patterns, is the idea that a certain mix of races in certain proportions is constitutionally required in order to enable the members of certain

minority groups to learn better in public schools. However, the interpretation of the statistics used to validate this notion fails to consider that there are reasons unrelated to ethnic balance which account for the fact that a significant proportion of Black students who attend predominantly White neighborhood schools seem to learn better. For these Black students tend to come from middle-class Black homes, and it may well be the home environment which accounts for their learning better in their neighborhood school. It is a well-established fact that "socioeconomic factors bear a strong relation to academic achievement" and that "schools as they have been generally run in this country do not make much difference in the educational achievement of students, that what is more important is the home and community environment of children." *Equality of Educational Opportunity* ("Coleman Report"), 1966, U.S. Office of Education, OE 38000, at p. 21; N.Y. Times, March 24, 1972, p. 54, col. 1. Thus, purely on a socioeconomic basis, i.e. the type of homes that Black students in neighborhood White schools come from, it would be expected that Black students in White neighborhood schools should achieve better results than the poor Black students in Black neighborhood schools, for reasons which are independent of the racial composition of the student body in the respective schools but which are dependent upon the type of homes the Black students come from. Thus, it is neither invidious discrimination nor the racial ratios in neighborhood schools which necessarily accounts for the differences in achievement levels of Black students in Black vs. White neighborhood schools. Moreover, the expectations of experts regarding the educational benefits of ethnic quotas in public schools have not been realized in practice. N.Y. Times, *ibid.*

Thus, this case thrusts upon us the spectre of legally

mandated social experimentation. Surely the Constitution does not require the State to perform such experiments. Particularly is this experimentation, under the coercion of a Federal Court order, totally unnecessary in a case where, as here, the school board has instituted a voluntary transfer program, which can more easily be policed by the school authorities, so that each parent may decide for himself whether he wishes his own child to take part in the experiment for the sake of a hoped-for better education. There simply is no room in a case like this for any coercion by the Court below in its judicial legislation of school boundaries to achieve what it believes to be a proper system of "ethnic group quotas". Glazer, *supra*, *53 Commentary* at 52. For the promise of *Brown*, *supra*, already "is being realized" without such ethnic quotas. *Ibid.*

Ethnic quotas on Grand Juries have long ago been condemned as unconstitutional by this Court. *Cassel v. Texas*, 339 U.S. 282 (1950). Likewise, this Court has held the States to be free to ban the picketing of a business establishment for the purpose of pressuring the hiring of employees on a racial quota basis. *Hughes v. Superior Court of California*, 339 U.S. 460 (1950). Pupil assignments on a racial basis in public schools likewise should be avoided by school boards, and certainly not coerced by the federal judiciary.

While the judiciary has the duty and power to implement the negative command of the Equal Protection clause of section 1 of the Fourteenth Amendment, only the Congress is given the authority to implement the affirmative power of section 5 of the Fourteenth Amendment. If such a departure from traditional practice, as racial pupil quotas, is to become a part of our national scheme, then at the very least it should be the Congress which decree such a policy after appropriate hearings in depth.

Yet the Congress has explicitly legislated *against* such a policy in enacting the Civil Rights Act, 42 USC 2000e – 6 (a)(2). Thus, Congress has re-affirmed a policy against racial or ethnic quotas as set forth by this Court in *Hughes, supra*. There is simply no reason in law or policy why this Court should not now likewise continue our national commitment of equality for all, with quotas for none.

CONCLUSION

The judgment of the Court of Appeals should be affirmed, except insofar as the Court of Appeals affirmed the judgment of the District Court on the First Cause of Action and in this respect the judgment of the Court of Appeals should be reversed; and the cause should be remanded to the District Court with directions to dismiss the complaint.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-507

WILFRED KEYES, ET AL., PETITIONERS

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c-6, 2000d, and 2000h-2 in the area of school desegregation. The appearance here as *amicus* is consistent with the government's participation in such cases as *Brown* v. *Board of Education*, 347 U.S. 483; *Brown* v. *Board of Education*, 349 U.S. 294; *Cooper* v. *Aaron*, 358 U.S. 1; *Goss* v. *Board of Education*, 373 U.S. 683; *Green* v. *School Board of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Swann* v. *Board of Education*, 402 U.S. 1.[1] While the govern-

[1] The United States has participated in every school desegregation case which this Court has heard on the merits since *Brown I. Rogers* v. *Paul*, 382 U.S. 198, and *Bradley* v. *School Board*, 382 U.S. 103, in which the government did not participate, were decided on the petitions for certiorari.

ment did not participate in this case in the courts below, the issues presented are related to those presented in cases where the government is a party. Thus, the outcome of this case will affect the government's enforcement responsibilities under federal law, especially in cases against school districts where racial segregation has not been compelled by state statute.

STATEMENT

The procedural history and the decisions of the courts below are summarized in the briefs of the parties. The Denver school district serves an area of 100 square miles and operates about 120 schools. Of its 100,000 pupils, 14 percent are black and 20 percent are Hispano.

The evidence before the district court was, broadly speaking, two-fold. First, evidence was presented concerning actions by school officials that allegedly contributed to the racially and ethnically segregated character of some predominantly black or Hispano schools in the system. This evidence related to such matters as construction policies and practices, assignment of faculty, and creation of attendance zones.

Second, evidence was presented comparing other predominantly minority schools in the system with certain predominantly Anglo schools, in terms of such characteristics as faculty experience and turnover, school facilities including site size, and achievement as measured on standard aptitude tests.

INTRODUCTION AND SUMMARY

This case presents for the first time in this Court questions involving the application of the equal pro-

tection clause in the context of racial and ethnic concentration in a northern urban school system with no history of compulsory segregation.

The record sets forth a pattern familiar to many urban areas—a basic neighborhood school system; a well-defined "core area" populated predominantly by black or ethnic minorities; a gradual expansion of this area into surrounding neighborhoods accompanied by an increasing number of predominantly minority schools; and significant evidence of sub par educational success in such schools.

Both below and in this Court, the parties have urged one-dimensional application of the equal protection clause. The plaintiffs contend that official acts of invidious racial discrimination have been widespread and continuous and require system-wide desegregation relief; the defendants argue that racial and ethnic impaction in the schools is primarily a function of residential patterns and that any official acts found in retrospect to have been racially motivated should be viewed as remote and insignificant causes of the present problems.

We agree with the courts below that there are at least two discrete applications of the equal protection clause to this factual pattern. First, both the district court and the court of appeals found that with respect to some of the schools in the neighborhoods that changed from Anglo to black or Hispano, the school board took official steps that deliberately caused or promoted minority concentrations. Such acts of *de jure* segregation violate the equal protection clause

and, under the decisions of this Court, must be remedied promptly and effectively.

Second, with respect to the original core area schools, both courts found that the petitioners had not presented sufficient evidence to show that the minority concentrations were related to official school board acts; the record supports that finding as to most core area schools. However, there was some evidence that the school district allocated disproportionately less of its resources to such schools and that by some of the standard measurements a poorer quality of education was delivered. The district court found in these "input" and "output" disparities a constitutional violation which it chose to remedy by eliminating the racial concentration. The court of appeals, however, found the apparently inferior education to be causally remote from the disproportionate allocation of resources and therefore considered it only an educational, and not a constitutional problem.

As explained more fully below, we concur generally with the district court's legal analysis, but believe that the relief ordered was beyond that required to remedy the violation. Under familiar principles, we therefore suggest a remand to define more precisely the nature of the violation and to design appropriate relief in this phase of the case.

DISCUSSION

We discuss here, in terms of the record in this case, both the standards that we believe should be applied in determining whether there has been presented a *prima facie* case of unconstitutional segregation of

public schools and unconstitutional denial of an equal educational opportunity, and the facts that we believe constitute a defense to each such *prima facie* showing.

I. STANDARDS FOR DETERMINING WHETHER THERE HAS BEEN AN UNCONSTITUTIONAL SEGREGATION OF PUBLIC SCHOOLS

We begin with the premise that the existence of racial or ethnic imbalance in public schools does not, by itself, constitute a *prima facie* case of unconstitutional segregation of public schools. *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D.N.J.), affirmed, 404 U.S. 1027. We also assume that the intentional segregation of students in public schools on the basis of race or national origin is *per se* an invidious racial or ethnic classification that cannot be justified by benign motives and is therefore unconstitutional. *Brown I*. While an absolute rule based solely on segregative results or, conversely, requiring in every case proof of discriminatory motive might be easy to apply, the former would, in our view, go beyond the requirements of the Fourteenth Amendment and the latter would mistakenly permit an agent of the state to segregate students by race or national origin so long as his motive is benign. See *Wright* v. *Council of the City of Emporia*, 407 U.S. 451; *Buchanan* v. *Warley*, 245 U.S. 60. The proper test requires a more sophisticated scrutiny of the facts to determine whether state officials have intentionally acted to create a racial or ethnic classification and whether the classification is an invidious one; it does not require a probing of the subjective motives of those state officials.

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1. *State action.* The first requisite to invoking the equal protection clause is that the classification be created by state action. *Ex parte Virginia*, 100 U.S. 339. The courts below agreed that, as stated by the court of appeals, "state imposed segregation of the sort condemned in *Brown* should [not] be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers" (Pet. App. 134a). Since student and teacher assignments, building locations, and other aspects of school operation are controlled by the school board, the existence of state action is clear. The principal inquiry, therefore, is whether the state action is a racial classification.

2. *Racial or ethnic classification.* The respondents contend that at least until 1964 the Denver school officials consistently made their decisions affecting student assignments on the basis of a neutral neighborhood school policy and without regard to race. If the record supported that proposition we believe the respondents would have a valid defense to a charge of unconstitutional segregation. For, in light of its common usage throughout the country[8] and the fact that it is in many ways the easiest and most logical system of student assignment, the neighborhood school should be presumptively nondiscriminatory.[9]

[8] Dr. Coleman testified that "most school systems organize their schools in relation to the residents by having fixed school districts and some of these are very ethnically homogeneous" (App. 1549a).

[9] The rule stated by the court of appeals was: "* * * neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the results of such plans is racial imbalance" (Pet. App. 134a).

The record does not reflect the racial residential patterns in School District No. 1 or the nature of the school operation when the neighborhood school structure was first adopted by the system. Consequently, there is no basis for a finding that the Denver school officials imposed a neighborhood school system *ab initio* on an existing pattern of residential segregation.[4] Compare *Cisneros* v. *Corpus Christi Independent School District*, C.A. 5, No. 71-2397, decided August 2, 1972 (*en banc*). On this record, therefore, the adoption of the neighborhood school policy cannot be said to have been racially discriminatory.

But the neighborhood served by a school is what the board chooses it to be, and we think the courts below were correct in saying that a neighborhood school system may not be manipulated to segregate students by race. In determining whether a neighborhood policy is being fairly applied, one must consider evidence about the size of the school buildings, their locations, the availability of transportation, natural and man-made barriers, and so forth. As this Court recognized in *Swann*, these are the factors "which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system." 402 U.S. at 20.

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[4] The evidence related almost exclusively to actions of school officials since 1950. While the record shows that at that time blacks were concentrated in the "Five Points" area (Pet. App. 4a), nothing in the record discloses how that situation occurred, or whether choices in school construction, attendance zone boundaries, and the like may have influenced the pattern of school attendance.

What is required, then, is a factual analysis of the causes of the segregation at each school to determine whether it is the result of intentional segregative action by the school authorities. The factual burden falls initially on the plaintiffs, who must show that the disparate racial or ethnic effect of the school authorities' action is related to a historical pattern or other circumstances showing explicit considerations of race or from which race-consciousness might be inferred. Here, such evidence was offered as to some schools, such as Manual High and the Park Hill schools,[4] but the record is silent as to others, such as the predominantly Hispano schools.

When the plaintiffs' burden has been met, as in the case of some schools here, the school officials may rebut the resulting presumption of racial discrimination by showing that they had no knowledge of the racial effect and that such effect was wholly fortuitous. *Jefferson* v. *Hackney*, 406 U.S. 535, 547. Or they may, besides factually disputing any evidence presented by the plaintiff, show that a variation from established policy was justified by a compelling circumstance or that available alternatives would not have changed the racial effect or were not feasible, or they may make some other showing that negates the

[4] In addition to racial statistics, there was evidence that Manual was planned as a heavily minority school. As to Manual and Park Hill there was evidence of deviations from normal school board policy, including a pattern of construction, boundary line changes, rejection of non-segregative options, and segregated faculty assignments.

basis of the presumption. But the thrust of the inquiry should be the objective intent of state officials, not their subjective motives.[6]

Here, the respondent school officials denied that any of their decisions or actions were made with an intention to segregate students or to assign faculty on the basis of race. They disputed the factual accuracy of some of the evidence presented by the petititoners, and they attempted to rebut any presumption of discrimination by showing that their action was consistent with established practices or that any variance from usual policies was based on other educational considerations.[7] The respondents' evidence varied from general disclaimers of any racial purpose to evidence which purported to justify, on educational grounds, actions which had a known racial effect.

In evaluating the evidence concerning "the special circumstances surrounding * * * particular schools" (Pet. App. 21a), the courts below appear to have applied a proper standard to the Park Hill area schools. For example, in determining that Barrett was uncon-

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[6] Thus, a judge should not be asked to determine whether racial considerations or other considerations were the "dominant purpose" underlying school officials' decisions. *Wright* v. *Council of the City of Emporia*, *supra*, 407 U.S. at 462; *Palmer* v. *Thompson*, 403 U.S. 217, 225.

[7] For example, to rebut the implications of evidence that optional zones were employed by Anglo students to avoid attending predominantly minority schools, the respondents presented evidence that the use of optional zones was a standard practice in the school system (App. 827a–857a). To justify the transportation of Anglo students past apparently under-utilized predominantly minority schools to Anglo schools, the respondents contended that the actual capacity of predominantly minority schools could not be measured by the usual standard

stitutionally segregated when it was opened, the district court considered the unusually small size of the school, its location and zone boundaries in light of the established board policies, the severity of the racial effect, the school officials' knowledge of the probable racial effect, the racial pattern of faculty assignments, and the alternatives available to the board (Pet. App. 5a, 21a–23a), and it considered and rejected the respondents' proffered justifications (Pet. App. 48a–49a). The court of appeals affirmed, concluding that there was "sufficient evidence to support segregative intent" (Pet. App. 135a). Concerning the construction of new Manual and the alterations of the mandatory Cole-Manual attendance zone,[8] the courts reached the opposite result, without examining in detail whether a *prima facie* case had been made out or rebutted. We think it is error to fail to make a detailed analysis of the evidence presented in determining whether a school is *de facto* or *de jure* segregated.[9]

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applied in the school system because the classroom size in those schools was reduced for educational reasons in order to lower the pupil-teacher ratio (Br. 20–21).

[8] The racial considerations underlying the construction of new Manual were explicit and the concentration of black high school students in that school was severe: 541 of the 641 black high school students in the district were enrolled in new Manual in its first year of operation (Br. 23).

[9] The district court said that pre-*Brown* "it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community" (Pet. App. 67a), and that the actions were not "wilful or malicious" (Pet. App. 68a–67a). It is thus unclear whether the reason for failing to explore the evidence as to these schools more fully was that the court excused the segregative effects of those race-

Cf. *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55 (C. A. 6).

3. *Segregative effect.* The purpose of injunctive relief, of course, is to remedy present violations, not to punish for past sins. The district court therefore inquired whether there was "a causal connection between the acts of the school administration complained of and the current condition of segregation" (Pet. App. 68a). However, it appears, at least as to Manual High School, that the court placed the burden of proof as to causal connection upon the plaintiffs. This Court has held that where a plaintiff has shown that state action caused unconstitutional segregation in the past, the burden is on the school officials to establish that the present segregated condition of schools affected by such action "is not the result of present or past discriminatory action on their part." *Swann* v. *Board of Education*, *supra*, 402 U.S. at 26. We see no reason why that rule should not apply as well where the segregation was caused by deliberate school board action.[10]

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conscious decisions on the ground that the motives of the board were benign. Such an approach would be inconsistent with previous decisions of this Court. See, *e.g.*, *Buchanan* v. *Warley*, 245 U.S. 60; *Cooper* v. *Aaron*, 358 U.S. 1; *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713.

[10] Of course, the rule applies only to schools as to which it has been shown that state action caused unconstitutional segregation. It does not apply to some other school in the system as to which it has been shown only that the student body is racially or ethnically imbalanced. In light of the general knowledge and judicial recognition of the effects of school construction and like decisions on residential patterns (see *Swann*, *supra*, 402 U.S. at 20-21), it is not an unreasonable burden to require the respondents, insofar as they relied upon racial shifts in

II. STANDARDS FOR DETERMINING WHETHER THERE HAS BEEN A DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY

In ascertaining whether school authorities have unlawfully discriminated on the basis of race or national origin by providing Negroes and Hispanos inferior facilities, faculties, or instructional programs, the courts again must also determine the existence of state action, of an invidious racial classification, and of a present discriminatory effect. Two types of evidence relating to unequal education were presented in this case: evidence about objectively measurable resources allocated to the various schools in the system (teacher experience and turnover, site size, age of buildings), and evidence of a more indirect nature about the quality of the educational program in the various schools (achievement test scores, drop-out rates, testimony of educators and parents). Perhaps because of the theories upon which the case was tried, neither kind of evidence was fully developed below.

1. *Objectively measurable resources.* The justiciability of allegations that equal educational opportunities have been denied could depend on whether the evidence necessary to support the allegations can be analyzed in terms of judicially discoverable and manageable standards for determining a violation and devising a remedy. See *Baker* v. *Carr*, 369 U.S. 186, 217. In this respect, a disparity in the allocation of objectively measurable resources may stand on a firmer

residential populations, to demonstrate that their segregative actions were not a cause of the residential segregation.

footing than more indirect evidence of the quality of education.[11]

The courts below agreed that with respect to at least one objectively measurable aspect—teacher experience—there was a disparity between predominantly Anglo schools and predominantly Negro/Hispano schools (Pet. App. 80a–82a, 143a–144a).[12] Instead of viewing such disparities as discrete violations, however, the courts below appear to have viewed them as evidence to be considered in determining whether minority group children were being denied an equal educational opportunity.[13]

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[11] For example, in *Swann*, *supra*, this Court said (402 U.S. at 18–19):

> Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown. * * * In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs.

The court of appeals appears to have expressed the same notion this way (Pet. App. 143a):

> If we allow the consignment of minority races to separate schools, the minimum the Constitution will tolerate is that from their objectively measurable aspects, these schools must be conducted on a basis of real equality, at least until any inequalities are adequately justified.

The court of appeals said this was "but a restatement" of *Brown* v. *Board of Education*, 347 U.S. 483, 493. See, also, the district court's opinion (Pet. App. 88a–89a).

[12] The district court also found a disparity in facilities but considered it of only marginal importance (Pet. App. 83a).

[13] As the court of appeals stated: "* * * we cannot conclude from that one factor—as indeed neither could the trial court—that inferior schooling is being offered" (Pet. App. 144a).

We think it would be inappropriate to adopt an all-or-nothing approach under which a school system can justify a disparity in objectively measurable educational inputs by showing, for example, that "it is not the proffered objective indicia of inferiority which causes the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs" (Pet. App. 144a). The causes of substandard academic performance are too conjectural to be made the central issue in desegregation suits; and in any event substandard performance is not the only effect of inadequate schooling.

Where the state provides inferior resources to predominantly Negro/Hispano schools, there is state action; in the absence of a legitimate non-racial reason for the disparity, there is a racial classification; the present discriminatory effect is simply that minority group students are receiving inferior resources for their education, and nothing further in the way of proof about educational consequences should be necessary to show that this is a basic unfairness.

2. *Output as a measure of equal education.* The district court's findings that scholastic achievement and student drop-out rates were worse at heavily Negro or Hispano schools (Pet. App. 78a–80a, 82a–83a) are fully supported by the record, and the court of appeals seems to have accepted them (*e.g.*, Pet. App. 144a). Thus, there appear to be objectively measurable disparities reflecting that the educational goals of the Denver public school system are less fully realized in the heavily Negro or Hispano schools. The difficulty

arises in determining whether that failure is the result of unconstitutional state action and, if so, in devising an appropriate remedy.

The school system urged, in effect, that the output disparities are not caused by state action or, if they are, that the action was not discriminatory as to blacks and Hispanos. It thus offered at least three explanations: (1) the low scores and high drop-out rates are the result of non-school-related factors; (2) some Anglo schools have similarly low achievement score medians; (3) the low scores correlate more closely with socioeconomic status than with race or national origin. A fourth question might be whether achievement scores are accurate indicators of the success of the educational program.

The district court found that the principal cause of the output disparities was "the enforced isolation imposed in the name of neighborhood schools and housing patterns" (Pet. App. 89a). The court of appeals said "[w]e cannot dispute the welter of evidence offered in the instant case and recited in the opinions of other cases that segregation in fact may create an inferior educational atmosphere" (Pet. App. 145a); it reversed, however, because "the trial court's findings stand or fall on the power of federal courts to resolve educational difficulties arising from circumstances outside the ambit of state action" (Pet. App. 144a). Thus, while the courts below seem to agree that the quality of a student's education depends in part on who his classmates are, the court of appeals found the district court inconsistent in ruling, on the one hand, that the school system had not discriminatorily segre-

gated the students in particular schools but, on the other hand, that the school system had discriminatorily provided inferior input for those schools by assigning a segregated student body to them.

But the issue, as perceived by the district court, was not whether the segregation was illegal but whether the school board had denied Negro and Hispano students equal protection of the laws by providing an educational environment in which the median achievement level of the students was predictably lower than in other schools. The board offered children in these allegedly *de facto* segregated schools what the court of appeals called "a curriculum which is allegedly not tailored to their educational and social needs" (Pet. App. 144a). The court of appeals appears to have assumed that because the school system may have treated the *de facto* segregated schools roughly the same as the predominantly Anglo schools, there could be no denial of equal protection.[11]

Like treatment of the two groups of schools would appear analogous to "the fabled offer of milk to the stork and the fox." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431.[12] We think that when this Court said in

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[11] As the district court said in its opinion on remedy (Pet App. 114a):

> * * * the underlying constitutional basis for [the March 21, 1970] decision * * * is that a state or its subdivision may not constitutionally maintain any program which treats members of minority groups unequally as compared with other groups. It makes no difference that the system may appear to be equal on its face, if its operation in fact results in unequal treatment. * * *

Brown I that state-provided education "must be made available to all on equal terms" (347 U.S. at 493) it meant that "the vessel in which the milk is proffered [must] be one all seekers can use." *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431. This means that where non-school-related factors produce differing educational needs among different racial and ethnic groups, the school system must seek to meet the needs of all groups equally.[15] If it fails to take adequate steps to meet these differing needs, the court may find that disparate achievement levels are school-related and caused by state action.[16]

The respondents pointed out below (*e.g.*, App. 568a) that although all predominantly minority group

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[15] As former Superintendent Oberholtzer testified (App. 1366a):

> There were differences in the curriculum within specific subject areas, to be sure, depending upon the needs of the pupils, their interests, and such. * * * This was related directly to that in an attempt to provide equality of opportunity.

See also *Schools, People & Money*, the Final Report of the President's Commission on School Finance (1972), p. 17:

> * * * the school is accountable if it fails to build upon a student's resources so as to enable him to make the most of whatever advantages he enjoys. Likewise, the school is at fault if it is insensitive to a student's handicaps or fails to give him the special help he needs to cope with them.

[16] In Denver, where in 1968 15.8 percent of the students were Hispano, the defendants might be constitutionally required to provide programs to meet special needs of Hispano students stemming from language or cultural differences. Cf. *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 525; *Meyer* v. *Nebraska*, 262 U.S. 390, 401. Also, compare *Cardona* v. *Power*, 384 U.S. 672, 675–677 (Douglas, J., dissenting), with *Katzenbach* v. *Morgan*, 384 U.S. 641, 659–664 (Harlan, J., dissenting).

schools have lower median achievement scores than the district-wide average, some predominantly Anglo schools scored lower than some of the predominantly minority group schools."[17] Respondents also point out that the experts testified that the low achievement was more closely correlated to socioeconomic status than to race (Br. 120–121). Such evidence is relevant to the question whether the inequality of opportunities is between racial or ethnic groups or between some other disfavored and favored classes.[18] The district court and court of appeals here held that the classification weighed most heavily on Negro and Hispano students, and the evidence appears to support that conclusion." Compare *Jefferson* v. *Hackney*, 406 U.S. 535.

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[17] For example, Plaintiffs' Exhibit 373 (App. 2090a) is a map designating the 30 elementary schools whose average achievement for the fifth grade in 1968 was below the 30th percentile. Four of those schools (Columbian, Sherman, Alameda, and College View) were majority Anglo in 1968 (Pl. Ex. 97, App. 2038a), and three of the predominantly minority schools affected by the district court's relief (Barrett, Hallett, Smith) ranked above the 30th percentile. Nine of the schools with achievement below the 30th percentile had enrollments between 30 and 50 percent Anglo and were therefore not classified as "minority schools" by either the district court or the petitioners (Remington, Smedley, Ashland, Eagleton, Evans, Monroe, Westwood, Elyria, Swansea). Two of these (Elyria and Smedley) subsequently fell below 30 percent Anglo and were therefore included in the relief.

[18] The plaintiffs have not claimed any unconstitutional economic classification, and that issue is not presented here. Cf. *San Antonio ISD* v. *Rodriguez*, No. 71–1332, this Term.

[19] See, *e.g.*, Pl. Ex. 376–R (App. 2096a), which shows that 13 percent of the Anglo students and over 60 percent of the Negro and Hispano students in 1968 were enrolled in schools that had average percentiles of below 30 on the fifth grade achievement tests. See, also, the Appendix to this memorandum, *infra*, pp. 25–26.

Apart from state action and racial classification, there is the question of the reliability of drop-out rates and achievement scores as measures of educational output. One difficulty is summarized in Mosteller and Moynihan's introduction to the recent restudy of the Coleman Report, *Equality of Educational Opportunity* (1966):[20]

> At the same time that we emphasize the importance of outputs, the reader must note that academic achievement is but one output, and that schooling is expected to produce many others. Retention rates, proportion going to college, income and occupation of graduates, even happiness, are a few of many outputs that might be measured. Although the EEOR studied academic achievement with some attention to self-image and self-esteem, the long-run implication of the EEOR is that outputs should be measured much more generally. Because the EEOR devotes so much space to academic achievement, the reader is likely to lose sight of that more general picture, since inevitably this book must often describe these variables both for EEOR and for the reanalysis. Lest it seem that academic achievement must be the only job of the schools, let us remember that studies do not find adult social achievement well predicted by academic achievement.

The Denver school authorities, however, have themselves relied upon drop-out rates and achievement scores as at least partial measurements of the success

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[20] Mosteller and Moynihan, *On Equality of Educational Opportunity* (1972), pp. 6–7.

of the school program,[21] and it is therefore appropriate to evaluate their actions in the light of evidence concerning those measurements. That evidence shows the existence of a school-related disparity in the achievement levels of children at minority group schools and Anglo schools. In these circumstances, we believe that the school board can meet its heavy burden of justifying its failure to eliminate the disparity by demonstrating that it is engaged in a concentrated, high priority, bona fide effort to meet the educational needs of the minority group students.[22] Although the defendants here presented testimony at the hearing on the merits relating to their efforts to meet the educational needs of all pupils,[23] it appears that the district court skipped over this step of the analysis and jumped directly from a finding of a school-related output disparity to a conclusion that the equal protection clause has been violated.[24]

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[21] See, *e.g.*, the testimony of the Denver Superintendent of Schools (App. 1777a) and Supervisor of Testing Services (App. 630a), and the system's report on old Manual High School (Pl. Ex. 356, App. 2086a, p. 6).

[22] The respondents argue that the low achievement test scores of most pupils in the predominantly Negro or Hispano schools were "in accordance with their capabilities as measured by the IQ tests" (Br. 117). Assuming the validity of such comparisons—as to which the record appears to be silent—this would not relieve respondents of the duty to develop and implement programs that attempt to deal with this difference between the characteristics of the minority group and Anglo schools.

[23] See, *e.g.*, the testimony of former Superintendent Oberholtzer (App. 1366a), quoted in note 21, *supra*.

[24] The district court did state, in a section headed "Discussion of Remedies," that "the remedial or special education pro-

III. STANDARDS FOR FASHIONING AN APPROPRIATE REMEDY

Both of the courts below found that the Denver school board had through official acts substantially contributed to the racial concentration of black students in the Park Hill area schools. This finding is supported by the record and should not be disturbed. The relief ordered by the district court and approved by the court of appeals was the implementation of the corrective program adopted and subsequently rescinded by the school board. Under the circumstances of this case we believe that these steps "promise realistically to work *now*," and are therefore appropriate. *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439.

We further support as legally and factually sound the conclusion of both courts below that the racial and ethnic concentrations in most of the core area schools did not originate with the policies and practices of the school board.[25] However, we share the view of the district court that significant disparities in educational opportunities in a group of schools defined by racial and ethnic concentrations would constitute violations of the equal protection clause. We do not concur with

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grams which have been carried on in these schools have not resulted in any significant improvement and so other methods are indicated" (Pet. App. 91a). There was, however, no mention of these special programs in the court's discussion of the constitutional violation (see Pet. App. 75a–89a).

[25] We believe that with respect to some of those schools a remand is necessary for a determination, based on proper legal standards, of the extent to which school board action may have intentionally segregated them. See, pp. 10–11, *supra*.

the district court's assumption that the only effective remedy for such a violation is to eliminate the racial concentration—and therefore the longstanding neighborhood school policy—by transferring the affected students. It would be equally effective to eliminate the disparities rather than disperse the students.[20] Indeed, such a program could be more specifically tailored to the violation—*i.e.*, the failure to provide an equitable share of resources and to meet special educational needs—and to that extent would be a preferred equitable remedy. We therefore agree with the court of appeals that in this situation the educational program, not the racial concentration, is the legal problem; we do not support that court's view that such a condition is beyond the area where it is appropriate for the federal judiciary to intervene (Pet. App. 145a).

If a violation is found, "the task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann* v. *Board of Education, supra*, 402 U.S. at 16. That balancing process may be difficult to apply where the condition is a denial of equal educational opportunity, since there is widespread disagreement among educational experts as to what the individual and collective interests are. However, while recognizing that there is not

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[20] In our view, the record here does not provide sufficient empirical support for the district court's apparent conclusion that the only feasible way to eliminate the disparities "is a system of desegregation and integration which provides compensatory education in an integrated environment" (Pet. App. 112a).

at this time—and may never be—one perfect educational remedy for the offending condition, one should be able to formulate guidelines for fashioning a judicial remedy. Such guidelines should begin with a recognition that equal educational opportunity "is a goal [the nation] does not know how to attain." Mosteller and Moynihan, *supra* note 20, at 45. "What is needed is innovation, experiment, effort, measurement, analysis" (*id.* at 63)."

We submit that the most appropriate remedy for this kind of violation is an educational one and should be developed by the school board in the first instance. Its elements would include: (1) application of resources in an even-handed manner; (2) identifying within the limits of educational expertise the special needs of each school that has either received inferior resources or offered demonstrably inferior educational opportunities; and (3) plans for designing and implementing a remedial program to meet such needs. The record below, compiled as it was with a different perception of the issue, precludes a more precise definition of either the violation or the remedy and in our view calls for a remand for such determinations within guidelines fixed by this Court.

" And see the testimony of plaintiffs' expert witness, Robert O'Reilly (App. 1932a):

> * * * this is a very unsettled field. There are no hard and fast rules to go on. It's very unlikely that anybody is ever going to come up with a treatment that is going to be generally effective with minority students at all. What has to be done is basically many, many years of experimentation in which we slowly and carefully identify and develop specific programs designed for * * * specific minority groups.

CONCLUSION

For the reasons stated above, we believe the decision of the court of appeals should be affirmed in part, reversed in part, and remanded for further proceedings.

Respectfully submitted.

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OCTOBER 1972.

APPENDIX

Achievement Scores, Medians Incomes, and Racial Compositions of Denver Elementary Schools, Listed in Order of Rank of Median Scores on Fifth Grade Paragraph Meaning Achievement Tests

School	5th Grade Par. Meaning Median Percentile[1]	5th Grade Sleeping Rank	5th Grade Arith. Concepts-Question Median Percentile[1]	5th Grade Arith. Concepts-Question Rank	Median Family Income[1]	Median Family Income Rank	Student Body Racial Composition[2]
Polk	82	1	58	1	8,889	11	70%+ Anglo.
Carson	81	2	64	11	10,000+	1	70%+ Anglo.
McMeen	82	3	70	8	7,705	28	70%+ Anglo.
Pitts	80	4	74	7	9,100	7	70%+ Anglo.
Bradley	78	5	63	15	7,889	23	70%+ Anglo.
Steele	76	6	82	1	10,000+	1	70%+ Anglo.
Stuart	76	6	56	12	10,000+	1	70%+ Anglo.
Ash Grove	75	8	68	10	8,710	10	70%+ Anglo.
University Park	75	8	78	5	8,120	18	70%+ Anglo.
Palmer	74	10	42	23	9,105	17	70%+ Anglo.
Steele	74	10	80	2	6,850	32	70%+ Anglo.
Cory	72	12	70	8	9,500	6	70%+ Anglo.
Sabin	72	12	48	23	8,230	14	70%+ Anglo.
Brentwood	72	12	62	3	9,435	40	70%+ Anglo.
Knight	68	15	53	15	10,000+	1	70%+ Anglo.
Bush	65	16	70	8	9,365	12	70%+ Anglo.
Moore	65	16	78	5	8,320	34	70%+ Anglo.
Washington Park	65	16	56	12	7,700	21	70%+ Anglo.
Ellis	64	19	58	10	8,260	13	70%+ Anglo.
Ebert	64	19	53	15	8,435	40	70%+ Anglo.
Asbury	60	21	34	34	6,920	30	70%+ Anglo.
Montclair	58	22	34	34	(2)	(2)	70%+ Anglo.
Park Hill	58	22	31	45	8,070	18	70%+ Anglo.
Traylor	58	22	53	15	(2)	(2)	70%+ Anglo.
Abott	54	25	34	34	6,400	43	70%+ Anglo.
Hoskins	54	25	43	27	8,725	9	70%+ Anglo.
Dennison	53	27	34	34	7,710	22	70%+ Anglo.
Schenck	53	27	28	54	6,800	36	70%+ Anglo.
Teller	53	27	40	31	6,660	37	70%+ Anglo.
Wyatt-Edison	53	27	64	14	10,000+	1	70%+ Anglo.
Hunt	52	31	30	49	6,800	31	70%+ Anglo.
Ashley	48	32	31	45	6,430	42	70%+ Anglo.
Brown	48	32	30	49	6,545	39	Anglo majority.
Edison	48	32	43	27	8,335	44	70%+ Anglo.
Force	48	32	31	45	7,055	25	70%+ Anglo.
Godsman	48	32	48	23	7,015	28	70%+ Anglo.
McKinley	48	32	34	53	6,100	51	70%+ Anglo.
Phillips	48	32	34	34	8,785	8	Anglo majority.
Stevens	48	32	34	34	5,830	50	70%+ Anglo.
Johnson	46	40	34	53	6,850	33	70%+ Anglo.
Rosedale	42	41	28	54	6,265	46	70%%+ Anglo.
Cheltenham	40	42	43	27	5,110	56	Hispano majority.
Cowell	40	42	31	45	5,870	48	Anglo majority.
Gilpin	40	42	43	27	7,050	26	70%+ Anglo.
Barkeley	38	45	28	60	6,850	33	70%+ Anglo.
Knapp	38	45	31	45	6,250	47	Anglo majority.
Lincoln	38	45	34	34	6,055	53	70%+ Anglo.
Manchester	38	45	11	73	5,150	55	Hispano majority.
Schmitt	38	45	37	33	7,015	28	70%+ Anglo.
Valverde	38	45	48	23	7,050	26	Anglo majority.
Barrett[3]	36	51	13	74	4,335	54	Negro majority.
Colfax	36	51	22	60	5,110	56	Anglo majority.
Elliott[3]	36	51	31	45	3,175	15	Negro majority.

Footnotes at end of table.

School	9th Grade Per. Reading Median Percentile[1]	9th Grade Per. Reading Rank	9th Grade Arith. Comprehension Median Percentile[2]	9th Grade Arith. Comprehension Rank	Median Family Income[3]	Median Family Income Rank	Student Body Racial Composition[4]
Burrus	30	54	28	54	$5,700	61	Anglo majority.
Beach Court	34	51	29	53	6,000	45	Anglo majority.
Belmont	34	51	34	51	5,800	54	70%+ Anglo.
Columbian	34	51	19	74	6,250	40	Anglo majority.
Gabaldon	34	51	28	54	5,970	52	Hispano majority.
Harrison	34	51	25	61	6,700	36	Anglo majority.
Alcalde	32	60	36	50	4,800	77	Anglo majority.
College View	32	60	19	74	6,000	45	70%+ Anglo.
Emerson	32	60	30	52	6,000	72	70%+ Anglo.
Sherman	32	60	31	49	5,915	56	70%+ Anglo.
Smith[5]	32	60	28	54	7,000	26	Negro majority.
Twitchell	32	60	28	54	6,100	51	70%+ Anglo.
Duplexes[6]	30	68	31	49	5,000	68	Hispano majority.
Elmwood[6]	30	68	28	54	5,000	68	Hispano majority.
Salazars[6]	30	68	22	68	7,000	19	Negro majority.
Zyrla[6]	30	68	34	51	4,500	79	Hispano majority.
Hawks	28	78	11	78	4,910	70	Hispano majority.
Zavaleta[6]	28	78	13	77	5,000	68	Hispano majority.
Wyatt	28	78	25	61	4,000	85	Negro-Hispano majority.
Bryant Webster[6]	26	79	26	58	5,000	68	Hispano majority.
Columbia[6]	26	79	22	68	5,000	63	Negro majority.
Swanson	26	79	11	78	5,000	62	Hispano majority.
Evans[6]	24	84	24	64	4,000	84	Negro-Hispano majority.
Ohkay	24	84	24	64	4,000	84	Hispano majority.
Gronlee[7]	24	84	20	66	4,700	83	Hispano majority.
Westwood	24	84	11	78	4,910	70	Hispano majority.
Whittier[7]	24	84	13	77	4,000	75	Negro majority.
Ashland	22	91	22	68	3,430	84	Hispano majority.
Crafton	22	91	14	76	3,000	86	Hispano majority.
Fairmont[7]	22	91	19	74	3,000	76	Hispano majority.
Ebert	18	94	11	78	2,000	88	Hispano majority.
Fairview[7]	18	94	22	68	2,000	87	Hispano majority.
Garden Plaza	18	94	11	78	4,000	73	Hispano majority.
Harrington[7]	18	94	30	52	5,725	28	Negro majority.
Mitchell[7]	18	94	30	52	3,000	82	Negro majority.
Wyatt	14	96	16	75	4,000	89	Hispano majority.
Beethoven[7]	11	98	8	80	(8)	(8)	70%+ Anglo.

[1] Source: Pl. Ex. 66.
[2] Source: Pl. Ex. 66A.
[3] Not available.
[4] Integrated by the District Court's preliminary injunction. In 1969 Barrett became majority Anglo (Def. Ex. 5-L).
[5] Court-designated schools.
[6] In 1968 Evans became 56.9% Anglo (Def. Ex. 5-I).
[7] Beethoven is a "special education" school (Pl. Ex. 34, p. 41).

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Slip Opinion

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KEYES ET AL. *v.* SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 71-507. Argued October 12, 1972—Decided June 21, 1973

Petitioners sought desegregation of the Park Hill area schools in Denver and, upon securing an order of the District Court directing that relief, expanded their suit to secure desegregation of the remaining schools of the Denver school district, particularly those in the core city area. The District Court denied the further relief, holding that the deliberate racial segregation of the Park Hill schools did not prove a like segregation policy addressed specifically to the core city schools and requiring petitioners to prove *de jure* segregation for each area that they sought to have desegregated. That court nevertheless found that the segregated core city schools were educationally inferior to "white" schools elsewhere in the district and, relying on *Plessy* v. *Ferguson*, 163 U. S. 537, ordered the respondents to provide substantially equal facilities for those schools. This latter relief was reversed by the Court of Appeals, which affirmed the Park Hill ruling and agreed that Park Hill segregation, even though deliberate, proved nothing regarding an overall policy of segregation. *Held:*

1. The District Court, for purposes of defining a "segregated" core city school, erred in not placing Negroes and Hispanos in the same category since both groups suffer the same educational inequities when compared with the treatment afforded Anglo students. Pp. 5–8.

2. The courts below did not apply the correct legal standard in dealing with petitioners' contention that respondent School Board had the policy of deliberately segregating the core city schools. Pp. 8–23.

(a) Proof that the school authorities have pursued an intentional segregative policy in a substantial portion of the school district will support a finding by the trial court of the existence

Syllabus

of a dual system, absent a showing that the district is divided into clearly unrelated units. Pp. 10–12.

(b) On remand the District Court should decide initially whether respondent School Board's deliberately segregative policy respecting the Park Hill schools constitutes the whole Denver school district a dual school system. Pp. 13–15.

(c) Where, as in this case, a policy of intentional segregation has been proved with respect to a significant portion of the school system, the burden is on the school authorities (regardless of claims that their "neighborhood school policy" was racially neutral) to prove that their actions as to other segregated schools in the system were not likewise motivated by a segregative intent. Pp. 17–22.

445 F. 2d 990, modified and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a separate opinion. BURGER, C. J., concurred in the result. POWELL, J., filed an opinion concurring in part and dissenting in part. REHNQUIST, J., filed a dissenting opinion. WHITE, J., took no part in the decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-507

Wilfred Keyes et al., Petitioners, v. School District No. 1, Denver, Colorado, et al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 21, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This school desegregation case concerns the Denver, Colorado, school system. That system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education.[1] Rather, the gravamen of this action, brought in June 1969 in the District Court for the District of Colorado by parents of Denver school children, is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, school site selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district.

The boundaries of the school district are co-terminus with the boundaries of the City and County of Denver.

[1] To the contrary, Art. IX, § 8, of the Colorado Constitution expressly prohibits "any classification of pupils . . . on account of race or color." As early as 1927, the Colorado Supreme Court held that a Denver practice of excluding black students from school programs at Manual High School and Morey Junior High School violated state law. *Jones* v. *Newlon*, 81 Colo. 25, 253 P. 386 (1927).

There were in 1969 119 schools[1] with 96,580 pupils in the school system. In early 1969, the respondent School Board adopted three resolutions, Resolutions 1520, 1524, and 1531, designed to desegregate the schools in the Park Hill area in the northeast portion of the city. Following an election which produced a Board majority opposed to the resolutions, the resolutions were rescinded and replaced with a voluntary student transfer program. Petitioners then filed this action, requesting an injunction against the rescission of the resolutions and an order directing that the respondent School Board desegregate and afford equal educational opportunity "for the School District as a whole." App., p. 32a. The District Court found that by the construction of a new, relatively small elementary school, Barrett, in the middle of the Negro community west of Park Hill, by the gerrymandering of student attendance zones, by the use of so-called "optional zones," and by the excessive use of mobile classroom units, among other things, the respondent School Board had engaged over almost a decade after 1960 in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill schools.[2] The court therefore ordered the Board to desegregate those schools through the implementation of the three rescinded resolutions. 303 F. Supp. 279 (1969); 303 F. Supp. 289 (1969).

Segregation in Denver schools is not limited, however, to the schools in the Park Hill area, and not satisfied with their success in obtaining relief for Park Hill, peti-

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[1] There are 92 elementary schools, 15 junior high schools, 2 junior-senior high schools, and 7 senior high schools. In addition, the Board operates an Opportunity School, a Metropolitan Youth Education Center, and an Aircraft Training Facility.

[2] The so-called "Park Hill schools" are Barrett, Stedman, Hallett, Smith, Philips, and Park Hill Elementary Schools; and Smiley Junior High School. East High School serves the area but is located outside of it. (See appendix.)

tioners pressed their prayer that the District Court order desegregation of all segregated schools in the city of Denver, particularly the heavily segregated schools in the core city area.[4] But that court concluded that its finding of a purposeful and systematic program of racial segregation affecting thousands of students in the Park Hill area did not, in itself, impose on the School Board an affirmative duty to eliminate segregation throughout the school district. Instead, the court fractionated the district and held that petitioners must make a fresh showing of *de jure* segregation in each area of the city for which they seek relief. Moreover, the District Court held that its finding of intentional segregation in Park Hill was not in any sense material to the question of segregative intent in other areas of the city. Under this restrictive approach, the District Court concluded that petitioners' evidence of intentionally discriminatory School Board action in areas of the district other than Park Hill was insufficient to "dictate the conclusion that this is *de jure* segregation which calls for an all-out effort to desegregate. It is more like *de facto* segregation, with respect to which the rule is that the court cannot order desegregation in order to provide a better balance." 313 F. Supp. 61, 73 (1970).

Nevertheless, the District Court went on to hold that the proofs established that the segregated core city schools were educationally inferior to the predominantly "white" or "Anglo" schools in other parts of the district—that is, "separate facilities . . . unequal in the quality of education provided." *Id.*, at 83. Thus, the court held that, under the doctrine of *Plessy* v. *Ferguson*,

[4] The so-called "core city schools" which are said to be segregated are Boulevard, Bryant-Webster, Columbine, Crofton, Ebert, Elmwood, Elyria, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Harrington, Mitchell, Smedley, Swansea, Whittier, Wyatt, and Wyman Elementary Schools; Baker, Cole, and Morey Junior High Schools; and East, West, and Manual High Schools. (See appendix.)

163 U. S. 537 (1896), respondent School Board constitutionally "must at a minimum . . . offer an equal educational opportunity," *ibid.*, and, therefore, although all-out desegregation "could not be decreed, . . . the only feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment." 313 F. Supp. 90, 96 (1970). The District Court then formulated a varied remedial plan to that end which was incorporated in the Final Decree.[4]

Respondent School Board appealed, and petitioners cross-appealed, to the Court of Appeals for the Tenth Circuit. That court sustained the District Court's finding that the Board engaged in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill schools and affirmed the Final Decree in that respect. As to the core city schools, however, the Court of Appeals reversed the legal determination of the District

[4] The first of the District Court's four opinions, 303 F. Supp. 279, was filed July 31, 1969, and granted petitioners' application for a preliminary injunction. The second opinion, 303 F. Supp. 289, was filed August 14, 1969, and made supplemental findings and conclusions. The third opinion, 313 F. Supp. 61, filed March 21, 1970, was the opinion on the merits. The fourth opinion, 313 F. Supp. 90, was on remedy and was filed May 21, 1970. The District Court filed an unreported opinion on October 19, 1971, in which relief was extended to Hallett and Stedman Elementary Schools which were found by the court in its July 31, 1969, opinion to be purposefully segregated but were not included within the scope of the three 1969 Board resolutions. The Court of Appeals filed five unreported opinions: on August 5, 1969, vacating preliminary injunctions; on August 27, 1969, staying preliminary injunction; on September 15, 1969, on motion to amend stay; on October 17, 1969, denying Motions to Dismiss; and on March 26, 1971, granting stay. Mr. Justice Brennan, on August 29, 1969, filed an opinion reinstating preliminary injunction, 396 U. S. 1215 (1969), and on April 26, 1971, this Court entered a *per curiam* order vacating the Court of Appeals' stay, 402 U. S. 182 (1971).

Court that those schools were maintained in violation of the Fourteenth Amendment because of the unequal educational opportunity afforded, and therefore set aside so much of the Final Decree as required desegregation and educational improvement programs for those schools. 445 F. 2d 990 (1971). In reaching that result, the Court of Appeals also disregarded respondent School Board's deliberate racial segregation policy respecting the Park Hill schools and accepted the District Court's finding that petitioners had not proved that respondent had a like policy addressed specifically to the core city schools.

We granted petitioners' petition for certiorari to review the Court of Appeals' judgment insofar as it reversed that part of the District Court's Final Decree as pertained to the core city schools. 404 U. S. 1036 (1972). The judgment of the Court of Appeals in that respect is modified to vacate instead of reverse the Final Decree. The respondent School Board has cross-petitioned for certiorari to review the judgment of the Court of Appeals insofar as it affirmed that part of the District Court's Final Decree as pertained to the Park Hill schools. *School District No. 1, etc.* v. *Wilfred Keyes et al.*, No. 71-572. The cross-petition is denied.

I

Before turning to the primary question we decide today, a word must be said about the District Court's method of defining a "segregated" school. Denver is a tri-ethnic, as distinguished from a bi-racial, community. The overall racial and ethnic composition of the Denver public schools is 66% Anglo, 14% Negro and 20% Hispano.[4] The District Court, in assessing the question of

[4] The parties have used the terms "Anglo," "Negro," and "Hispano" throughout the record. We shall therefore use those terms. "Hispano" is the term used by the Colorado Department of Education to refer to a person of Spanish, Mexican, or Cuban heritage. Colorado Department of Education, Human Relations in Colorado,

de jure segregation in the core city schools, preliminarily resolved that Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school. 313 F. Supp., at 60. Later, in determining the schools that were likely to produce an inferior educational opportunity, the court concluded that a school would be considered inferior only if it had "a concentration of either Negro or Hispano students in the general area of 70 to 75 percent." *Id.*, at 77. We intimate no opinion whether the District Court's 70 to 75% requirement was correct. The District Court used those figures to signify educationally inferior schools, and there is no suggestion in the record that those same figures were or would be used to define a "segregated" school in the *de jure* context. What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school must be taken into consideration. The District Court has recognized these specific factors as elements of the definition of a "segregated" school, *id.*, at 74, and we may therefore infer that the court will consider them again on remand.

We conclude, however, that the District Court erred

A Historical Record 203 (1968). In the Southwest, the "Hispanos" are more commonly referred to as "Chicanos" or "Mexican-Americans."

The more specific racial and ethnic composition of the Denver public schools is as follows:

	Anglo		*Negro*		*Hispano*	
Pupils	No.	%	No.	%	No.	%
Elementary	38,719	61.8	8,297	13.2	12,570	23.0
Junior High	14,848	66.7	2,898	13.4	3,858	17.9
Senior High	14,852	72.8	2,442	12.0	3,101	15.2
Total	68,419	65.7	13,632	14.1	19,529	20.2

in separating Negroes and Hispanos for purposes of defining a "segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. *Hernandez* v. *Texas*, 347 U. S. 475 (1954). See also *United States* v. *Texas Education Agency*, 467 F. 2d 848 (CA5 1972) (*en banc*); *Cisneros* v. *Corpus Christi Independent School District*, 467 F. 2d 142 (CA5 1972) (*en banc*); *Alvarado* v. *El Paso Independent School District*, 445 F. 2d 1011 (CA5 1971); *Soria* v. *Oxnard School District*, 328 F. Supp. 155 (CD Cal. 1971); *Romero* v. *Weakley*, 226 F. 2d 399 (CA9 1955). Indeed, the District Court recognized this in classifying predominantly Hispano schools as "segregated" schools in their own right. But there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently published two Reports on Hispano education in the Southwest.[7] Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians.[8] In fact, the District Court itself recognized that "[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination." 313 F. Supp., at 60. This is agreement that, though of different origins, Negroes and His-

[7] United States Commission on Civil Rights, Mexican-American Education Study, Ethnic Isolation of Mexican-Americans in the Public Schools of the Southwest (April 1971); United States Commission on Civil Rights, Mexican-American Education Series, The Unfinished Education (October 1970).

[8] The Commission's first Report, on p. 41, summarizes its findings:

"The basic finding of this report is that minority students in the Southwest—Mexican-Americans, blacks, American Indians—do not obtain the benefits of public education at a rate equal to that of their Anglo classmates."

panos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.

II

In our view, the only other question that requires our decision at this time is that subsumed in Question 2 of the Questions Presented by petitioners, namely, whether the District Court and the Court of Appeals applied an incorrect legal standard in addressing petitioners' contention that respondent School Board engaged in an unconstitutional policy of deliberate segregation in the core city schools. Our conclusion is that those courts did not apply the correct standard in addressing that contention.[9]

Petitioners apparently concede for the purposes of this case that in the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action. Petitioners proved that for almost a decade after 1960 respondent School Board had engaged in an unconstitutional policy of deliberate racial segregation in the Park Hill schools. Indeed, the District Court found that "[b]etween 1960 and 1969 the Board's policies with respect to those northeast Denver schools show an

[9] Our Brother REHNQUIST argues in dissent that the Court somehow transgresses the "two-court" rule. *Infra*, p. 11. But at this stage, we have no occasion to review the factual findings concurred in by the two courts below. Cf. *Neil* v. *Biggers*, 409 U. S. 188 (1972). We address only the question whether those courts applied the correct legal standard in deciding the case as it affects the core city schools.

undeviating purpose to isolate Negro students" in segregated schools "while preserving the Anglo character of [other] schools." 303 F. Supp., at 294. This finding did not relate to an insubstantial or trivial fragment of the school system. On the contrary, respondent School Board was found guilty of following a deliberate segregation policy at schools attended, in 1969, by 37.69% of Denver's total Negro school population, including one-fourth of the Negro elementary pupils, over two-thirds of the Negro junior high pupils, and over two-fifths of the Negro high school pupils.[10] In addition,

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[10] The Board was found guilty of intentionally segregative acts of one kind or another with respect to the schools listed below. (As to Cole and East, the conclusion rests on the rescission of the resolutions.)

PUPILS 1968–1969

	Anglo	*Negro*	*Hispano*	*Total*
Barrett	1	410	12	432
Stedman	27	634	25	686
Hallett	76	634	41	751
Park Hill	684	223	56	963
Philips	307	203	45	555
Smiley Jr. High	360	1,112	74	1,546
Cole Jr. High	46	884	289	1,219
East High	1,409	1,039	175	2,623
Subtotal Elementary	1,095	2,104	179	3,378
Subtotal Jr. High	406	1,996	363	2,765
Subtotal Sr. High	1,409	1,039	175	2,623
Total	2,910	5,139	717	8,766

The total Negro school enrollment in 1968 was:

Elementary	8,297
Junior High	2,893
Senior High	2,442

Thus, the above-mentioned schools included:

Elementary	25.36% of all Negro elementary pupils
Junior High	68.99% of all Negro junior high pupils
Senior High	42.55% of all Negro senior high pupils
Total	37.69% of all Negro pupils

there was uncontroverted evidence that teachers and staff had for years been assigned on a minority teacher-to-minority school basis throughout the school system. Respondent argues, however, that a finding of state-imposed segregation as to a substantial portion of the school system can be viewed in isolation from the rest of the district, and that even if state-imposed segregation does exist in a substantial part of the Denver school system, it does not follow that the District Court could predicate on that fact a finding that the entire school system is a dual system. We do not agree. We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (*Brown I*), the State automatically assumes an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system," *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955) (*Brown II*), see also *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968), that is, to eliminate from the public schools within their school system "all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971).[11]

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[11] Our Brother REHNQUIST argues in dissent that *Brown* v. *Board of Education* did not impose an "affirmative duty to integrate" the schools of a dual school system but was only a "prohibition against discrimination" "in the sense that the assignment to a child of a particular school is not made to depend on his race . . . ." *Infra*, p. 5. That is the interpretation of *Brown* expressed 18 years ago by a three-judge court in *Briggs* v. *Elliott*, 132 F. Supp. 776, 777

This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. Several considerations support this conclusion. First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white.[12] Similarly, the practice of building a school—such as the Barrett Elementary School in this case—to a certain size and in a certain location, "with conscious knowledge that it would

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(1955): "The Constitution, in other words, does not require integration. It merely forbids discrimination." But *Green* v. *County School Board*, 391 U. S. 430, 438 (1968), rejected that interpretation insofar as *Green* expressly held that "School boards . . . operating state-compelled dual systems were nevertheless clearly charged [by *Brown II*] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* remains the governing principle. *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971). See also *Kelley* v. *Metropolitan County Board of Education*, 317 F. Supp. 980, 984 (1970).

[12] As a former School Board President who testified for the respondents put it: "Once you change the boundary of any one school, it is affecting all the schools, . . ." Testimony of Mrs. Lois Heath Johnson on direct examination. App., p. 951a–952a.

Similarly, Judge Wisdom has recently stated:

"Infection at one school infects all schools. To take the most simple example, in a two school system, all blacks at one school means all or almost all whites at the other." *United States* v. *Texas Education Agency*, 467 F. 2d 848, 888 (CA5 1972).

be a segregated school," 303 F. Supp., at 285, has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools. We recognized this in *Swann* when we said:

> "They [school authorities] must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
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> "In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed

through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of races. Upon a proper showing a district court may consider this in fashioning a remedy." 402 U. S., at 20-21.

In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of or the natural boundaries within a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system." *Brown II*, *supra*, at 301.

On remand, therefore, the District Court should decide in the first instance whether respondent School

Board's deliberate racial segregation policy with respect to the Park Hill schools constitutes the entire Denver school system a dual school system. We observe that on the record now before us there is indication that Denver is not a school district which might be divided into separate, identifiable and unrelated units. The District Court stated, in its summary of findings as to the Park Hill schools, that there was "a high degree of interrelationship among these schools, so that any action by the Board affecting the racial composition of one would almost certainly have an effect on the others." 303 F. Supp., at 294. And there was cogent evidence that the ultimate effect of the Board's actions in Park Hill was not limited to that area: the three 1960 resolutions designed to desegregate the Park Hill schools changed the attendance patterns of at least 29 schools attended by almost one-third of the pupils in the Denver school system.[12] This suggests that the official segregation in Park Hill affected the racial composition of schools throughout the district.

On the other hand, although the District Court did not state this or indeed any reason why the Park Hill finding was disregarded when attention was turned to the core city schools—beyond saying that the Park Hill and core city areas were in its view "different"—the areas, although adjacent to each other, are separated by Colorado Boulevard, a six-lane highway. From the record, it is difficult to assess the actual significance of Colorado Boulevard to the Denver school system. The Boulevard runs the length of the school district, but at least two elementary schools, Teller and Steck, have attendance zones which cross the Boulevard. Moreover, the District Court, although referring to the Boulevard as "a natural dividing line," 303 F. Supp., at 282, did not feel

[12] See the chart at 445 F. 2d 1008–1009, which indicates that 31,707 pupils attended the schools affected by the resolutions.

constrained to limit its consideration of *de jure* segregation in the Park Hill area to those schools east of the Boulevard. The court found that by building Barrett Elementary School west of the Boulevard and by establishing Colorado Boulevard as the eastern boundary of the Barrett attendance zone, the Board was able to maintain for a number of years the Anglo character of the Park Hill schools. This suggests that Colorado Boulevard is not to be regarded as the type of barrier that of itself could confine the impact of the Board's actions to an identifiable area of the school district, perhaps because a major highway is generally not such an effective buffer between adjoining areas. Cf. *Davis* v. *Board of School Commissioners of Mobile County*, 402 U. S. 33 (1971). But this is a factual question for resolution by the District Court on remand. In any event, inquiry whether the District Court and the Court of Appeals applied the correct legal standards in addressing petitioners' contention of deliberate segregation in the core city schools is not at an end even if it be true that Park Hill may be separated from the rest of the Denver school district as a separate, identifiable and unrelated unit.

III

The District Court proceeded on the premise that the finding as to the Park Hill schools was irrelevant to the consideration of the rest of the district, and began its examination of the core city schools by requiring that petitioners prove all of the essential elements of *de jure* segregation—that is, stated simply, a current condition of segregation resulting from intentional state action directed specifically to the core city schools.[14] The

[14] Our Brother REHNQUIST argues in dissent that the District Court did take the Park Hill finding into account in addressing the question of alleged *de jure* segregation of the core city schools. *Infra*, p. 9. He cites the following excerpt from a footnote to the

segregated character of the core city schools could not be and is not denied. Petitioners' proof showed that at the time of trial 22 of the schools in the core city area were less than 30% in Anglo enrollment and 11 of the schools were less than 10% Anglo.[13] Petitioners also introduced substantial evidence demonstrating the existence of a disproportionate racial and ethnic composition of faculty and staff at these schools.

On the question of segregative intent, petitioners presented evidence tending to show that the Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools. Respondents countered this evidence by arguing that the segregation in these schools is the result of a racially neutral "neighborhood school policy" and that the acts of which petitioners complain are explicable within the bounds of that policy. Accepting the School Board's explanation, the District Court and the Court of Appeals agreed that a finding of *de jure* segregation as to the core city schools was not permissible since

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District Court's opinion of March 21, 1970, 313 F. Supp., at 74–75: "Although past discriminatory acts may not be a substantial factor contributing to present segregation, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation." But our Brother REHNQUIST omits the rest of the footnote: "Thus, in part I of this opinion, we discussed the building of Barrett, boundary changes and the use of mobile units as they relate to the purpose for the rescission of Resolutions 1520, 1524 and 1531." Obviously, the District Court was carefully limiting the comment to the consideration being given past discriminatory acts *affecting the Park Hill schools* in assessing the causes of current segregation of *those schools*.

[13] In addition to these 22 schools, see 313 F. Supp., at 78, two more schools, Elyria and Smedley Elementary Schools, became less than 30% Anglo after the District Court's decision on the merits. These two schools were thus included in the list of segregated schools. 313 F. Supp., at 92.

petitioners had failed to prove "(1) a racially discriminatory purpose and (2) a casual relationship between the acts complained of and the racial imbalance admittedly existing in those schools." 445 F. 2d, at 1000. This assessment of petitioners' proof was clearly incorrect.

Although petitioners had already proved the existence of intentional school segregation in the Park Hill schools, this crucial finding was totally ignored when attention turned to the core city schools. Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system. On the contrary, where, as here, the case involves one school board, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent with respect to other segregated schools in the system. This is merely an application of the well-settled evidentiary principle that "the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." II Wigmore, Evidence 200 (3d ed. 1940). "Evidence that similar and related offenses were committed . . . tend[s] to show a consistent pattern of conduct highly relevant to the issue of intent." *Nye & Nissen* v. *United States*, 336 U. S. 613, 618 (1949). Similarly, a finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder. See, for example, the cases cited in II Wigmore, *supra*, at 301–302. And "[t]he foregoing principles are equally as applicable to civil cases as to criminal cases, . . ." II Wigmore, *supra*, at 300. See also McCormick, Evidence 329 (1954).

Applying these principles in the special context of school desegregation cases, we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system. We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* [10] is *purpose* or *intent* to segregate. Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving plaintiffs with the burden of proving otherwise. But at that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities can not be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregative actions. In that circumstance, it is both fair and

[10] 402 U. S. 1, 17–18 (1971).

reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent.

This burden-shifting principle is not new or novel. There are no hard and fast standards governing the allocation of the burden of proof in every situation. The issue, rather, "is merely a question of policy and fairness based on experience in the different situations." IX Wigmore, Evidence § 2486 (3d ed. 1940). In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in *Swann*, *supra*, 402 U. S., at 18, we observed that in a system with a "history of segregation," "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sport activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." Again, in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation "thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence." *Chambers* v. *Hendersonville City Board of Education*, 364 F. 2d 189, 192 (CA4 1966) (*en banc*). See also *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 887–888 (CA5 1966), aff'd *en banc*, 380 F. 2d 385 (1967); *North Carolina Teachers' Association* v. *Asheboro City Board of Education*, 393 F. 2d 736, 743 (CA4 1968) (*en banc*); *Williams* v. *Kimbrough*, 295 F. Supp. 578, 585 (WD La. 1969); *Bonner* v. *Texas City*

Independent School District, 305 F. Supp. 600, 621 (SD Tex. 1969). Nor is this burden-shifting principle limited to former statutory dual systems. See, *e. g.*, *Davis* v. *School District of the City of Pontiac*, 309 F. Supp. 734, 743, 744 (ED Mich. 1970), aff'd, 443 F. 2d 573 (CA6 1971); *United States* v. *School District No. 151*, 301 F. Supp. 201, 228 (ND Ill. 1969), mod. on other grounds, 432 F. 2d 1147 (CA7 1970). Indeed, to say that a system has a "history of segregation" is merely to say that a pattern of intentional segregation has been established in the past. Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.

In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions. The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a

lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did. In *Swann*, we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention. 402 U. S., at 31–32. See also *Hobson* v. *Hansen*, 269 F. Supp. 401, 495 (DC 1967), aff'd *sub nom. Smuck* v. *Hobson*, 132 U. S. App. D. C. 372, 408 F. 2d 175 (1969).[17] We made it clear, however, that a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.

The respondent School Board invoked at trial its "neighborhood school policy" as explaining racial and ethnic concentrations within the core city schools, arguing that since the core city area population had long been Negro and Hispano, the concentrations were necessarily

[17] It may be that the District Court and Court of Appeals were applying this test in holding that petitioners had failed to prove that the Board's actions "caused" the current condition of segregation in the core city schools. But if so, certainly plaintiffs in a school desegregation case are not required to prove "cause" in the sense of "non-attenuation." That is a factor which becomes relevant only after past intentional actions resulting in segregation have been established. At that stage, the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions.

the result of residential patterns and not of purposefully segregative policies. We have no occasion to consider in this case whether a "neighborhood school policy" of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting *de jure* segregation. It is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation. Our observations in *Swann*, *supra*, at 28, are particularly instructive on this score:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. . . . 'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral."

Thus, respondent School Board having been found to have practiced deliberate racial segregation in schools attended by over one-third of the Negro school population, that crucial finding establishes a prima facie case of intentional segregation in the core city schools. In such case, respondent's neighborhood school policy is not to be determinative "simply because it appears to be neutral."

IV

In summary, the District Court on remand, *first*, will afford respondent School Board the opportunity to prove its contehtion that the Park Hill area is a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district. If respondent School Board fails to prove that contention, the District Court, *second*, will determine whether respondent School Board's conduct over almost a decade after 1960 in carrying out a policy of deliberate racial segregation in the Park Hill schools constitutes the entire school system a dual school system. If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system "root and branch." *Green* v. *County School Board*, *supra*, 391 U. S., at 438. If the District Court determines, however, that the Denver school system is not a dual school system by reason of the Board's actions in Park Hill, the court, *third*, will afford respondent School Board the opportunity to rebut petitioners' prima facie case of intentional segregation in the core city schools raised by the finding of intentional segregation in the Park Hill schools. There, the Board's burden is to show that its policies and practices with respect to school site location, school size, school renovations and additions, student at-

tendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together and premised on the Board's so-called "neighborhood school" concept, either were not taken in effectuation of a policy to create or maintain segregation in the core city schools, or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools. Considerations of "fairness" and "policy" demand no less in light of the Board's intentionally segregative actions. If respondent Board fails to rebut petitioners' prima facie case, the District Court must, as in the case of Park Hill, decree all-out desegregation of the core city schools.

The judgment of the Court of Appeals is modified to vacate instead of reverse the parts of the Final Decree that concern the core city schools, and the case is remanded to the District Court for further proceedings consistent with this opinion.[12]

It is so ordered.

MR. CHIEF JUSTICE BURGER concurs in the result.

MR. JUSTICE WHITE took no part in the decision of this case.

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[12] We therefore do not reach and intimate no view upon the merits of the holding of the District Court, premised upon its erroneous finding that the situation "is more like de facto segregation," 313 F. Supp., at 73, that nevertheless, although all-out desegregation "could not be decreed, . . . the only feasible and constitutionally acceptable program . . . is a system of desegregation and integration which provides compensatory education in an integrated environment." *Id.*, at 96.

SUPREME COURT OF THE UNITED STATES

No. 71-507

Wilfred Keyes et al., Petitioners, v. School District No. 1, Denver, Colorado, et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 21, 1973]

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, I agree with my Brother POWELL that there is, for the purposes of the Equal Protection Clause of the Fourteenth Amendment as applied to the school cases, no difference between *de facto* and de *jure* segregation. The school board is a state agency and the lines that it draws, the locations it selects for school sites, the allocation it makes of students, the budgets it prepares are state action for Fourteenth Amendment purposes.

As Judge Wisdom cogently stated in *United States* v. *Texas Education Agency*, 467 F. 2d 848, segregated schools are often created, not by dual school systems decreed by the legislature, but by the administration of school districts by school boards. Each is state action within the meaning of the Fourteenth Amendment. "Here school authorities assigned students, faculty, and professional staff, employed faculty and staff; chose sites for schools; constructed new schools and renovated old ones; and drew attendance zone lines. The natural and foreseeable consequence of these actions was segregation of Mexican-Americans. Affirmative action to the contrary would have resulted in desegregation. When school authorities by their actions, contribute to segrega-

tion in education, whether by causing additional segregation or maintaining existing segregation, they deny to the students equal protection of the laws.

"We need not define the quantity of state participation which is a prerequisite to a finding of constitutional violation. Like the legal concepts of 'the reasonable man,' 'due care,' 'causation,' 'preponderance of the evidence,' and 'beyond a reasonable doubt,' the necessary degree of state involvement is incapable of precise definition and must be defined on a case-by-case basis. Suffice it to say that school authorities here played a significant role in causing or perpetuating unequal educational opportunities for Mexican-Americans, and did so on a system-wide basis." *Id.*, at 863–864.

These latter acts are often said to create *de facto* as contrasted with *de jure* segregation. But as Judge Wisdom observes, each is but another form of *de jure* segregation.

I think it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies. If a "neighborhood" or "geographical" unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to "the elite," leaving the "undesirables" to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind those covenants.

There is state action in the constitutional sense when public funds are dispersed by urban development agencies to build racial ghettoes.

Where the school district is racially mixed and the races are segregated in separate schools, where black teachers are assigned almost exclusively to black schools, where the school board closed existing schools located in fringe areas and built new schools in black areas and in distant white areas, where the school board continued

the "neighborhood" school policy at the elementary level, these actions constitute state action. They are of a kind quite distinct from the classical *de jure* type of school segregation. Yet calling them *de facto* is a misnomer, as they are only more subtle types of state action that create or maintain a wholly or partially segregated school system. See *Kelly* v. *Guinn*, 456 F. 2d 100.

When a State forces, aids, or abets, or helps create a racial "neighborhood," it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.

The Constitution and Bill of Rights have described the design of a pluralistic society. The individual has the right to seek such companions as he desires. But a State is barred from creating by one device or another ghettoes that determine the school one is compelled to attend.

SUPREME COURT OF THE UNITED STATES

No. 71-507

Wilfred Keyes et al., Petitioners, v. School District No. 1, Denver, Colorado, et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 21, 1973]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I concur in the remand of this case for further proceedings in the District Court, but on grounds that differ from those relied upon by the Court.

This is the first school desegregation case to reach this Court which involves a major city outside the South. It comes from Denver, Colorado, a city and a State which have not operated public schools under constitutional or statutory provisions which mandated or permitted racial segregation.[1] Nor has it been argued that any other legislative actions (such as zoning and housing laws) contributed to the segregation which is at issue.[2] The

[1] Article IX, § 8, of the Colorado Constitution has expressly prohibited "any classification of pupils . . . on account of race or color."

[2] See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 23 (1971):

"We do not reach . . . the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." The term "state action," as used herein, thus refers to actions of the appropriate public school authorities.

Court has inquired only to what extent the Denver public school authorities may have contributed to the school segregation which is acknowledged to exist in Denver.

The predominantly minority schools are located in two areas of the city referred to as Park Hill and the core city area. The District Court considered that a school with a concentration of 70 to 75% "Negro or Hispano students" was identifiable as a segregated school. 313 F. Supp., at 77. Wherever one may draw this line, it is undisputed that most of the schools in these two areas are in fact heavily segregated in the sense that their student bodies are overwhelmingly composed of non-Anglo children. The city-wide school mix in Denver is 66% Anglo, 14% Negro, and 20% Hispano. In areas of the city where the Anglo population largely resides, the schools are predominantly Anglo, if not entirely so.

The situation in Denver is generally comparable to that in other large cities across the country in which there is a substantial minority population and where desegregation has not been ordered by the federal courts. There is segregation in the schools of many of these cities fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half. The focus of the school desegregation problem has now shifted from the South to the country as a whole. Unwilling and footdragging as the process was in most places, substantial progress toward achieving integration has been made in southern States.[8] No comparable progress has been made in many nonsouthern cities with large minority

[8] According to the 1971 HEW estimate, 43.9% of Negro pupils attended majority white schools in the South as opposed to only 27.8% who attended such schools in the North and West. Fifty-seven percent of all Negro pupils in the North and West attend schools with over 80% minority population as opposed to 32.2% who do so in the South. 118 Cong. Rec. 8145.

populations[4] primarily because of the *de facto/de jure* distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South.[5] But if our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.

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[4] The 1971 HEW Enrollment Survey dramatized the segregated character of public school systems in many nonsouthern cities. The percentage of Negro pupils which attended schools more than 80% black was 91.3 in Cleveland, Ohio; 97.8 in Compton, California; 78.1 in Dayton, Ohio; 78.6 in Detroit, Michigan; 95.7 in Gary, Indiana; 86.4 in Kansas City, Missouri; 86.6 in Los Angeles, California; 78.8 in Milwaukee, Wisconsin; 91.3 in Newark, New Jersey; 89.8 in St. Louis, Missouri. The full data from the Enrollment Survey may be found in 118 Cong. Rec. S144-148, Jan. 20, 1972.

[5] As Senator Ribicoff (D.-Conn.) recognized:

"For years we have fought the battle of integration primarily in the South where the problem was severe. It was a long, arduous fight that deserved to be fought and needed to be won.

"Unfortunately, as the problem of racial isolation has moved north of the Mason-Dixon line, many northerners have bid an evasive farewell to the 100-year struggle for racial equality. Our motto seems to have been 'Do to southerners what you do not want to do to yourself.'

"Good reasons have always been offered, of course, for not moving vigorously ahead in the North as well as the South.

"First, it was that the problem was worse in the South. Then the facts began to show that that was no longer true.

"We then began to hear the de facto-de jure refrain.

"Somehow residential segregation in the North was accidental or de facto and that made it better than the legally supported de jure segregation of the South. It was a hard distinction for black children in totally segregated schools in the North to understand, but it allowed us to avoid the problem." 118 Cong. Rec. S2542, Feb. 24, 1972.

I

In my view we should abandon a distinction which long since has outlived its time, and formulate constitutional principles of national rather than merely regional application. When *Brown* v. *Board of Education*, 347 U. S. 483 (1954), was decided, the distinction between *de jure* and *de facto* segregation was consistent with the limited constitutional rationale of that case. The situation confronting the Court, largely confined to the southern States, was officially imposed racial segregation in the schools extending back for many years and usually embodied in constitutional and statutory provisions.

The great contribution of *Brown I* was its holding in unmistakable terms that the Fourteenth Amendment forbids state-compelled or authorized segregation of public schools. 347 U. S., at 488, 493–495. Although some of the language was more expansive, the holding in *Brown I* was essentially negative: It was impermissible under the Constitution for the States, or their instrumentalities, to force children to attend segregated schools. The forbidden action was *de jure*, and the opinion in *Brown I* was construed—for some years and by many courts—as requiring only state neutrality, allowing "freedom of choice" as to schools to be attended so long as the State itself assured that the choice was genuinely free of official restraints.[6]

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[6] See, *e. g.*, *Bradley* v. *School Board*, 345 F. 2d 310, 316 (CA4 *en banc*, 1965):

"It has been held again and again . . . that the Fourteenth Amendment prohibition is not against segregation as such. . . . A state or school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to the school attended, so that each pupil, in effect, assigns himself to the school he wishes to attend." (The case was later

But the doctrine of *Brown I*, as amplified by *Brown II*, 349 U. S. 294 (1955), did not retain its original meaning. In a series of decisions extending from 1954 to 1971 the concept of state neutrality was transformed into the present constitutional doctrine requiring affirmative state action to desegregate school systems.[7] The keystone case was *Green* v. *County School Board*, 391 U. S. 430, 438 (1968), where school boards were declared to have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." The school system before the Court in *Green* was operating in a rural and sparsely settled county where there were no concentrations of white and black populations, no neighborhood school system (there were only two schools in the county), and none of the problems of an urbanized school district.[8] The Court properly identified the freedom of choice program there as a subterfuge, and the language in *Green* imposing an affirmative duty to convert to a unitary system was appropriate on the facts before the Court. There was, however, reason to question to what extent this duty would apply in the vastly different factual setting of a

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vacated and remanded by this Court, which expressed no view on the merits of the desegregation plans submitted.) 382 U. S. 103, 105 (1965). See also *Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209 (CA7 1963); *Downs* v. *Board of Educ.*, 336 F. 2d 988 (CA10 1964); *Deal* v. *Board of Educ.*, 369 F. 2d 55 (CA6 1966).

[7] For a concise history and commentary on the evolution, see generally A. Bickel, The Supreme Court and the Idea of Progress, pp. 126–130 (1970).

[8] See also the companion cases in *Raney* v. *Board of Education*, 391 U. S. 443 (1968), and *Monroe* v. *Board of Comm'rs*, 391 U. S. 450 (1968), neither of which involved large urban or metropolitan areas.

large city with extensive areas of residential segregation, presenting problems and calling for solutions quite different from those in the rural setting of New Kent County, Virginia.

But the doubt as to whether the affirmative duty concept would flower into a new constitutional principle of general application was laid to rest by *Swann* v. *Board of Education*, 402 U. S. 1 (1971), in which the duty articulated in *Green* was applied to the urban school system of metropolitan Charlotte, North Carolina. In describing the residential patterns in Charlotte, the Court noted the "familiar phenomenon" in the metropolitan areas of minority groups being "concentrated in one part of the city," 402 U. S., at 25, and acknowledged that:

> "Rural areas accustomed for half a century to the consolidated school system implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns." 402 U. S., at 14.

Despite this recognition of a fundamentally different problem from that involved in *Green*, the Court nevertheless held that the affirmative duty rule of *Green* was applicable, and prescribed for a metropolitan school system with 107 schools and some 84,000 pupils essentially the same remedy—elimination of segregation "root and branch"—which had been formulated for the two schools and 1,300 pupils of New Kent County.

In *Swann*, the Court further noted it was concerned only with States having "a long history" of officially imposed segregation and the duty of school authorities in those States to implement *Brown I*. 402 U. S., at 5–6. In so doing, the Court refrained even from considering whether the evolution of constitutional doctrine from *Brown I* to *Green/Swann* undercut whatever logic once supported

the *de facto/de jure* distinction. In imposing on metropolitan southern school districts an affirmative duty, entailing large-scale transportation of pupils, to eliminate segregation in the schools, the Court required these districts to alleviate conditions which in large part did *not* result from historic, state-imposed *de jure* segregation. Rather, the familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities. This is a national, not a southern phenomenon. And it is largely unrelated to whether a particular State had or did not have segregatory school laws.[9]

Whereas *Brown I* rightly decreed the elimination of state-imposed segregation in that particular section of the country where it did exist, *Swann* imposed obligations on southern school districts to eliminate conditions which are not regionally unique but are similar both in origin and effect to conditions in the rest of the country. As

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[9] As Dr. Karl Taeuber states in his article, Residential Segregation, Scientific American, August 1965, at 14:

"No elaborate analysis is necessary to conclude from these figures that a high degree of residential segregation based on race is a universal characteristic of American cities. This segregation is found in the cities of the North and West as well as of the South; in large cities as well as small; in nonindustrial cities as well as industrial; in cities with hundreds of thousands of Negro residents as well as those with only a few thousand; and in cities that are progressive in their employment practice and civil rights policies as well as those that are not."

In his book, Negroes in Cities (1965), Dr. Taeuber stated that residential segregation exists "regardless of the character of local laws and policies and regardless of other forms of discrimination." *Id.*, at 35.

the remedial obligations of *Swann* extend far beyond the elimination of the outgrowths of the state-imposed segregation outlawed in *Brown*, the rationale of *Swann* points inevitably towards a uniform, constitutional approach to our national problem of school segregation.

II

The Court's decision today, while adhering to the *de jure/de facto* distinction, will require the application of the *Green/Swann* doctrine of "affirmative duty" to the Denver School Board despite the absence of any history of state-mandated school segregation. The only evidence of a constitutional violation was found in various decisions of the school board. I concur in the Court's position that the public school authorities are the responsible agency of the State, and that if the affirmative duty doctrine is sound constitutional law for Charlotte, it is equally so for Denver. I would not, however, perpetuate the *de jure/de facto* distinction nor would I leave to petitioners the initial tortuous effort of identifying "segregative acts" and deducing "segregatory intent." I would hold, quite simply, that where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities (I will usually refer to them collectively as the "school board") are sufficiently responsible [10] to impose upon them a nationally applicable burden to demon-

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[10] A prima facie case of constitutional violation exists when segregation is found to a substantial degree in the schools of a particular district. It is recognized, of course, that this term is relative and provides no precise standards. But circumstances, demographic and otherwise, vary from district to district and hard and fast rules should not be formulated. The existence of a substantial percentage of schools populated by students from one race only or predominately so populated, should trigger the inquiry.

strate they nevertheless are operating a genuinely integrated school system.

A

The principal reason for abandonment of the *de jure/de facto* distinction is that, in view of the evolution of the holding in *Brown I* into the affirmative duty doctrine, the distinction no longer can be justified on a principled basis. In decreeing remedial requirements for the Charlotte/Mecklenburg school district, *Swann* dealt with a metropolitan, urbanised area in which the basic causes of segregation were generally similar to those in all sections of the country, and also largely irrelevant to the existence of historic, state-imposed segregation at the time of the *Brown* decision. Further, the extension of the affirmative duty concept to include compulsory student transportation went well beyond the mere remedying of that portion of school segregation for which former state segregation laws were ever responsible. Moreover, as the Court's opinion today abundantly demonstrates, the facts deemed necessary to establish *de jure* discrimination present problems of subjective intent which the courts cannot fairly resolve.

At the outset, one must try to identify the constitutional right which is being enforced. This is not easy, as the precedents have been far from explicit. In *Brown I*, after emphasising the importance of education, the Court said that:

> "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U. S., at 493.

In *Brown II*, the Court identified the "fundamental principle" enunciated in *Brown I* as being the unconstitutionality of "racial discrimination in public education," 349 U. S., at 298, and spoke of "the personal interest of the plaintiffs in admission to public schools as soon

as practicable on a nondiscriminatory basis." 349 U. S., at 300. Although this and similar language is ambiguous as to the specific constitutional right, it means—as a minimum—that one has the right not to be compelled by state action to attend a segregated school system. In the evolutionary process since 1954, decisions of this Court have added a significant gloss to this original right. Although nowhere expressly articulated in these terms, I would now define it as the right, derived from the Equal Protection Clause, to expect that once the State has assumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts.[11] This means that school authorities, consistent with the generally accepted educational goal of attaining quality education for all pupils, must make and implement their customary decisions with a view toward enhancing integrated school opportunities.

The term "integrated school system" presupposes, of course, a total absence of any laws, regulations or policies supportive of the type of "legalized" segregation condemned in *Brown*. A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close old ones, and

[11] See discussion in Part III, *infra*, of the remedial action which is appropriate to accomplish *desegregation* where a court finds that a school board has failed to operate an *integrated school system* within its district. Plaintiffs must, however, establish the failure of a school board to operate an integrated school system before a court may order desegregative steps by way of remedy. These are two distinct steps which recognize the necessity of proving the constitutional violation before desegregative remedial action can be ordered.

determine the size and grade categories with this same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind.

The foregoing prescription is not intended to be either definitive or all-inclusive, but rather an indication of the contour characteristics of an *integrated school system* in which all citizens and pupils may justifiably be confident that racial discrimination is neither practiced nor tolerated. An integrated school system does not mean—and indeed could not mean in view of the residential patterns of most of our major metropolitan areas—that *every school* must in fact be an integrated unit. A school which happens to be all or predominantly white or all or predominantly black is not a "segregated" school in an unconstitutional sense if the system itself is a genuinely integrated one.

Having school boards operate an integrated school system provides the best assurance of meeting the constitutional requirement that racial discrimination, subtle or otherwise, will find no place in the decisions of public school officials. Courts judging past school board actions with a view to their *general integrative effect* will be best able to assure an absence of such discrimination while avoiding the murky, subjective judgments inherent in the Court's search for "segregatory intent." Any test resting on so nebulous and elusive an element as a school board's segregatory "intent" provides inadequate assurance that minority children will not be short-changed in the decisions of those entrusted with the non-discriminatory operation of our public schools.

Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle. The school board exercises pervasive and continuing responsibility over the long range plan-

ning as well as the daily operations of the public school system. It sets policies on attendance zones, faculty employment and assignments, school construction, closings and consolidations, and myriad other matters. School board decisions obviously are not the sole cause of segregated school conditions. But if, after such detailed and complete public supervision, substantial school segregation still persists, the presumption is strong that the school board, by its acts or omissions, is in some part responsible. Where state action and supervision are so pervasive and where, after years of such action, segregated schools continue to exist within the district to a substantial degree, this Court is justified in finding a prima facie case of a constitutional violation. The burden then must fall on the school board to demonstrate it is operating an "integrated school system."

It makes little sense to find prima facie violations and the consequent affirmative duty to desegregate solely in those States with state-imposed segregation at the time of the *Brown* decision. The history of state-imposed segregation is more widespread in our country than the *de jure/de facto* distinction has traditionally cared to recognize.[13] As one commentator has noted:

"the three court of appeals decisions denying a constitutional duty to abolish de facto segregation all

[13] Indeed, if one goes back far enough, it is probable that all racial segregation, wherever occurring and whether or not confined to the schools, has at some time been supported or maintained by government action. In *Becket* v. *School Board*, 308 F. Supp. 1274, 1311-1315 (ED Va. 1969), Judge Walter Hoffman compiled a summary of past public segregatory action which included examples from a great majority of States. He concluded that "only as to the states of Maine, New Hampshire, Vermont, Washington, Nevada, and Hawaii does it appear from this nonexhaustive research that no discriminatory laws appeared on the books at one time or another." *Id.*, at 1315.

arose in cities—Cincinnati, Gary and Kansas City, Kansas—where racial segregation in schools was formerly mandated by state or local law. [*Deal* v. *Cincinnati Bd. of Educ.*, 369 F. 2d 55 (CA6 1966), cert. denied, 377 U. S. 924 (1964); *Downs* v. *Board of Educ.*, 336 F. 2d 988 (CA10 1964), cert. denied, 380 U. S. 914, *Bell* v. *School City*, 324 F. 2d 209 (CA7 1963), cert. denied, 377 U. S. 924.] Ohio discarded its statute in 1887, Indiana in 1949, and Kansas City not until the advent of *Brown*. If Negro and white parents in Mississippi are required to bus their children to distant schools on the theory that the consequences of past de jure segregation cannot otherwise be dissipated, should not the same reasoning apply in Gary, Indiana, where no more than five years before *Brown* the same practice existed with presumably the same effects." Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Cal. L. Rev. 275, 297 (1972).[12]

Not only does the *de jure/de facto* distinction operate inequitably on communities in different sections of the

[12] The author continues:

"True, the earlier the policy of segregation was abandoned the less danger there is that it continues to operate covertly, is significantly responsible for present day patterns of residential segregation, or has contributed materially to present community attitudes toward Negro schools. But there is no reason to suppose that 1954 is a universally appropriate dividing line between de jure segregation that may safely be assumed to have spent itself and that which may not. For many remedial purposes, adoption of an arbitrary but easily administrable cutoff point might not be objectionable. But in a situation such as school desegregation, where both the rights asserted and the remedial burdens imposed are of such magnitude, and where the resulting sectional discrimination is passionately resented, it is surely questionable whether such arbitrariness is either politically or morally acceptable."

country: more importantly, it disadvantages minority children as well. As the Fifth Circuit stated:

> "The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area, also violates such constitutional rights in another area." *Cisneros* v. *Corpus Christi Independent School District*, 467 F. 2d 142, 148 (CA5 *en banc*, 1972) quoting *United States* v. *Jefferson County Board of Educ.*, 380 F. 2d 385, 397 (CA5 *en banc*) Gewin, J., dissenting).[14]

The Court today does move for the first time toward breaking down past sectional disparities, but it clings tenuously to its distinction. It searches for *de jure* action in what the Denver School Board has done or failed to do, and even here the Court does not rely upon the results or effects of the Board's conduct but feels compelled to find segregatory intent: [15]

"We emphasize that the differentiating factor be-

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[14] See Bickel, *supra*, n. 7, at 119:
"If a Negro child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation."

[15] The Court today does not require, however, a segregatory intent with respect to the entire school system, and indeed holds that if such

tween *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate." (Court Opinion, p. 18) (italics are the Court's).

The Court's insistence that the "differentiating factor" between *de jure* and *de facto* segregation be "purpose or intent" is difficult to reconcile with the language in so recent a case as *Wright* v. *Council of the City of Emporia*, 407 U. S. 451 (7972). In holding there that "motivation" is irrelevant, the Court said:

"In addition, an inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools, and we have said that '[t]he measure of any desegregation plan is its effectiveness.' *Davis* v. *School Commissioners of Mobile County*, 402 U. S. 33, 37.

"Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system.

. . . . .

"Though the *purpose* of the new school district was found to be discriminatory in many of these cases, the

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an intent is found with respect to some schools in a system, the burden—normally on the plaintiffs—shifts to the defendant school authorities to prove a negative: namely, that their purposes were benign, *ante*, pp. 17–18.

The Court has come a long way since *Brown I*. Starting from the unassailable *de jure* ground of the discriminatory constitutional and statutory provisions of some States, the new formulation—still professing fidelity to the *de jure* doctrine—is that desegregation will be ordered despite the absence of any segregatory laws if: (i) segregated schools in fact exist; (ii) a court finds that they result from some action taken with segregatory intent by the school board; (iii) such action relates to any "meaningful segment" of the school system; and (iv) the school board cannot prove that its intentions with respect to the remainder of the system were nonsegregatory.

courts' holdings rested not on motivation or purposes but on the *effect* of the action upon the dismantling of the dual school system involved. That was the focus of the District Court in this case, and we hold that its approach was proper." 407 U. S., at 462.

I can discern no basis in law or logic for holding that the motivation of school board action is irrelevant in Virginia and controlling in Colorado. It may be argued, of course, that in *Emporia* a prior constitutional violation had already been proven and that this justifies the distinction. The net result of the Court's language, however, is the application of an *effect* test to the actions of southern school districts and an *intent* test to those in other sections, at least until an initial *de jure* finding for those districts can be made. Rather than straining to perpetuate any such dual standard, we should hold forthrightly that significant segregated school conditions in whatever section of the country are a prima facie violation of constitutional rights. As the Court has noted elsewhere:

> "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that *mere chance* resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. *The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.*" *Hernandez* v. *Texas*, 347 U. S. 475, 482 (1954). (Emphasis added.)

B

There is thus no reason as a matter of constitutional principle to adhere to the *de jure/de facto* distinction in school desegregation cases. In addition, there are rea-

sons of policy and prudent judicial administration which point strongly toward the adoption of a uniform national rule. The litigation heretofore centered in the South already is surfacing in other regions. The decision of the Court today, emphasizing as it does the elusive element of segregatory intent, will invite numerous desegregation suits in which there can be little hope of uniformity of result.

The issue in these cases will not be whether segregated education exists. This will be conceded in most of them. The litigation will focus as a consequence of the Court's decision on whether segregation has resulted in any "meaningful or significant" portion of a school system from a school board's "segregatory intent." The intractable problems involved in litigating this issue are obvious to any lawyer. The results of litigation—often arrived at subjectively by a court endeavoring to ascertain the subjective intent of school authorities with respect to action taken or not taken over many years—will be fortuitous, unpredictable and even capricious.

The Denver situation is illustrative of the problem. The courts below found evidence of *de jure* violations with respect to the Park Hill schools and an absence of such violations with respect to the core city schools, despite the fact that actions taken by the school board with regard to those two sections were not dissimilar. It is, for example, quite possible to contend that both the construction of Manual High School in the core city area and Barrett Elementary School in the Park Hill area operated to serve their surrounding Negro communities and, in effect, to merge school attendance zones with segregated residential patterns. See Petitioner's Brief, pp. 80–83. Yet findings even on such similar acts will, under the *de jure/de facto* distinction, continue to differ, especially since the Court has never made clear what suffices to establish the requisite "segregatory intent" for

an initial constitutional violation. Even if it were possible to clarify this question, wide and unpredictable differences of opinion among judges would be inevitable when dealing with an issue as slippery as "intent" or "purpose," especially when related to hundreds of decisions made by school authorities under varying conditions over many years.

This Court has recognized repeatedly that it is "extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment," *Palmer* v. *Thompson*, 403 U. S. 214, 224 (1971); *McGinnis* v. *Royster*, — U. S. —, — (1973); *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968). Whatever difficulties exist with regard to a single statute will be compounded in a judicial review of years of administration of a large and complex school system.[14] Every act of a school board and school administration, and indeed every failure to act where affirmative action is indicated, must now be subject to scrutiny.

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[14] As one commentator has expressed it:

"If the courts are indeed prepared to inquire into motive, thorny questions will arise even if one assumes that racial motivation is capable of being proven at trial. What of the case in which one or more members of a school board, but less than a majority, are found to have acted on racial grounds? What if it appears that the school board's action was prompted by a mixture of motives, including constitutionally innocent ones that alone would have prompted the board to act? What if the members of the school board were not themselves racially inspired but wished to please their constituents, many of whom they knew to be so? If such cases are classified as unconstitutional de jure segregation, there is little point in preserving the de jure-de facto distinction at all. And it may well be that the difference between any of these situations and one in which racial motivation is altogether lacking is too insignificant, from the standpoint of both the moral culpability of the state officials and the impact upon the children involved, to support a difference in constitutional treatment." Goodman, *supra*, n. 11, at 284-285.

The most routine decisions with respect to the operation of schools, made almost daily, can affect in varying degrees the extent to which schools are initially segregated, remain in that condition, are desegregated, or—for the long term future—are likely to be one or the other. These decisions include action or nonaction with respect to school building construction and location; the timing of building new schools and their size; the closing and consolidation of schools; the drawing or gerrymandering of student attendance zones; the extent to which a neighborhood policy is enforced; the recruitment, promotion and assignment of faculty and supervisory personnel; policies with respect to transfers from one school to another; whether, and to what extent, special schools will be provided, where they will be located, and who will qualify to attend them; the determination of curriculum, including whether there will be "tracks" that lead primarily to college or to vocational training, and the routing of students into these tracks; and even decisions as to social, recreational and athletic policies.

In *Swann* the Court did not have to probe into segregatory intent and proximate cause with respect to each of these "endless" factors. The basis for its *de jure* finding there was rooted primarily in the prior history of the desegregation suit. 402 U. S., at 5–6. But in a case of the present type, where no such history exists, a judicial examination of these factors will be required under today's decision. This will lead inevitably to uneven and unpredictable results, to protracted and inconclusive litigation, to added burdens on the federal courts, and to serious disruption of individual school systems. In the absence of national and objective standards, school boards and administrators will remain in a state of uncertainty and disarray, speculating as to what is required and when litigation will strike.

C

Rather than continue to prop up a distinction no longer grounded in principle, and contributing to the consequences indicated above, we should acknowledge that whenever public school segregation exists to a substantial degree there is prima facie evidence of a constitutional violation by the responsible school board. It is true, of course, that segregated schools—wherever located—are not solely the product of the action or inaction of public school authorities. Indeed, as indicated earlier, there can be little doubt that principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socio-economic influences which have concentrated our minority citizens in the inner cities while the more mobile white majority disperse to the suburbs. But it is also true that public school boards have continuing, detailed responsibility for the public school system within their district and, as Judge John Minor Wisdom has noted, "where the figures [showing segregation in the schools] speak so eloquently, a *prima face* case *of* discrimination is established." *United States* v. *Texas Education Agency*, 467 F. 2d 848, 873 (CA5 *en banc* 1972). Moreover, as foreshadowed in *Swann* and as implicitly held today, school boards have a duty to minimize and ameliorate segregated conditions by pursuing an affirmative policy of desegregation. It is this policy which must be applied consistently on a national basis without regard to a doctrinal distinction which has outlived its time.

III

The preceding section addresses the constitutional obligation of public authorities in the school districts throughout our country to operate *integrated school sys-*

tems. When the schools of a particular district are found to be substantially segregated, there is a prima facie case that this obligation has not been met. The burden then shifts to the school authorities to demonstrate that they have in fact operated an integrated system as this term is defined above, *supra*, p. 10. If there is a failure successfully to rebut the prima facie case, the question then becomes what reasonable affirmative desegregative steps district courts may require to place the school system in compliance with the constitutional standard. In short, what specifically is the nature and scope of the remedy?

As the Court's opinion virtually compels the finding on remand that Denver has a "dual school system," that city will then be under an "affirmative duty" to desegregate its entire system "root and branch." *Green* v. *County School Board*, 391 U. S., at 438. Again, the critical question is what ought this constitutional duty to entail.

A

The controlling case is *Swann*, *supra*, and the question which will confront and confound the District Court and Denver School Board is what indeed does *Swann* require. *Swann* purported to enunciate no new principles, relying heavily on *Brown I* and *II* and on *Green*. Yet it affirmed a district court order which had relied heavily on "racial ratios" and sanctioned transportation of elementary as well as secondary pupils. Lower federal courts have often read *Swann* as requiring far-reaching transportation decrees[17] "to achieve the greatest possible degree of actual

[17] See, *e. g.*, *Thompson* v. *School Board of Newport News*, —— F. 2d ——, —— (1972), where the CA4 *en banc*, upheld a district court assignment plan where "travel time, varying from a minimum of forty minutes and a maximum of one hour, each way, would be required for busing black students out of the old City and white students into the old City in order to achieve a racial balancing of the

desegregation." 402 U. S., at 26. In the context of a large urban area, with heavy residential concentrations of white and black citizens in different—and widely separated—sections of the school district, extensive dispersal and transportation of pupils is inevitable if *Swann* is read as expansively as many courts have been reading it to date.

To the extent that *Swann* may be thought to require large-scale or long-distance transportation of students in our metropolitan school districts, I record my profound misgivings. Nothing in our Constitution commands or encourages any such court compelled disruption of public education. It may be more accurate to view *Swann* as having laid down a broad rule of reason under which desegregation remedies must remain flexible and other values and interests be considered. Thus the Court recognized that school authorities, not the federal judiciary, must be charged in the first instance with the task of desegregating local school systems. 402 U. S., at 16. It noted that school boards in rural areas can adjust more readily to this task than those in metropolitan dis-

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district." This transportation was decreed for children from the third grade up, involving children as young as eight years of age.

In *Northcross* v. *Memphis Bd. of Educ.*, 466 F. 2d 390, 395 (1972), the CA6 affirmed a district court assignment plan which daily transported 14,000 children with "the maximum time to be spent on the buses by any child [being] 34 minutes. . . ," presumably each way. But as Judge Weick noted in dissent the CA6 instructed the district judge to implement yet further desegregation orders. Plans presently under consideration by that court call for the busing of 39,085 and 61,530 children respectively, for undetermined lengths of time. *Id.*, at 395–986.

Petitioners before this Court in *Potts* v. *Flax*, No. 72–288, cert. denied, — U. S. — (197–), contended that the implementation of the CA5's directive in *Flax* v. *Potts*, 464 F. 2d 865 (1972), would require bus rides of up to two hours and 20 minutes each day and a round trip of up to 70 miles. Petition, at 14. While respondents contend these figures represent an "astounding inflation," Response, at 7, transportation of a significant magnitude seems inevitable.

tricts "with dense and shifting population, numerous schools, congested and complex traffic patterns." *Id.*, at 14. Although the use of pupil transportation was approved as a remedial device, transportation orders are suspect "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the education process." *Id.*, at 31. Finally, the age of the pupils to be transported was recognized by the Court in *Swann* as one important limitation on the time of student travel. *Ibid.*

These factors were supposed to help guide district courts in framing equitable remedies in school desegregation cases.[18] And the Court further emphasized that equitable decrees are inherently sensitive, not solely to the degree of desegregation to be achieved, but to a variety of other public and private interests:

> . . . a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution. *Swann, supra*, at 15–16.

Those words echoed a similar expression in *Brown II*, 349 U. S., at 229:

> "In fashioning and effecting the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility

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[18] See *United States* v. *Texas Education Agency*, 467 F. 2d 848, 883 (CA5 1972) (Bell, J., concurring in an opinion in which seven other judges joined):

"In our view the remedy which the district court is required to formulate should be formulated within the *entire context* of the opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*. . . . [Emphasis added.]"

for adjusting and reconciling public and private needs."

Thus in school desegregation cases, as elsewhere, equity counsels reason, flexibility and balance. See, *e. g.*, *Lemon* v. *Kurtzman*, — U. S. — (1973). I am aware, of course, that reasonableness in any area is a relative and subjective concept. But with school desegregation, reasonableness would seem to embody a balanced evaluation of the obligation of public school boards to promote desegregation with other, equally important educational interests which a community may legitimately assert. Neglect of either the obligation or the interests destroys the even-handed spirit with which equitable remedies must be approached.[19] Overzealousness in pursuit of any single goal is untrue to the tradition of equity and to the "balance" and "flexibility" which this Court has always respected.

B

Where school authorities have defaulted in their duty to operate an integrated school system, district courts must insure that affirmative desegregative steps ensue. Many of these can be taken effectively without damaging state and parental interests in having children attend schools within a reasonable vicinity of home. Where desegregative steps are possible within the framework of a system of "neighborhood education," school authorities must pursue them. For example, bound-

[19] The relevant inquiry is "whether the costs of achieving desegregation in any given situation outweigh the legal, moral and educational considerations favoring it. . . . It is clear . . . that the Constitution should not be held to require any transportation plan that keeps children on a bus for a substantial part of the day, consumes significant portions of funds otherwise spendable directly on education, or involves a genuine element of danger to the safety of the child." School Desegregation After Swann: A Theory of Government Responsibility, 39 U. Chi. L. Rev. 421, 422, 443 (1972).

aries of neighborhood attendance zones should be drawn to integrate, to the extent practicable, the school's student body. Construction of new schools should be of such a size and at such a location as to encourage the likelihood of integration, *Swann*, at 21. Faculty integration should be attained throughout the school system, *Swann*, at 19; *United States* v. *Montgomery County Board of Education*, 395 U. S. 225 (1969). An optional majority to minority transfer program, with the State providing free transportation to desiring students, is also a helpful adjunct to a desegregated school system. *Swann*, at 26–27. It hardly need be repeated that allocation of resources within the school district must be made with scrupulous fairness among all schools.

The above examples are meant to be illustrative, not exhaustive. The point is that the over-all integrative impact of such school board decisions must be assessed by district courts in deciding whether the duty to desegregate has been met. For example, "neighborhood school plans are constitutionally suspect when attendance zones are superficially imposed upon racially defined neighborhoods, and when school construction preserves rather than eliminates the racial hegemony of given schools."[20] *Keyes* v. *School District No. 1, Denver Colorado*, —— F. 2d ——. *United States* v. *Board of Education of Tulsa County*, 429 F. 2d ——, 1258–1259. This does not imply that decisions on faculty assignment, attendance zones, school construction, closing and consolidation, must be made to the detriment of all neutral, nonracial considerations. But these considerations can, with proper school board initiative, generally be met in a manner that will enhance the degree of school desegregation.

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[20] A useful study of the historical uses and abuses of the neighborhood school concept is M. Weinberg, Race & Place (1967).

C

Defaulting school authorities would have, at a minimum, the obligation to take affirmative steps of the sort outlined in the above section. School boards would, of course, be free to develop and initiate further plans to promote school desegregation. In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.

A *constitutional requirement* of extensive student transportation solely to achieve integration presents a vastly more complex problem. It promises on the one hand a greater degree of actual desegregation, while it infringes on what may fairly be regarded as other important community aspirations and personal rights. Such a requirement is further likely to divert attention and resources from the foremost goal of any school system: the best quality education for all pupils. The Equal Protection Clause does indeed command that racial discrimination not be tolerated in the decisions of public school authorities. But it does not require that school authorities undertake widespread student transportation solely for the sake of maximizing integration.[21]

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[21] In fact, due to racially separate residential patterns that characterize our major urban areas it is quite unrealistic to think of achieving in many cities substantial integration throughout the school district without a degree of student transportation which would have the gravest economic and educational consequences. As Professor Bickel notes:

"In most of the larger urban areas, demographic conditions are such that no policy that a court can order, and a school board, a city or

This obviously does not mean that bus transportation has no place in public school systems or is not a permissible means in the desegregative process. The transporting of school children is as old as public education, and in rural and some suburban settings it is as indispensable as the providing of books. It is presently estimated that approximately half of all American children ride buses to school for reasons unrelated to integration.[23] At the secondary level in particular, where the schools are larger and serve a wider, more dispersed constituency than the elementary school, some form of public or privately financed transportation is often necessary. There is a significant difference, however, in transportation plans voluntarily initiated by local school boards for educational purposes and those imposed by a federal court. The former usually represent a necessary or convenient means of access to the school nearest home; the latter often require lengthy trips for no purpose other than to further integration.[24] Yet the

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even a state has the capability to put into effect, will in fact result in the foreseeable future in racially balanced public schools. Only a reordering of the environment involving economic and social policy on the broadest conceivable front might have an appreciable impact." Bickel, *supra*, n. 7, at 132.

[23] Estimates vary. *Swann*, *supra*, at 29, noted that "eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969–1970 in all parts of the country." Senator Ribicoff (D.-Conn.) a thoughtful student of this problem, stated that "two-thirds of all American children today ride buses to school for reasons unrelated to integration." 118 Cong. Rec. 32543, Feb. 24, 1972.

[24] Historically, distant transportation was wrongly used to promote segregation. "Negro children were generally considered capable of travelling longer distances to school and without the aid of any vehicle. What was too far for a white child became reasonably near for a Negro child," Weinberg, *supra*, n. 20, at 87.

This deplorable history has led some to argue that integrative bus rides are justified as atonement for past segregatory trips and that neighborhood education is now but a code-word for racial segrega-

Court in *Swann* was unquestionably right in describing bus transportation as "one tool of school desegregation." 402 U. S., at 30.[24] The crucial issue is when, under what circumstances, and to what extent such transportation may appropriately be ordered. The answer to this turns—as it does so often in the law—upon a sound exercise of discretion under the circumstances.

Swann itself recognized limits to desegregative obligations. It noted that a constitutional requirement of "any particular degree of racial balance or mixing . . . would be disproved . . . ," and sanctioned district court use of mathematical ratios as "no more than a starting point in the process of shaping a remedy. . . ." 402 U. S., at 24, 25. Thus particular schools may be all white or all black and still not infringe constitutional rights if the *system* is genuinely integrated and school authorities are pursuing integrative steps short of extensive and disruptive transportation. The refusal of the Court in *Swann* to require racial balance in schools throughout the

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tion. But misuse of transportation in the past does not imply neighborhood schooling has no valid nonsegregatory uses for the present. Nor would wrongful transportation in the past justify detrimental transportation for the children of today.

[24] Some communities had transportation plans in effect at the time of court desegregation orders. See *Swann*, *supra*, at 29, n. 11; *Davis* v. *School Comm'rs of Mobile County*, 402 U. S. 33, 34–35 (1971). Courts have used the presence or absence of existing transportation in a district as one factor in framing and implementing desegregation decrees. *United States* v. *Watson Chapel School District*, 446 F. 2d 933, 937 (CA8 1971); *Northcross* v. *Board of Educ.*, 444 F. 2d 1179, 1182–1183 (CA6 1971); *Davis* v. *Board of Educ.*, 328 F. Supp. 1197, 1203 (ED Ark. 1971). Where a school board is voluntarily engaged in transporting students, a district court is, of course, obligated to insure that such transportation is not undertaken with segregatory effect. Where, also, voluntary transportation programs are already in progress, there may be greater justification for court-ordered transportation of students *for a comparable time and distance* to achieve greater integration.

district or the arbitrary elimination of all "one-race schools," 402 U. S., at 26, is grounded in a recognition that the State, parents, and children all have at stake in school desegregation decrees legitimate and recognizable interests.

The personal interest might be characterized as the desire that children attend community schools near home. Dr. James Coleman testified for petitioners at trial that "most school systems organize their schools in relation to the residents by having fixed school districts and some of these are very ethnically homogeneous." App. 1549a. In *Deal* v. *Cincinnati Board of Education*, 396 F. 2d 55, 60 (1966), the Sixth Circuit summarized the advantages of such a neighborhood system of schools: [25]

> "Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety haz-

[25] The term "neighborhood school" should not be supposed to denote solely a walk-in school or one which serves children only in the surrounding blocks. The Court has noted, in a different context, that "the word 'neighborhood' is quite as susceptible of variation as the word 'locality.' Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Connally* v. *General Const. Co.*, 269 U. S. 385, 395 (1926). In the school context, "neighborhood" refers to relative proximity, to a preference for a school nearer, rather than more distant from home.

ards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication."

The neighborhood school does provide greater ease of parental and student access and convenience, as well as greater economy of public administration. These are obvious and distinct advantages, but the legitimacy of the neighborhood concept rests on more basic grounds.[26]

Neighborhod school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest and dedication to public schools may well run higher with a neighborhood attendance pattern: distance may encourage disinterest. Many citizens sense today a decline in the intimacy of our institutions—home, church, and school—which has caused a concomitant decline in the unity and communal spirit of our people. I pass no judgment on this viewpoint, but I do believe that this Court should be wary of compelling in the name of constitutional law what may seem to many a dissolution in the traditional, more personal fabric of their public schools.

Closely related to the concept of a community and neighborhood education, are those rights and duties parents have with respect to the education of their children.

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[26] I do not imply that the neighborhood concept must be embodied in every school system. But where a school board has chosen it, federal judges should accord it respect in framing remedial decrees.

The law has long recognized the parental duty to nurture, support, and provide for the welfare of children, including their education. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534, 535, a unanimous Court held that:

> "Under the doctrine of *Meyer* v. *Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

And in *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965), the Court noted that in *Pierce*, "the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments." I do not believe recognition of this right can be confined solely to a parent's choice to send a child to public or private school. Most parents cannot afford the luxury of a private education for their children, and the dual obligation of private tuitions and public taxes. Those who may for numerous reasons seek public education for their children should not be forced to forfeit all interest or voice in the school their child attends. It would, of course, be impractical to allow the wishes of particular parents to be controlling. Yet the interest of the parent in the enhanced parent-school and parent-child communication allowed by the neighborhood unit ought not to be suppressed by force of law.

In the commendable national concern for alleviating public school segregation, courts may have overlooked the fact that the rights and interests of children affected by a desegregation program also are entitled to consid-

eration. Any child, white or black, who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school suffers an impairment of his liberty and his privacy. Not long ago, James B. Conant wrote that "[a]t the elementary school level the issue seems clear. To send young children day after day to distant schools seems out of the question." [27] A community may well conclude that the portion of a child's day spent on a bus might be used more creatively in a classroom, playground, or some other extracurricular school activity. Decisions such as these, affecting the quality of a child's daily life, should not lightly be held constitutionally errant.

To this point I have focused mainly on the personal interests of parents and children which a community may believe to be best protected by a neighborhood system of schools. But broader considerations lead me to question just as seriously any remedial requirement of extensive student transportation solely to further integration. Any such requirement is certain to fall disproportionately on the school districts of our country, depending on their degree of urbanization, financial resources, and their racial composition. Some districts with little or no biracial population will experience little or no educational disruption, while others, notably in large, biracial metropolitan areas, must at considerable expense undertake extensive transportation to achieve the type of integration frequently being ordered by district courts.[28] At a time when public education generally is suffering serious financial malnutrition, the economic burdens of such transportation can be severe, requiring both initial capital outlays and annual operating costs in the millions of

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[27] Slums and Suburbs, 29 (1961).

[28] See n. 21, *supra*.

dollars.[29] And while constitutional requirements have often occasioned uneven burdens, never have they touched so sensitive a matter as wide differences in the compulsory transportation requirements for literally hundreds of thousands of school children.

The argument for student transportation also overlooks the fact that the remedy exceeds that which may be necessary to redress the constitutional evil. Let us use Denver as an example. The Denver School Board, by its action and nonaction, may be legally responsible for some of the segregation that exists. But if one assumes a maximum discharge of constitutional duty by the Denver Board over the past decades, the fundamental problem of residential segregation would persist.[30] It is indeed a novel application of equitable power—not to mention a dubious extension of constitutional doctrine—to require so much greater a degree of forced school integration than would have resulted from purely natural and neutral nonstate causes.

The compulsory transportation of students carries a further infirmity as a constitutional remedy. With most constitutional violations, the major burden of remedial action falls on offending state officials. Public officials who act to infringe personal rights of speech, voting, or

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[29] In Memphis, for example, which has no history of busing students, the minimum transportation plan ordered by the courts will require, in the School Board's estimate, an initial capital expenditure of $1,064,192 for buses plus an annual operating cost of $629,192. The Board estimates that a more extensive transportation program to be considered by the district court will require initial capital investments of $3,924,000 and annual operating costs of $1,783,490. The most drastic transportation plan before the district court requires estimated annual operating costs of from $2,354,220, $2,431,710, or $3,463,100 depending on the Board's transportation arrangements. *Northcross* v. *Board of Education of Memphis City Sch.*, *supra*, n. 17, at 898 (Weick, J., dissenting).

[30] See n. 9, *supra*.

religious exercise, for example, are obliged to cease the offending act or practice and, where necessary, institute corrective measures. It is they who bear the brunt of remedial action, though other citizens will to varying degrees feel its effects. School authorities responsible for segregation must, at the very minimum, discontinue segregatory acts. But when the obligation further extends to the transportation of students, the full burden of the affirmative remedial action is borne by children and parents who did not participate in any constitutional violation.

Finally, courts in requiring so far-reaching a remedy as student transportation solely to maximize integration, risk setting in motion unpredictable and unmanageable social consequences. No one can estimate the extent to which dismantling neighborhood education will hasten an exodus to private schools, leaving public school systems the preserve of the disadvantaged of both races. Or guess how much impetus such dismantlement gives the movement from innercity to suburb, and the further geographical separation of the races. Nor do we know to what degree this remedy may cause deterioration of community and parental support of public schools, or divert attention from the paramount goal of quality in education to a perennially devisive debate over who is to be transported where.

The problem addressed in this opinion has perplexed courts, school officials, other public authorities, and students of public education for nearly two decades. The problem, especially since it has focused on the "busing issue," has profoundly disquieted the public wherever extensive transportation has been ordered. I make no pretense of knowing the best answers. Yet, the issue in this and like cases comes to this Court as one of constitutional law. As to this issue, I have no doubt whatever. There is nothing in the Constitution, its history

or—until recently—in the jurisprudence of this Court that mandates the employment of forced transportation of young and teenage children to achieve a single interest, as important as this interest may be. We have strayed, quite far as I view it, from the rationale of *Brown I* and *II*, as reiterated in *Swann*, that courts in fashioning remedies must be "guided by equitable principles" which include the "adjusting and reconciling [of] public and private needs," *Brown II*, 349 U. S., at 229.

I urge a return to this rationale. This would result, as emphasized above, in no prohibition on court-ordered student transportation in furtherance of desegregation. But it would also require that the legitimate community interests in neighborhood school systems be accorded far greater respect. In the balancing of interests so appropriate to a fair and just equitable decree, transportation orders should be applied with special caution to any proposal as disruptive of family life and interests—and ultimately of education itself—as extensive transportation of elementary age children solely for desegregation purposes. As a minimum, this Court should not require school boards to engage in the unnecessary transportation away from their neighborhoods of elementary age children.[21] It is at this age level that neighborhood education performs its most vital educational role. It is with respect to children of tender years that the greatest concern exists for their physical and psycholog-

[21] There may well be advantages in commencing the integrative experiences at an early age, as young children may be less likely than older children and adults to develop an inhibiting racial consciousness. These advantages should be considered as school boards make the various decisions with the view to achieving and preserving an integrated school system. *Supra*, p. 10. But in the balancing of all relevant interests, the advantages of an early integrative experience must, and in all fairness should, be weighed against other relevant advantages and disadvantages and in light of the demographic characteristics of the particular community.

ical health. It is also here, at the elementary school, that the rights of parents and children are most sharply implicated."[*]

IV

The existing state of law has failed to shed light and provide guidance on the two issues addressed in this opinion: (i) whether a constitutional rule of uniform, national application should be adopted with respect to our national problem of school desegregation and (ii) if so, whether the ambiguities of *Swann*, construed to date almost uniformly in favor of extensive transportation, should be redefined to restore a more viable balance among the various interests which are involved. With all deference, it seems to me that the Court today has addressed neither of these issues in a way that will afford adequate guidance to the courts below in this case or lead to a rational, coherent national policy.

The Court has chosen, rather, to adhere to the *de facto/de jure* distinction under circumstances, and upon a rationale, which can only lead to increased and inconclusive litigation, and—especially regrettable—to deferment of a nationally consistent judicial position on this subject. There is, of course, state action in every school district in the land. The public schools always have been funded and operated by States and their local subdivisions. It is true that segregated schools, even in the cities of the South, are in large part the product of social and economic factors—and the resulting residential patterns. But there is also not a school dis-

[*] While greater transportation of secondary school students might be permitted, even at this level the desire of a community for racially neutral neighborhood schools should command judicial respect. It would ultimately be wisest, where there is no absence of good faith, to permit affected communities to decide this delicate issue of student transportation on their own.

trict in the United States, with any significant minority school population, in which the school authorities—in one way or the other—have not contributed in some measure to the degree of segregation which still prevails. Instead of recognizing the reality of similar, multiple segregatory causes in school districts throughout the country, the Court persists in a distinction whose duality operates unfairly on local communities in one section of the country and on minority children in the others.

The second issue relates to the ambiguities of *Swann* and the judicial disregard of legitimate community and individual interests in framing equitable decrees. In the absence of a more flexible and reasonable standard than that imposed by district courts after *Swann*, the desegregation which will now be decreed in Denver and other major cities may well involve even more extensive transportation than has been witnessed up to this time.

It is well to remember that the course we are running is a long one and the goal sought in the end—so often overlooked—is the best possible educational opportunity for all children. Communities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation. The single most disruptive element in education today is the widespread use of compulsory transportation, especially at elementary grade levels. This has risked distracting and diverting attention from basic educational ends, dividing and embittering communities, and exacerbating rather than ameliorating inter-racial friction and misunderstanding. It is time to return to a more balanced evaluation of the recognised interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert. This will help assure that integrated

school systems will be established and maintained by rational action, will be better understood and supported by parents and children of both races, and will promote the enduring qualities of an integrated society so essential to its genuine success.

SUPREME COURT OF THE UNITED STATES

No. 71-507

Wilfred Keyes et al., Petitioners, v. School District No. 1, Denver, Colorado, et al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 21, 1973]

MR. JUSTICE REHNQUIST, dissenting.

I

The Court notes at the outset of its opinion the differences between the claims made by the plaintiffs in this case and the classical "*de jure*" type of claims made by plaintiffs in cases such as *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and its progeny. I think the similarities and differences, not only in the claims, but in the nature of the constitutional violation, deserve somewhat more attention than the Court gives them.

In *Brown*, the Court held unconstitutional statutes then prevalent in southern and border States mandating that Negro children and white children attend separate schools. Under such a statute, of course, every child in the school system is segregated by race, and there is no racial mixing whatever in the population of any particular school.

It is conceded that the State of Colorado and the city of Denver have never had a statute or ordinance of that description. The claim made by these plaintiffs, as described in the Court's opinion, is that the school board by "use of various techniques such as the manipulation of students' attendance zones, school site selection and a neighborhood school policy" took race into account

in making school assignments in such a way as to lessen that mixing of races that would have resulted from a racially neutral policy of school assignment. If such claims are proven, those minority students who as a result of such manipulative techniques are forced to attend schools other than those that they would have attended had attendance zones been neutrally drawn are undoubtedly deprived of their constitutional right to equal protection of the laws just as surely as were the plaintiffs in *Brown* v. *Board of Education* by the statutorily required segregation in that case. But the fact that invidious racial discrimination is prohibited by the Constitution in the north as well as the south must not be allowed to obscure the equally important fact that the consequences of manipulative drawing of attendance zones in a school district the size of Denver does not necessarily result in denial of equal protection to all minority students within that district. There are significant differences between the proof which would support a claim such as that alleged by plaintiffs in this case, and the total segregation required by statute which existed in *Brown*.

The Court's opinion obscures these factual differences between the situation shown by the record to have existed in Denver and the situations dealt with in earlier school desegregation opinions of the Court. The Court states, *ante*, p. 10, that ". . . we have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs proved that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (*Brown I*), the state automatically assumes that affirmative duty 'to effectuate a transition

to arrange a nondiscriminatory school system,' *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955) (*Brown II*) . . . ."

That statement is of course correct in the *Brown* context, but in the *Brown* cases and later ones that have come before the Court the situation which had invariably obtained at one time was a "dual" school system mandated by law, by a law which prohibited Negroes and whites from attending the same schools. Since under *Brown* such a law deprived each Negro child of the equal protection of the laws, there was no need to prove "the elements of *de jure* segregation as to each and every school," since the law itself had required just that sort of segregation.

But in a school district the size of Denver's, it is quite conceivable that the school board might have engaged in the racial gerrymandering of the attendance boundary between two particular schools in order to keep one largely Negro and Hispano, and the other largely Anglo, as the District Court found to have been the fact in this case. Such action would have deprived affected minority students who were the victims of such gerrymandering of their constitutional right to equal protection of the law. But if the school board had been evenhanded in its drawing of the attendance lines for other schools in the district, minority students required to attend other schools within the district would have suffered no such deprivation. It certainly would not reflect normal English usage to describe the entire district as "segregated" on such a state of facts, and it would be a quite unprecedented application of principles of equitable relief to determine that if the gerrymandering of one attendance zone were proven, particular racial mixtures could be required by a federal district court for every school in the district.

It is quite possible, of course, that a school district purporting to adopt racially neutral boundary zones

might with respect to every such zone individiously discriminate against minorities, so as to produce substantially the same result as was produced by the statutorily decreed segregation involved in *Brown*. If that were the case, the consequences would necessarily have to be the same as were the consequences in *Brown*. But in the absence of a statute requiring segregation, there must necessarily be the sort of factual inquiry which was unnecessary in those jurisdictions where racial mixing in the schools was forbidden by law.

Underlying the Court's entire opinion is its apparent thesis that a district judge is at least permitted to find that if a single attendance zone between two individual schools in the large metropolitan district is found by him to have been "gerrymandered," the school district is guilty of operating a "dual" school system, and is apparently a candidate for what is in practice a federal receivership. Not only the language of the Court in the opinion, but its reliance on the case of *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968), indicates that such would be the case. It would therefore presumably be open to the District Court to require, *inter alia*, that pupils be transported great distances throughout the district to and from schools whose attendance zones have not been gerrymandered. Yet unless the Equal Protection Clause of the Fourteenth Amendment now be held to embody a principle of "taint," found in some primitive legal systems but discarded centuries ago in ours, such a result can only be described as the product of judicial fiat.

Green, *supra*, represented a marked extension of the principles of *Brown* v. *Board of Education*, *supra*. The Court in *Green* said:

> "It is of course true that for the time immediately after *Brown II* [349 U. S. 294] the concern was with making an initial break in a long-established

pattern of excluding Negro children from schools attended by white children . . . . Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . ." 391 U. S., at 436.

"*Brown II* was a call for the dismantling of well-entrenched dual system tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U. S., at 437–438.

The drastic extension of *Brown* which *Green* represented was barely, if at all, explicated in the latter opinion. To require that a genuinely "dual" system be disestablished, in the sense that the assignment to a child of a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines is quite obviously something else.

The Court's own language in *Green* makes it unmistakably clear that this significant extension of *Brown's* prohibition against discrimination, and the conversion of that prohibition into an affirmative duty to integrate, was made in the context of a school system which had for a number of years rigidly excluded Negroes from attending the same schools as were attended by whites. Whatever may be the soundness of that decision in the

context of a genuinely "dual" school system, where segregation of the races had once been mandated by law, I can see no constitutional justification for it in a situation such as that which the record shows to have obtained in Denver.

II

The Court's opinion gives lip service to the notion that the inquiry as to whether or not the Denver school district was "segregated" is a factual one, though it refers in various critical language to the District Court's refusal to find that minority concentrations in the core area schools was the result of discriminatory action on the part of the school board. The District Court is said to have "fractionated" the district, *ante*, p. 3, and to have "held that its finding of intentional segregation in Park Hill was not in any sense material to the question of segregatory intent in other areas of the city," *ante*, p. 3. It is difficult to know what the Court means by the first of these references, and even more difficult to justify the second in the light of the District Court's opinion.

If by "fractionating" the district, the Court means that the District Court treated together events that occurred during the same time period, and that it treated those events separately from events that occurred during another time span, this is undoubtedly correct. This is the approach followed by most experienced and careful finders of fact.

In commencing that part of its comprehensive opinion which dealt with the "core-area" schools, the District Court observed:

> "The evidentiary as well as the legal approach to the remaining schools is quite different from that which has been outlined above. *For one thing, the concentrations of minorities occurred at an earlier date*, and in some instances, prior to the *Brown*

decision by the Supreme Court. Community attitudes were different, including the attitudes of the school board members. *Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill School.*" (Emphasis supplied.) Appendix 57a.

The District Court noted, in its opinion of July 31, 1969, the differentiation that the plaintiffs themselves had made between the so-called "Park Hill" schools and the "core-area" schools. The plaintiffs had sought a preliminary injunction prohibiting the school board from rescinding three resolutions which had been adopted by a differently composed school board earlier in 1969 and which would have redrawn school boundary lines in the Park Hill area to achieve greater integration. In his opinion granting that injunction, the District Court said:

"Attention at this hearing has focused primarily on the schools in Northeast Denver, and particularly on the area which is commonly called Park Hill. The alleged segregated schools, elementary and junior high schools in this area, have acquired their character as such during the past ten years. The primary reason for this is the migration of the Negro community eastward from a confined community surrounding what is commonly called 'five points.' Before 1950 the Negroes all lived in the community bounded roughly by Twentieth Avenue on the south, Twentieth Street on the West, York Street on the east, and Thirty-Eighth Avenue on the north. The schools in this area were, and are now, largely Negro schools. However, we are not presently confronted with the validity of this condition. During this period the Negro population was relatively small, and this condition had developed over a long period of time. However, by 1960

and, indeed, at the present time this population is sizeable. As the population has expanded the move has been to the east, first to Colorado Boulevard, a natural dividing line, and later beyond Colorado Boulevard, but within a narrow corridor—more or less fixed North-South boundaries. The migration caused these areas to become substantially Negro and segregated." Appendix 4a.

Further reference to the District Court's several opinions shows that the allegedly discriminatory acts of the school board in the Park Hill area occurred between 1960 and 1969, in the context of a steadily expanding Negro school population in the Park Hill area and heightened sensitivity on the part of the community to the problems raised by integration and segregation.

The allegedly discriminatory acts with respect to the "core-area" schools—New Manual High School, Cole Junior High School, Morey Junior High School, and Boulevard and Columbine Elementary Schools—took place between the years 1952 and 1961. They took place, as indicated by the references to the District Court's opinion noted above, not in a context of a rapidly expanding Negro population, but in a context of a relatively fixed area of the city that had for an indefinite period of time been predominantly Negro.

Thus, quite contrary to the intimation of virtual arbitrariness contained in the Court's opinion, the District Court's separate treatment of the claims respecting these two separate areas was absolutely necessary if a careful factual determination, rather than a jumbled hash of unrelated events, was to emerge from the fact-finding process. The "intent" with which a public body performs an official act is difficult enough to ascertain under the most favorable circumstances. See *Palmer v. Thompson*, 403 U. S. 217 (1971); *Royster v. McGinnis*, —— U. S. —— (1973). Far greater difficulty is encoun-

tered if we are to assess the intentions with which official acts of a school board are performed over a period of years. Not only does the board consist of a number of members, but the membership customarily turns over as a result of frequent periodic elections. Indeed, it was as a result of the 1969 election for membership on the Denver School Board that the board's policy which had previously favored the correction of racial imbalance by implementation of resolutions was reversed by the election of new members to the board.

These difficulties obviously do not mean that the inquiry must be abandoned, but they do suggest that the care with which the District Court conducted it in this case is an absolutely essential ingredient to its successful conclusion.

The Court's bald statement that the District Court "held that its finding of additional segregation in Park Hill was not in any sense material to the question of segregatory intent in other areas of the city" is flatly belied by the following statement in the District Court's opinion:

> "Although past discriminatory acts may not be a substantial factor contributing to present segregation, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation." Appendix 70a.

Thus, it is apparent that the District Court was fully aware that it might take into consideration the intention with which it found the school board to have performed one act in assessing its intention in performing another act. This is the most that the references in the Court's opinion to evidentiary treatises such as *Wigmore* and *McCormick* support. And it should be noted that the cases cited by the Court, and by the authors of the treatises, almost invariably deal with the intention of a

particular individual or individuals, and not with the "intention" of a public body whose membership is constantly changing.

The Court's opinion totally confuses the concept of a permissible inference in such a situation, of which the District Court indicated it was well aware, with what the Court calls a "presumption" and what it calls a "shifting of the burden of proof" and a "shifting of the burden of going forward with the evidence." No case from this Court has ever gone further in this area than to suggest that a finding of intent in one factual situation may support a finding of fact in another related factual situation involving the same actor, a principle with which, as indicated above, the District Court was thoroughly familiar.

The District Court cases cited by the Court represent almost entirely the opinions of judges who were themselves finders of fact, concluding as a part of the fact-finding process that intent with respect to one act may support a conclusion of a like intent with respect to another. This is but a restatement of the principle of which the District Court showed it was aware. And obviously opinions of courts of appeals upholding such findings of the District Court do not themselves support any broader proposition than do the opinions of the District Court in question.

Chambers v. *Hendersonville City Board of Education*, 364 F. 2d 189 (CA4 1966), and *North Carolina Teachers Association* v. *Asheboro City Board of Education*, 393 F. 2d 736 (CA4 1968), involved a background of segregation by a law in the State of North Carolina and "the failure of the public school system to desegregate in compliance with the mandates of *Brown* until forced to do so by litigation." The courts held that the decimation in the ranks of the Negro teachers while white teachers were unaffected, raised an inference of discrim-

ination which cast upon the school board the burden of justifying such decimation. In each case, the school board had offered virtually no evidence supporting any nondiscriminatory basis for the result reached. The cases are thus wholly different in their factual background from the case now before the Court.

Also worthy of note is the fact that neither in *Chambers* nor in *Asheboro* did the Court of Appeals remand for a further hearing, but in effect ordered judgments for the appellant on the issue considered. This amounted to a determination that the factual finding of the District Court on that issue was "clearly erroneous," and the statement as to presumption was a statement as to the appellate court's method of evaluating the factual finding. This Court is in quite a different position in reviewing this case, with the factual finding of the District Court having been affirmed by the Court of Appeals for the Tenth Circuit, than was the Court of Appeals for the Fourth Circuit in reviewing the factual findings of the District Courts that were before it in *Chambers* and in *Asheboro*. Indeed, it would be contrary to settled principles for this Court to upset a factual finding sustained by the Court of Appeals. "A seasoned and wise rule of this Court makes concurrent findings of two courts final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214 (1948).

The Court, doubtless realizing the difficulty of justifying an outright reversal, instead remands for further factual determination under newly enunciated standards governing the evidentiary treatment of the finding as to Park Hill by the District Court. These standards are called in some parts of the opinion an inference, and in other parts a shifting of the burden of going forward with the evidence, and in other parts a *prima facie* case. Quite apart from my disagreement with the majority on

its constitutional law, I cannot believe it is a service to any of the parties to this litigation to require further factual determination under such a vague and imprecise mandate. But more fundamentally, I believe that a district judge thoroughly sympathetic to the plaintiffs' claims gave them the full evidentiary hearing to which they were entitled and carefully considered all of the evidence before him. He showed full awareness of the evidentiary principle that he might infer from the "segregatory intent" with which he found the board to have acted in the Park Hill area a like intent with respect to the core area, but he deliberately declined to do so. This was his prerogative as the finder of fact, and his conclusion upon its affirmance by the Court of Appeals is binding upon us.

III

The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require. It then adds to this potpourri a confusing enunciation of evidentiary rules in order to make it more likely that the trial court will on remand reach the result which the Court apparently wants it to reach. Since I believe neither of these steps is justified by prior decisions of this Court, I dissent.

IN THE

Supreme Court of the United States

October Term 1971

No. 71-507

WILFRED KEYES, et al.,

Petitioners,

vs

SCHOOL DISTRICT NO. 1, DENVER COLORADO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING AND FOR STAY OF MANDATE

Respondents respectfully petition the Court for a rehearing on one of the two questions decided by the Court in its Opinion of June 21, 1973, namely, whether the courts below applied the correct legal standard in addressing petitioners' claims of state-imposed segregation in the core city schools; and as to that question, respondents seek rehearing only as to that part of the question relating to the shifting of the burden of proof discussed in Part III of the Opinion.

Respondents also request that the mandate be stayed until disposition of this petition.

Grounds for the Petition

1. Summary

The Opinion leaves doubt as to whether the school authorities have the burden of proving lack of segregative intent as to their actions prior to the intentionally segregative actions, first occurring in 1960, proven by the petitioners.

All precedent and authority hold that prior intentional acts are probative on the question of the intent associated with later acts. Yet the Opinion does not explicitly confine the effect of the burden-shifting principle to actions at or after the time of the proven intentional segregative acts.

Whether the respondents' burden of proof extends to school district actions prior to 1960, when the first segregative act, the building of Barrett School, was shown, will make a substantial difference, upon remand, in the scope of the proceedings, including the time required for trial preparation, the duration of the trial, and the expense to the school district. It will make the difference of whether the school district must carry the burden of proof respecting the intent of all of its actions for only the 14-year period extending back to 1959, or for a much longer period of at least twice that duration to the early 1940's when ethnic concentrations first began to appear in the Denver schools.

2. The Authorities and Precedents

All of the treatises and cases cited by the Court refer to prior or concurrent conduct. The touchstone for the burden-shifting rule is the

> ". . . well-settled evidentiary principle that 'the *prior* doing of other similar acts, whether clearly

> part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.' II Wigmore, Evidence 200 (3d ed. 1940)." (emphasis added) (Opinion, p. 17)

The example of the application of the principle from the criminal context *(Nye & Nissen* v. *United States,* 336 U.S. 613 [1949]) involved presentation of false invoices during the same period of time as the acts charged (332 U.S. at 618).

The school desegregation cases cited by the Court — *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), and the teacher discharge cases — all involved a "history of segregation," which the Court expressly defines:

> "Indeed, to say that a system has a 'history of segregation' is merely to say that a pattern of intentional segregation has been established in the *past.*" (emphasis added) (Opinion, p. 20)

The Court then restates its holding, in the light of these authorities, as follows:

> "Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of *subsequent or other* segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that *this* segregated schooling is not also the result of intentionally segregative acts." (emphasis added) (Opinion, p. 20)

The use of the words "subsequent or other," especially in light of the authorities cited, is consistent with the applicability of the shift of burden to subsequent or contemporaneous

situations, excluding prior segregated schooling from the operation of the burden-shifting rule.

3. The Application of the Rule by the Courts Below

The courts below clearly recognized that prior segregative acts have probative value on the issue of segregative intent with respect to later acts.

This Court commenced its discussion of the burden-shifting principle with the observation that the District Court had considered "*past* discriminatory acts . . . in assessing the causes of current segregation . . . " (emphasis added) (Opinion, n. 14, p. 16). The District Court had limited its consideration of the Park Hill actions in 1960 (building Barrett), 1962 and 1964 (boundary changes at Stedman and Hallett), and 1965 (mobile units at Stedman and Hallet), to the assessment of segregative purpose of the later 1969 acts (the repeal of the racial balancing resolutions). Thus, the limitation of the District Court's comment is *chronological*, not geographical.

When the Court of Appeals agreed with the District Court that the "petitioners had failed to prove" intentional discriminatory acts causing present racial imbalance in the core city schools, the Court of Appeals clearly limited the imposition of the burden on petitioners to the time period prior to 1960 when there were no prior segregative acts shown:

> "Where, as here, the system is not a dual one, and where no type of state imposed segregation has *previously* been established, the burden is on plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action. (emphasis added) (445 F. 2d at 1006, A.P. 148a)

4. The Structure of the Case and the Order of Events

The segregative acts in Park Hill occurred in the 1960's, as the Opinion notes (p. 8); but, with one exception, the Opinion nowhere identifies the time period in which the acts with respect to the core city schools took place. The exception is the reference to actions in the core city area antedating the 1954 decision in *Brown*, where the focus of the Opinion was on the attenuation of causal effect, as distinct from intent. (Opinion, p. 20)

Respondents believe that it is probable that the Court, in formulating the burden-shifting principle, misapprehended the order of events as between the Park Hill schools and the core city schools. This could easily have happened because the Park Hill evidence was presented at the first hearing in support of the first cause of action, and the trial court's opinions thereon were announced and reported first. The District Court discussed the Park Hill evidence in the first part of its opinion on the merits, and the Court of Appeals did likewise in its opinion. Petitioners, in their brief, consistently reversed the chronology in discussing the evidence and other aspects of the case, and discussed the Park Hill events first before turning to the earlier events in the core city area.

Actually, almost all of the actions of the school district with respect to the core city area took place in the 1950's, under wholly different school boards, ten years before the Park Hill events.

5. The Secondary Issue of Causal Attenuation

Nor does the discussion of causal attenuation (Opinion, pp. 20, 21) appear to carry the application of the burden-shifting principle back to actions taken prior to the period of proven intentional segregation. This is because the showing of causal attenuation comes into play as to those acts

which cannot be shown to lack segregative intent. (Opinion, p. 21) And such intent, by all authorities cited, can be inferred only on the basis of prior or contemporaneous segregative acts, and not on the basis of subsequent intentional acts many years later.

Conclusion

We are assured by Biblical authority that the iniquities of the fathers will not be visited on the children. Conversely, the Court should not visit the "sins" of one generation of school board members and administrators upon the men and women serving in such capacities in an earlier generation.

WHEREFORE, respondents respectfully pray that rehearing be granted on the question of whether proven discriminatory acts may be deemed probative on the issue of the segregative purpose of earlier acts, thus shifting the burden of proof as to such earlier acts. A resolution of this question is of substantial importance in determining the scope of the future conduct of this litigation.

This petition is filed after the Court has adjourned; respondents, accordingly, also respectfuly request that the mandate of the Court be stayed until disposition of this petition, in the interests of orderly further proceedings below.

Respectfully submitted,

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CERTIFICATE

The undersigned, counsel for respondents, certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay, and that the petition is restricted to substantial grounds now available to respondents in view of the Opinion herein.

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Attorneys for Respondents

END OF CASE